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## **Tolerating extremism : to what extent should intolerance be tolerated?**

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# **Tolerating Extremism: To What Extent Should Intolerance be Tolerated?**

Amos N. Guiora



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Amos N. Guiora



*Tolerating Extremism: To What Extent Should Intolerance be Tolerated?*

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## INTRODUCTION

I travel a great deal, domestically and internationally. Like anyone who spends significant time on planes (250,000 miles in 2011) it is my preference to tune out the world, particularly the person next to me; I do so thanks to BOSE headphones, listening to music my kids have gathered for me (I would not know how to download music if my life depended on it) and reading, working or looking out the window. Sometimes, however, the person seated next to me seems particularly interesting and relying on instinct I engage in conversation. If I am truly lucky, such a conversation can be extraordinarily engaging and thought provoking. This happened on a flight from Atlanta, GA to Augusta, GA. My partner in row 1 was a physician with a busy private practice in Augusta. After a quick exchange of pleasantries we, somehow, made our way to discussing religion and extremism.

I told him about my previous book, *Freedom from Religion*, and about this PhD project in the Netherlands<sup>1</sup> He was clearly intrigued and shared with me that he and his wife adopted a child because of their faith; he explained that as they have means it is their duty to share with others, less fortunate than them. In his own words, he is an evangelical Christian and faith is the most important guide in both his professional and personal life. It soon became clear to me that his morals were totally dependent on his religious convictions. His view was: no religion, no morals. Ethics could not be derived from anything else than his religion. I asked him how he resolves his deep evangelical faith with modern medicine; his response was a total surprise for me. Simply put, he does not believe in evolution viewing it as physiologically impossible. Apparently, his religious convictions were not only fundamental for his moral stances, but for his scientific views as well. Something that contradicted his religion could not be “true” in the sense of scientifically validated.

For him, creationism is the only possibility and all efforts to explain evolution are non-starters. I asked him how he resolves the tension, perhaps intellectual disconnect and profound contradiction are better terms, between modern

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<sup>1</sup> see Guiora, Amos, “Religious Extremism: A Fundamental Danger”, in: *South Texas Law Review*, Vol. 50, No. 743, (2009), pp. 743-768; Guiora, Amos, “Vrijheid van meningsuiting: een terugblik en een blik vooruit”, in: Afshin Ellian, Gelijk Molier, Tom Zwart, red., *Mag ik dit zeggen? Beschouwingen over de vrijheid van meningsuiting*, Boom Juridische Uitgevers, Den Haag 2011, pp. 117-139; Guiora, Amos, “Multiculturalism and Religious Extremism: Whose Human Rights Do We Protect?”, in: Gelijk Molier, Afshin Ellian, and David Suurland, eds., *Terrorism, Ideology, Law, and Policy*, Republic of Letters Publishing, Dordrecht 2011, pp. 337-361.

science and creationism. His response was simple and clear: my job is to save people's lives and evolution plays no role in what I do. Simply put, it is God who decides. When I shared this conversation with physician friends their reactions ranged from bewilderment to apoplexy; many expressed regret they did not have the chance to directly engage him in a science based conversation something I am thoroughly incapable and incompetent to do.

The second part of our conversation related to his family and homosexuality. He shared with me that he and his wife have six children. One of his children is a bachelor in his mid-20's regarding whom we had the following exchange based on a hypothetical ---akin to a law school exam---that his son is a homosexual:

ANG: What would you do if that child were to inform you that he is a homosexual?

MD: My wife and I would seek to talk him out of it.

ANG: What would you do if your child wanted to bring his homosexual partner home?

MD: The partner would never step into our house.

ANG: Would you attend your son's homosexual wedding?

MD: (After looking wistfully into space for a few seconds) No, my wife and I would not attend and we would request that our other children also not attend.

ANG: But I thought you loved your son more than anything in the world.

MD: I do; but I love the Bible more than I love my son.

I found the conversation extraordinarily enlightening, perhaps painful and certainly candid. Especially the remark that you can love the Bible more than your son struck a note with me. After discussing it with friends and colleagues, and wrestling with what is the appropriate forum for sharing this exchange, I decided it is a relevant and powerful opening to this book. I do so carefully because the conversation was private; however given the rawness of its emotions and what it conveys regarding the depth of religious belief I decided to include it. There was one last exchange, which, for me, was of extraordinary importance.

ANG: Listening to you reminds me of conversations with deeply religious Jews and Moslems for both are convinced of the absolute rightness and truth of their faith and path.

MD: Correct, but there is a difference.

ANG: What is the difference?

MD: I know the truth.

ANG: Funny, because that is what they say.

MD: I know; but I am right.

Perhaps, more than any other dialogue this last exchange neatly summarizes how a person of deep religious faith articulates his worldview. I would not define this individual as an extremist<sup>2</sup>; however, his conviction that his truth is the absolute truth places him---whether he agrees or not-----in the same camp as religious extremists. Some of the things he said were familiar to me on the basis of my frequent contacts with religious extremists. Here I always found a similar pattern:

- (1) Morals being completely dependent on religion;
- (2) Religion also being primary when it contradicts scientific validation;
- (3) Personal relationships subservient to religious revelation;
- (4) Complete self-assurance when it comes the rightness of the worldview adopted.

While I assume my seatmate was not a man of violence, his refusal to accept that others may also believe they 'know the truth' and that their faith is as valid as his suggests that this educated physician is a religious extremist. Not violent, but unrelenting in absolute conviction of the rightness of 'my truth' and the total dismissal of others. In particular, I was struck by his conviction that he and his family not attend his son's hypothetical wedding.

Whether this is akin to 'hate the sin, love the sinner' in that he is proving his love to his son by not participating in his celebration is a valid question. Regardless of the answer, the father's faith trumps the son's hypothetical decision. This type of extremism, though, is not unique to religion and can also be found in the political arena. An example of this is seen in the defeat of six-term Senator Lugar in the Indiana Republican Party Senate Primary. In a statement shortly after his loss he

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<sup>2</sup> An issue discussed at length in this book.

explained what he believed caused his loss.

Unfortunately, we have an increasing number of legislators in both parties who have adopted an unrelenting partisan viewpoint. This shows up in countless vote studies that find diminishing intersections between Democrat and Republican positions. Partisans at both ends of the political spectrum are dominating the political debate in our country. And partisan groups, including outside groups that spent millions against me in this race, are determined to see that this continues. They have worked to make it as difficult as possible for a legislator of either party to hold independent views or engage in constructive compromise. If that attitude prevails in American politics, our government will remain mired in the dysfunction we have witnessed during the last several years.<sup>3</sup>

Much like the stranger on the plane, it seems this extremism or conviction of absolute rightness, at the complete dismissal of other viewpoints, has led to ignoring discussion regarding the public interest focusing exclusively on what fits a particular ideology. In other words, in creating a paradigm where extremism is tolerated, risks to society and “at risk” individuals are given “short shrift”.

My conversation with the physician-father, along with Senator’s Lugar’s words, is a most appropriate background for the issues addressed in the pages that follow: religious and secular extremism in a number of countries. Six countries – Germany, Israel, the Netherlands, Norway, the United Kingdom and the United States- - will be surveyed by examining specific examples from each country. The project focuses on a myriad of issues including the US civil rights movement, child endangerment in the context of religious extremism, soccer hooliganism, public demonstrations against women singing, unbridled religious extremist incitement, violent neo-Nazism, extreme right wing actions, multiculturalism, the limits of free speech, tolerating intolerance and the social compact.

The dominant theme we shall explore is: to what extent should society tolerate intolerance? This is, of course, a hugely important question. It is something Karl Popper famously addressed when he wrote that “unlimited tolerance” must lead

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<sup>3</sup> Mike Zapler, *Lugar Unloads on ‘Unrelenting’ Partisanship*, POLITICO BLOG (May 9, 2012, 7:48 AM), <http://www.politico.com/blogs/on-congress/2012/05/lugar-unloads-on-unrelenting-partisanship-122891.html>.

to the “disappearance of tolerance”?<sup>4</sup> Popper was writing against the backdrop of the rise of the Nazis in the 1930s of the twentieth century. Now we are faced with other extremist challenges. Nevertheless, the type of questions this confronts us with is similar. Addressing this question requires discussing to whom does government a duty and what is the harm caused by extremism. These issues will be our focus; in delving into these complicated and complex questions it is clear that the discussion will cause discomfort, if not controversy. That has been very clear to me in the course of my research; conversations with a wide-range of subject matter experts from different countries and distinct disciplines repeatedly reinforced this reality.

To effectively address “tolerating intolerance” requires examining disparate themes covering a broad mosaic. That is necessary to effectively answer complicated questions including: to whom is a duty owed, to what extent should society protect itself against an identifiable threat, how does the nation-state balance protections with freedoms and what should be the definition of extremism. After all, an overly broad definition of extremism will unnecessarily impinge on otherwise protected rights whereas a very narrow definition will grant protections to those who endanger society.

Comparatively-- different countries, distinct cultures, unique paradigms---- analyzing “tolerating intolerance “ is intended to facilitate understanding the depth and importance of the query. The chapter “break-down” (see below) is intended to enhance the discussion; the comparative discussion will be interwoven into the issues addressed in each chapter. Important to emphasize that at its core the question regarding how much intolerance should society tolerate requires examining two over-arching questions: to whom does government owe a duty and when should government intervene, thereby limiting individual rights while protecting individuals.

This work reflects an eclectic approach to an age – old problem. I am not the first, nor the last to address extremism. It is, to be frank, an issue that has been “part and parcel” of human nature and history for thousands of years. It is safe to assume that extremism will continue to an integral part of the human existence in the years to come. In other words, extremism is a reality. The question, however, is whether extremism endangers society and if yes, to what extent and what can be done to mitigate the harm it causes. As discussed in

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<sup>4</sup> Popper, K.R., *The Open Society and its Enemies*, Volume 1, The Spell of Plato, Routledge & Kegan Paul, London and Henley 1977 (1945), p. 265; Rijpkema, Bastiaan, “Popper’s Paradox of Democracy”, in: *Think*, Volume 11, Issue 32, September 2012, pp. 93-96.



chapter one, I define extremism as a powerful combination of violence and ideology that must necessarily always be “correct” in the mind of its believers. For those believers their ideology is invariably “the truth” and must be defended at all costs. Think of the friendly physician I introduced earlier.

In undertaking this project my intention is to explore religious and secular extremism in a number of different countries. I do so because I am intrigued by a comparative approach, having adopted it in previous scholarship. I believe it an important, and effective, method to examine a particular topic, with the caveat that different cultures and societies have distinct nuances, subtleties and realities. In that vein, important to note there is a differential treatment amongst the surveyed countries reflecting the distinct values of each society relevant to the specific issues the project addresses.

While this project focuses on religious and secular extremism I am not engaged in “religion bashing”. Although I will focus on some less pleasant aspects of religion, in particular extremist religion, this exercise should not be mistaken for atheist propaganda in the sense of New Atheism.<sup>5</sup> ; I find that to be uninteresting and vapid. I am, however, interested in exploring ways in which the state can more effectively protect itself against those who seek to harm individuals and society alike while protecting the freedom of speech of those who challenge society.

Re-articulated, my exploration focuses on the relationship between extremism and society, particularly how the latter can more effectively protect itself against the former. In doing so, I believe it essential to analyze, if not focus, on the relationship between tolerance and intolerance, particularly society’s willingness to tolerate intolerance at the risk of “harm”.

There is a triangular relationship between “tolerance”, “intolerance” and “harm” for intolerance is not harm-free. In that vein, one of the most important questions is the extent of harm to individuals and society the state should tolerate regarding freedom of speech and freedom of religion. It is for that reason that the chapters ahead focus, in large part, on these two freedoms. While attention is paid to other issues relevant to a broader discussion regarding

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<sup>5</sup> see: Hitchens, Christopher, *The Portable Atheist: Essential Readings for the Nonbeliever*, Selected and with introduction by Christopher Hitchens, Da Capo Press, Philadelphia 2007; Stenger, Victor J., *The New Atheism: Taking a Stand for Science and Reason*, Prometheus Books, Amherst N.Y. 2009.

extremism, the focal point of this project is the freedom of speech and freedom of speech.

There is a direct link between extremism and national security, or what some define as public order. Regardless of the term, the point of departure in this project is inquiring to whom does the state owe a duty. In many ways, that question is essential to resolving the “limits of tolerating intolerance” query. In asking to “whom does the state owe a duty” my working thesis is that resolving this dilemma suggests it is legitimate for the state to minimize otherwise guaranteed rights. To that end, the two core questions are should the state minimize individual rights in the face of extremism and, if yes, “how”?

To address these two questions, I made a number of assumptions:

- That extremism exists (secular and religious alike);
- That extremism poses a harm to individuals and society alike;
- That the state owes a duty to protect;
- That the state must act proactively to protect;
- That minimizing individual rights to protect the “at risk” is a legitimate;
- That there are limits to how much intolerance can be tolerated;
- That extremists “push the envelope” in terms of “testing” society;
- That extremists effectively use social media and the internet;
- that incitement endangers society;
- That a comparative approach facilitates understanding how different countries address-confront these common (yet circumstance/culture/condition dependent) questions and challenges;

Answering these questions required I travel “in country” to the surveyed countries and meet with a wide-range of subject matter experts representing distinct disciplines, beliefs, perspectives and agendas. Needless to say, the subject naturally lends itself to distinct and contentious points of view, reflecting the enormous complexity of the questions posed. My approach was agenda “free”; nevertheless, I was well aware those interviewed articulated positions and perspectives reflecting their particular approach to the subject matter. The project incorporates distinct voices reflecting powerful and compelling disparate opinions, perspectives and values. I have made a deliberate and conscious effort to give wide space and latitude to those voices. Needless to say, the analysis and recommendations are solely mine and I bear exclusive responsibility for their interpretation.

As a condition to speaking with me, the overwhelming majority of individuals requested anonymity; while I agreed with their condition, I am aware of the possible discomfort such an approach may cause. Nevertheless, I felt---after careful consideration and much reflection----that not acceding to this request would deny me access and insight to thoughtful and reflective people whose thoughts were essential to my research. Needless to say, in accordance with academic rigor and standards, all articles and books I quote are cited in full. Furthermore, records of all communications----in- person interviews, emails and phone conversations---- are in my personal files. It is also important to note that the reasoning I develop in this thesis and the conclusions drawn are not dependent on anonymous sources. I do not invite the reader to assent to a view on the basis of an authority of whom I cannot reveal the identity. The reason that I engaged with many people is that they pointed out relevant material for study and they provided me intellectual sparring partners for my ideas.

Given the sensitivity and controversy of the subject matter I concluded that not respecting requests for anonymity requests would make this a distinctly different, and very limited, project. I am convinced were I not to include disparate, distinct and controversial voices the final product would be significantly distinct from the pages that follow. Were I not to respect these requests I would not be in a position bring “unfiltered voices” to the table; it is my belief that these voices are essential to truly understanding extremism. I am fully confident this approach significantly enhances the reader’s insight to the issues at hand.

Naturally, meetings with senior national security officials in the surveyed countries were conditioned on a guarantee of anonymity. This, for me, was an obvious request; the same holds true for individuals who felt their personal security was “at risk” were their involvement in the project known. While “off the record” conversations with national security officials are, largely, a “given” the same may, understandably, not be readily apparent regarding subject matter experts from other fields. However, as I learned when researching and writing “Freedom from Religion” (first and second editions) the subject matter is sufficiently controversial to elicit repeated requests for anonymity. Important to add that in agreeing to this demand I imposed on myself to be the readers’ “eyes and ears” requiring that I be both an honest reporter and objective analyst.

Regarding the methodology of the chapters a few words are in order: each chapter could, literally, be a book onto itself. To that end, the chapters “read” differently, some very detailed, others less so. Similarly, different topics and different countries reflect disparate levels of treatment. The chapters are neither equal in length nor equal in treatment; they are not intended to be so. Some are intended to provide a “window” on a particular issue whereas others present a specific issue in greater depth and intensity. In that vein, some chapters are very analytical, others more descriptive. Important to recall that in addressing the questions posed above my goal was to create the “groundwork” for the final chapter. The significance of this “build-up” cannot be sufficiently emphasized; from a methodological perspective the first six chapters are intended to create the groundwork for the recommendations that are the essence of the last chapter.

Similarly, there is a difference between how free speech in the US is analyzed in comparison to the other surveyed countries. That reflects both the historical richness of US case law and my familiarity with relevant Supreme Court decisions. There is another reason, though, why the case law on free speech in the US is treated much more elaborately than in the chapters on Norway and the Netherlands. This is – it is important to emphasize – not a book on the freedom of speech in the countries mentioned. This thesis is not aimed to be a contribution of comparative constitutional law or comparative human rights law.<sup>6</sup> The aim is to present an informed reflection on how to deal with extremism. So the comparative approach does not suggest, directly or indirectly, equal treatment amongst all surveyed countries; the intention is to provide the reader with sufficient information to draw comparisons and consider distinct approaches to similar paradigms. To that end, the approach I have adopted does not claim to address each country equally nor provide equal “space” to each issue; that is neither my purpose nor interest.

One of the important discussion points in the tolerance/intolerance debate is multiculturalism. It is, understandably, an issue that causes discomfort amongst readers with some questioning its relevance to this project. I decided to incorporate a chapter regarding multiculturalism because of its deep---albeit uncomfortable----relationship to extremism. The multiculturalism debate, far more prevalent in Europe than in the US, highlights powerful tensions between

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<sup>6</sup> see: Fraleigh, Douglas M., Tuman, Joseph S., *Freedom of Speech: in the Marketplace of Ideas*, St. Martin's Press, New York 1997; Barendt, Eric, *Freedom of Speech*, Second Edition, Oxford University Press USA, New York 2007.

“traditional” European society and that of “immigrant” Europe. Numerous professional and personal visits to Europe, particularly in the Netherlands, Norway and UK, highlighted the centrality of the multiculturalism debate in the context of the domestic political debate.

This was very much on the lips of a wide range of individuals with whom I met; while recognizing the importance of the topic, many articulated hesitation, if not discomfort, in the discussion. However, because of multiculturalism’s profound connection to both intolerance/tolerance and extremism it is essential to the broader discussion. There is, needless to say, concern the multiculturalism discussion is a thinly veiled “finger pointing” exercise aimed at immigrants in accordance with deep concerns raised by the European political far-right. Wide-ranging discussions with subject matter experts from different fields and disciplines emphasized the importance of immigration to Europeans.

A clear connection was “drawn” between immigration, security and extremism; in that vein, the question oft posed was how, and to what extent, does society protect itself against the “outsider”. The irony, needless to add, was that the “outsider” was a member of society though distinct culturally, religiously and ethnically from “traditional” society. As European leaders weigh their individual and collective responses to events both in Europe and beyond its borders sensitivity--the extent is unclear----is necessarily paid to the possible reactions of relevant immigrant populations. In that spirit, chapter five is heavily descriptive for addressing contemporary social tensions in the context of this project requires focusing on a number of issues, particularly the economy, immigration and gender issues relevant to religion.

By analogy: the Boston Marathon bombers encompass a significant number of “stories within the story” relevant to this project, reaching far beyond the bombing itself. Whether Tamerlan Tsarnaev was radicalized in a mosque or self-radicalized, religious extremism, as a motivating factor is essential to understanding the actions of the Tsarnaev brothers. Similarly, the issue of assimilation and acculturation is relevant to understanding the relationship between immigrants and the society they have chosen for their new home. This question is of particular importance given the politically charged debate both in the US and Europe regarding immigration. In this vein, the discussion must include analysis of integration, immigration and extremism. In many ways, the

three are directly related to security concerns and considerations, both domestically and internationally.

The multiculturalism chapter (chapter three) proposes measures intended to facilitate more effective protection of the “at risk” population. My concern regarding that population is predicated on an assumption both that this category exists and is worthy of enhanced protection.<sup>7</sup> I am aware that the proposed “protection paradigm” minimizes otherwise protected rights. I am similarly aware that some topics and my treatment of them causes discomfort; that is both legitimate and not surprising given the issue addressed in this book. Perhaps for that purpose, the tone I have adopted for this project is more informal than formal, more conversational than academic. That is the manner I feel most honestly reflects the voices of those interviewed. However, the tone in the chapters addressing questions of law, particularly regarding freedom of speech, is appropriate to a legal analysis of extraordinarily important judicial decisions.

Regarding the countries chosen a word of admission: I commute between the US and Israel and spend significant time in the Netherlands. As a result of this project, I travelled to the UK and Norway. I am not an expert on British or Norwegian society; however, because of the range, depth and scope of “in country” interviews I conducted I feel comfortable in writing about both countries. It goes without saying that were it not for the murderous act of Breivik on July 22, 2011 I would not have included Norway in this project.

The reaction of Norwegian subject matter experts with whom I met reflected acknowledgment, albeit with a “heavy sigh”, that Breivik’s actions placed Norway “on the map” of extremism. More than one interlocutor began our conversation by suggesting that “if not for Breivik, you would not be visiting Norway”. They were, of course, correct.

However, the terrible tragedy of July 22, 2011 *must* be included in this project. One can but hope that Breivik’s actions will not lead, directly or indirectly, to “copy cat” attacks. However, there is little doubt his murderous rampage raises

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<sup>7</sup> For similar approaches see: Moller Okin, Susan, *Is Multiculturalism Bad for Women?* With Respondents, edited by Joshua Cohen, Matthew Howard, and Martha Nussbaum, Princeton University Press, Princeton, New Jersey 1999; West, Patrick, *The Poverty of Multiculturalism*, Civitas: Institute for the Study of Civil Society, 2005; Alibhai-Brown, Yasmin, *After Multiculturalism*, The Foreign Policy Centre, London 2000.

yellow flags of caution regarding extreme right-wing political opinions held by traditional (i.e. white) Europeans in the face of threats they perceive immigrants (read, multiculturalism and tolerance of intolerance) pose to *their* society. The week I spent in Oslo shed much light both on Breivik personally and the dangers emanating from a committed and radicalized lone-wolf actor; precisely because Breivik was ruled sane (the initial psychiatric evaluation concluding he was insane notwithstanding) his actions cannot be “brushed aside”. To do so (while arguably “convenient”) is dangerous and self-defeating; Norwegian society must engage in painful self-reflection and the intelligence services must thoroughly re-assess their understanding of “threat posed”. To that end, not incorporating Norway would be to ignore a traumatic specific event that sheds powerful light on the complicated, and obviously fraught with tension, relationship between extremism, immigration and multiculturalism.

Regarding the Netherlands: I have been professionally engaged with Holland for almost a decade and have been extraordinarily fortunate to spend significant time with a wide-range of individuals. While I do not speak Dutch (nor Norwegian) I have never found that to be an issue in the context of preventing open and frank discussions. Regarding Norway, Holland and the UK there is always discomfort----if not a certain danger----in the outsider commenting on a society that is not his. I am well aware of this because of my own reaction to much of what I read regarding Israel, often times scratching my head at what I consider to be ignorance of the outsider. However, as discomfiting as that read may be, its importance must not be instinctively dismissed. While nuance may be missed, the perspective of the visitor can shed interesting light on what the insider assumes to be the truth. To that end, I can but hope that my insights regarding the UK, Holland and Norway will be read in that spirit.

The importance---and relevance----of Chapter Five (Contemporary Social Tensions) is that it brings to light many of the circumstances and conditions that enhance, if not facilitate, an environment of extremism. While the chapter is descriptive (rather than analytical) its inclusion is essential to explain circumstances relevant to the extremism discussion. That is, without this descriptive discussion it would be difficult to understand the background for the broader extremism analysis. Given the centrality of the freedom of speech analysis to this project, understanding the circumstances that accentuate the danger posed by incitement is essential.

That is, the discussion in Chapter Five focuses on significant tensions confronting the Netherlands, Norway, the UK and Israel; those tensions create an environment where extremist speech finds a more willing audience than otherwise. The deep concern, if not outright opposition, regarding immigrants and the “dangers” they pose to “mainstream” society are a critical aspect of the broader extremism discussion. Similarly, the powerful----and arguably dangerous----increasing extremism of Israel’s orthodox community is particularly relevant to the freedom of speech/freedom of religion analysis. To that extent, to understand the power and influence of rabbinical incitement it is necessary to understand the complicated “lay of the land”.

This, then, is an eclectic project incorporating distinct perspectives and issues; its primary focus-----while weaving different themes---is on the “at risk” population to whom government owes a duty of protection from extremists. That protection as analyzed in the chapters ahead implies minimizing rights of those who pose harm; needless to say, the “rights minimization” paradigm is not met with sanguine responses across the board. That is legitimate and understandable; however, the “duty to protect” requirement is an equally profound obligation not instinctually dismissible in the name of protecting otherwise guaranteed rights. I chose to focus on the relationship between “freedom of speech” and “duty to protect” because it highlights the tension between powerful competing rights at the heart of the tolerating intolerance discussion.

The vile and incessant hatred orchestrated by the Israeli religious right wing prior to the assassination of then Prime Minister Yitzhak Rabin was virulent, unrelenting and unforgiveable.<sup>8</sup> His assassination, in retrospect, should have come as no surprise. What was shocking was the utter failure of state agents to take seriously the unmitigated incitement and the incompetence of the State Attorney General to prosecute those responsible for inciting Rabin’s assassin, Yigal Amir. I lived in Israel during those terrible days; like many others I was aghast at the unrelenting hatred but did not entertain the thought that a Jew would kill the Prime Minister.

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<sup>8</sup> see: Guiora, Amos, N. *Freedom from Religion: Rights and National Security* (First and Second Editions, 2009, 2013); *Freedom of Speech and Incitement Against Democracy*, Martinus Nijhoff (2000), David Kretzmer and Francine Kershman Hazan, ed.; Thiel, Markus, *The ‘Militant Democracy’ Principle in Modern Democracies*, Ashgate, 2009; “BOUNDARIES OF FREEDOM OF EXPRESSION BEFORE AND AFTER PRIME MINISTER RABIN’S ASSASSINATION”, in R. Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance: Essays in Honour and Memory of Yitzhak Rabin* (Ann Arbor: University of Michigan Press, 2000).



On one occasion I attended a meeting with Rabin and recall being struck by the paucity of security surrounding the Prime Minister. His assassination was a turning point in Israeli society, culture and history. The collective failure of “all of us” to recognize the threat posed by religious extremist incitement and our collective inability to protect the Prime Minister is a stain on society. In many ways, it motivates this project precisely because I understand----as a citizen of Israel----the dangers posed by unrestrained free speech and the significance of institutional weakness to protect the “at risk”.

Similarly, I was raised in an intellectual environment where “words matter”; my father, a psycholinguist, emphasized the primacy of language and its powers. In addition, as a law professor who teaches criminal procedure and writes about the limits of interrogation, operational decision-making and the limits of state power I am extremely sensitive to the power of words. Simply put, “words kill”. That is why this project focuses on free speech and the need to limit words that incite. This is an extraordinarily complicated balancing act that requires society’s full engagement and attention. It is in that spirit that the discussions I conducted----and the voices I present in the chapters that follow---bring to life the complexity of the free speech, tolerance/intolerance and protection discussion.

In that vein, it is important to emphasize clearly what this book is, and therefore what it is not. The book reflects an interdisciplinary effort to ask, answer and propose practical resolution to the concerns reflected in the subtitle. While I do discuss, and examine, freedom of speech issues it is in the broader context of the tolerance/intolerance debate. In that sense, while addressing freedom of speech questions it is broader than a casebook focused exclusively on that remarkably important topic. What is important, with respect to the theme this book addresses, is examining the freedom of speech in the tolerance/intolerance discussion.

Re-articulated, the focus of this book is an analysis of social policy ---in a number of different countries—which requires a freedom of speech discussion but not a focus. To that end, this work is not focused solely on the law; rather it is multi-disciplinary predicated on a comparative approach. The primary intention is to foster, perhaps engender is a better word, debate and discussion regarding the question to whom does government owe a duty. Answering that query requires stepping beyond a legal analysis exclusively; while the law is germane to the discussion, it cannot be the exclusive focus.

As I write these lines, I am involved in an extraordinarily complex, complicated and controversial judicial matter where one of the critical questions is to whom does the state owe a duty in the context of harm caused by religious extremism. The relevance of the matter to this work is that it highlights the practical nature of the question this project seeks to answer. Re-articulated: as will be discussed in the pages ahead, the question of government intervention in the face of extremism is of extraordinary importance, not to mention controversy and dilemma. In many ways, its resolution requires addressing, and hopefully resolving, the balancing of individual rights with state rights. After all, both are legitimate, yet the harm posed by extremism requires determining to what extent certain freedoms will be curtailed, if not minimized. In many ways, at the heart of this discussion is the freedom of speech.

That is the responsibility of government; to that end, I propose government does not have the “luxury” to hide behind clichéd mantras that guaranteed individual rights are immutable, not subject to careful review and, therefore, when justified, must be curtailed. Advocating limiting individual rights for the sole purpose of protecting society and “at risk” individuals alike will strike some as unnecessarily excessive. However, a cost-benefit analysis suggests failure to do so facilitates harm. Needless to say, solutions are neither easy nor controversy free; that, however, does not justify refraining from posing the difficult question. After all, the solution requires identification of the problem with the understanding that an answer is not easily at “arms reach”. Nevertheless, that must not deter us from conducting the inquiry while seeking to propose answers that will facilitate public discussion providing concrete recommendations to decision makers.

The chapters that follow are aimed to facilitate discussion regarding when government should intervene when confronted with extremism. The discussion particularly focuses on two distinct issues: limiting extremist incitement and minimizing harm caused by extremism. Addressing both requires recognizing that extremism causes harm and that incitement is essential to extremism. Conversely, those uncomfortable with either or both assumptions will suggest that while extremism undoubtedly challenges democracy, it reflects a necessary cost. Those advocating tolerance of extremism, what I refer to as tolerating intolerance, have suggested to me that democracy is strengthened by this challenge.

While an interesting argument it is, I suggest, fraught with danger primarily

because of the harm caused by extremism. It is, then, harm that drives much of our discussion; addressing harm requires recognizing its existence, discussing its sources and impacts and then asking how can it be mitigated in the context of protecting individual rights. Re-articulated: I am of the belief that extremism---secular and religious alike---causes harm and that the responsibility of government is to confront extremism in order to minimize harm. That is, there is a limit to the tolerance of intolerance.

To address these issues, the book is divided into the following chapters;

- Chapter One: Defining Extremism;
- Chapter Two: The dangers extremism poses to society;
- Chapter Three: Multiculturalism;
- Chapter Four: Religious Extremism: Causes and Examples of Harm;
- Chapter Five: Contemporary social tensions
- Chapter Six: What limits should be imposed on free speech?
- Chapter Seven: Looking Forward

Dean (then Professor) Martha Minow's article<sup>9</sup> is the intellectual background for the discussion ahead. No other law review article has so significantly shaped my thinking; I have read it innumerable times and include it in my seminar, 'Global Justice'. After all, in discussing extremism, the key questions are: to whom is a duty owed and what are the limits of intolerance that are to be tolerated? Answering these questions requires examining limits and rights; analyzing them in the context of extremism is the 'core' of this book. While freedom of speech and freedom of religion are vital to democracies, the freedoms are not unlimited. Where to draw the line between permissible and impermissible is complicated. Doing so in the extremist paradigm significantly exacerbates that complexity; lines are starkly drawn because extremists and extremism pose threats. The public must determine to what extent it protects itself from extremists while ensuring that extremists' rights are not violated. Addressing this tension is essential; it is, to coin a phrase, where the book is 'going'.

The basic theme that will be woven is that religious and secular extremists pose dangers to society and individuals alike; the question I will seek to answer is to

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<sup>9</sup> See Minow, *Tolerance in an Age of Terror*, 16 USC Inter. L.J. 453 (2007).

what extent should, and does, society protect itself against a readily identifiable threat. Whether society chooses to ‘see’ that threat is essential to the discussion; examining why the threat is minimized, at best, and ignored, at worst, is a classic example of history repeating itself.

Undertaking this examination requires determining how to balance competing rights; complicating the analysis is the ‘sacred veil’ that protects religion and hinders candid discourse regarding dangers posed by religious extremism. Addressing the immunity oft-times granted religion can pierce that veil, if not lift it. Secular extremism does not enjoy similar protection; nevertheless, line drawing between protected and illegal secular conduct is no less complicated than tackling the dangers posed by religious extremism.

In addressing the dangers posed by religious and secular extremism, I hope to highlight their impact on society and individuals. Simultaneously, I include recommendations for specific measures that will facilitate the nation state’s ability to protect itself while ensuring protection of those posing that danger. That is, to what extent does the nation state protect freedom of religion and freedom of speech to those who would minimize freedoms for and of others? ‘To what extent should intolerance be tolerated’, the question posed by Dean Minow and by Karl Popper,<sup>10</sup> shall serve as our guide precisely because it is the most pressing query in the contemporary era; it may well be the question our children will similarly struggle with.

The question is whether threats to national security and public order justify minimizing free speech. In some ways, American history has demonstrated a ready willingness to answer in the affirmative. The costs, as repeatedly demonstrated, are significant with respect both to First Amendment principles and on a human, individual basis. However, disregarding legitimate threats to national security is *also* dangerous. The dilemma, then, is determining the seriousness of the threat and public order and ascertaining whether limiting free speech will mitigate that threat and at what cost to individual liberty. The risk in finger pointing is extraordinary; there is always a danger in identifying the ‘other’ as posing a threat to society.

In many ways the ‘tolerating intolerance’ paradigm espoused by Professor

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<sup>10</sup> See Cliteur, Paul, & Rijpkema, Bastiaan, “The Foundations of Militant Democracy”, in: Afshin Ellian & Gelijn Molier, eds., *The State of Exception and Militant Democracy in a Time of Terror*, Republic of Letters Publishing, Dordrecht 2012, pp, 227-273.

Minow is directly 'on point' with respect to the limits of free speech. That is, do religious and secular extremists pose a sufficient enough threat to society that *their* freedom of speech protections need be re-defined? There is, clearly, danger in raising this question; it suggests deliberate identification of a specific group as worthy of special attention in the context of establishing a rights minimization paradigm. The risk in this proposal is significant; similarly, the possible risk to public safety and individuals alike in failing to recognize the possible harm posed by religious and secular extremists is also fraught with danger.

2013 marks eighteen years since the Murrah Federal Building bombing, twelve years since 9/11, five years since the coordinated attacks in Mumbai and two years since the attack in Norway that killed 77 Norwegian's. Each serves as a tragic reminder of the extraordinary power of extremism, religious and secular alike. Clearly, extremism is not a new phenomenon; however, because it continuously confronts society on a daily basis it is essential to study, understand and define it. Narrowly defining extremism is essential; otherwise the danger of recklessly castigating, much less punishing for mere thought alone is a distinct possibility.

One of the specific goals of this book is to propose a narrow, carefully crafted definition of extremism. Arthur Miller's powerful play, "The Crucible"<sup>11</sup> brilliantly articulates the dangers of extremism when it is used to justify harming otherwise innocent individuals. It must be recalled that 'The Crucible' depicts not only the horrors of the Salem Witchcraft Trials but also the "darkness at noon"<sup>12</sup> of McCarthyism.

To that end, both the iconic phrase, "round up the usual suspects" made famous in Casablanca and Justice Jackson's seminal warning regarding the 'unfettered executive'<sup>13</sup> serve as powerful reminders of the requirement to balance legitimate individual rights with equally legitimate national security rights. While extremism poses a danger to society there is equal danger in casting an arbitrary, capricious net in an effort to protect society. The responsibility and burden confronting decision makers regarding this tension is, literally, overwhelming and

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<sup>11</sup> Miller, Arthur, *The Crucible: A Play in Four Acts*, Penguin Books, London 2000 (1953).

<sup>12</sup> Koestler, Arthur, *Darkness at Noon*, Penguin Books, Harmondsworth 1982 (1940).  
Crossman, Richard, ed., *The God that Failed*, Ayer Company, Publishers, Inc., Salem, New Hampshire 1984 (1949).

<sup>13</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

fraught with danger. One of this project's goals is to both address the tension candidly and to recommend mechanisms resolving its seemingly intractable conundrum.

There is an interesting paradox to be noted: while history is replete with examples of over-reaction in the face of crisis, contemporary society has demonstrated a startling inability to clearly recognize an obvious threat. In addressing extremism from the balancing perspective, the primary question is whose rights are to be protected and how the tension between individual rights and national security rights is to be resolved. In addressing this question the assumption is both are legitimate and must be protected.

Clearly extremism is not a new phenomenon; any effort to limit its scope and impact must be done with sensitivity and respect for otherwise guaranteed rights. After all, the right to free speech is essential to democratic societies and culture. That said, the extremism confronting contemporary society is exacerbated both by the tone of the current political climate and the power, speed and reach of the Internet. The blogosphere, social network and Internet dramatically impact how the message of extremism is conveyed. One of the great challenges confronting decision makers is how to respond to the Internet's facilitation of extremism while respecting individual and civil rights. In other words, the challenge is determining what degree of extremism can be tolerated--in the context of freedom of speech----before determining that extremists pose a clear and present danger.

A research project of this scope significantly benefits from direct outreach to a broad range of experts, commentators and observers; to that end, a questionnaire was sent to academics, security officials, policy makers, thought leaders and religious leaders in Germany, Israel, the Netherlands, Norway, the United Kingdom and the United States. Given the dangers posed by extremism and its ramifications for society and individuals alike, wide spectrums of experts and thought leaders must participate in the discussion regarding extremism.

Respondents to the questionnaire were asked to address the following issues.

- a. The definition of the term 'extremism';
- b. The dangers extremism poses to society;
- c. The differences between secular extremism and religious extremism;
- d. The causes/motivations for extremist movements (secular and religious);
- e. The role of religion in fomenting/encouraging extremism (historically and currently);
- f. The power of the internet and social media in facilitating extremist movements and ideas;
- g. Contemporary social tensions (i.e. economic crises, breakdown of traditional family structure);
- h. Measures and methods to minimize reach/power of extremism/extremist leaders (secular and religious);
- i. The power of 'hate speech' and what, if any, limits should be imposed on free speech in the context of extremism.

The book 'tracks' these questions as reflected in the chapter headings. That is, the book's flow largely mirrors the questions posed in the questionnaire. Interspersed throughout the book are specific examples that highlight a particular issue. As an example, the trial of the Dutch Member of Parliament, Geert Wilders, acquitted of five counts of hate speech and discrimination,<sup>14</sup> is an important 'case study' addressing whose speech should be protected in the context of public discussion regarding religious extremism. As was made clear in the Wilders case, *how* to resolve this complex dilemma raises profoundly important questions regarding values and principles of contemporary society.

The chapters, individually and collectively, are based on scholarship from different disciplines including law, sociology, religion and political science; analysis of court cases from different jurisdictions; significant in-country research. The in-country research, proceeded by significant study intended to enhance familiarization with the six surveyed countries, emphasized conversations with subject matter experts from distinct fields including national security experts, academics, faith leaders, people of faith, politicians, individuals previously convicted of extremist related crimes, members of the media (traditional and non-traditional) and thought leaders. Rigorous effort was made

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<sup>14</sup> *Geert Wilders acquitted on hate speech charges*, TELEGRAPH, June 23, 2011, <http://www.telegraph.co.uk/news/worldnews/europe/netherlands/8593559/Geert-Wilders-acquitted-on-hate-speech-charges.html>.

to ensure that the book not reflect one of the disturbing, if not frightening, characteristics of extremism: the echo chamber. That is, I met with a wide range of experts representing and articulating disparate viewpoints on issues relevant to this project.

One reader of an earlier draft commented that the book has innumerable spin-off possibilities. That is relevant in the following context: the subject matter of extremism is both enormously complicated and hard to fit into a ‘neat’ category. By its very nature it is interdisciplinary; that was consistently reinforced in meetings with thoughtful subject matter experts representing distinct disciplines. To that end, this book both paints on a wide canvas while focusing on specific issues; that is, addressing both what is extremism and what dangers does it pose requires a two-step process. The first step is the larger picture; the second step is a narrower focus. In that sense, spin-offs are a correct suggestion because of the large number of issues deserving further treatment, whether from the perspective of the law or from a distinct approach.

Defining extremism and determining the limits of tolerable extremism is essential to framing the discussion that drives this book. While some might suggest definitions are problematic, the need to determine limits of lawful, tolerable behavior outweighs concern regarding definitions that arguably suggest limits on free speech. Undoubtedly that is a valid concern; nevertheless, both those ‘pushing the envelope’ and those potentially harmed must know the limits of lawful conduct.

Arguably the philosophical approach that “one man’s terrorist is another man’s freedom fighter”<sup>15</sup> would be preferred by those who shy away from definitions and the inevitable limits they impose on individual liberty and freedom. However, respecting the rights of individuals to articulate principles seemingly ‘outside the box’ while ensuring those comments stay within boundaries society can tolerate justify imposition of a definition. In writing my previous book on this topic, *Freedom from Religion: Rights and National Security*<sup>16</sup>, I chose not to define religion while proffering a definition of religious extremism. This decision--criticized by some---was based on a conviction, after consulting with respected theologians and academics engaged in the study of religion, that defining religion is, frankly, all but impossible. It is, in many ways, whatever an individual chooses

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<sup>15</sup> GERALD SEYMOUR, *HARRY’S GAME* 62 (Overlook 1975).

<sup>16</sup> AMOS GUIORA, *FREEDOM FROM RELIGION: RIGHTS AND NATIONAL SECURITY* (Oxford 2009).



it to be; in other words, to quote the colloquialism, ‘whatever works for you’.

However, while defining religion is an issue that I chose to ‘shy’ away from,<sup>17</sup> narrowly defining religious extremism was necessary. The reasons are two-fold: because the harm religious extremists potentially cause is significant and measures implemented by the nation state to minimize the impact of religious extremism potentially impact civil and political rights. Religion, when practiced by people of moderate, mainstream faith, is largely concerned with man’s relationship with God and provides positive social and faith exchanges for people either on an intra or inter faith basis.

For that reason, moderate, mainstream religion does not pose a threat to civil, democratic society; accordingly, the state need not engage in a discussion how to ‘limit’ faith<sup>18</sup>. That is in direct contrast to religious extremism that entails, as defined in Freedom from Religion, a willingness to harm another individual in order to bring glory to God. That reality—*the very real possibility of harm*—justifies government imposed limits on the practice of extremist religion because the primary responsibility of government is to protect the civilian population, specifically children,<sup>19</sup> from harm, whether external or internal. That obligation imposes on government the responsibility—and the right—to impose limits on how religious extremism is *practiced*; similarly, it justifies imposing limits on the *free speech* of religious extremists. By extension, then, the same principle applies to secular extremism.

Nevertheless a ‘yellow card’ is in order: there is danger in identifying threats to society. History has repeatedly shown that casting aspersions and collective punishment can have tragic results. However, the danger to society in not clearly defining potential threats---and failing to take pro-active measures to minimize possible harm---is no less dangerous. To that end, the tension is obvious: do we restrict otherwise guaranteed protections or do tolerate intolerance. Re-stated: is there harm to adopting a leniency paradigm regarding extremism and intolerance. As I suggest in the pages that follow the answer is “yes”, tolerating intolerance is a model that unnecessarily and unjustifiably endangers individuals and society alike.

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<sup>17</sup> See: Boyan, Stephen A. Jr., “Defining Religion in Operational and Institutional Terms”, in: *The University of Pennsylvania Law Review*, No. 116, 1967-1968, pp. 479-498.

<sup>18</sup> With the exception of separation of church and state.

<sup>19</sup> Amos N. Guiora, *Protecting the Unprotected: Religious Extremism and Child Endangerment*, 12 J. L. & Fam. Stud. 391 (2010).

The wide-ranging responses to the questionnaire question ‘how do you define extremism’ reflect an extraordinary lack of uniformity and agreement; nevertheless there are certain basic similarities in the definitions offered. What, in broad strokes, the definitions suggest is that extremism is an explicit rejection of existing societal norms and mores. The extremist in addition to taking the law into his own hands unequivocally rejects restrictions and limitations imposed by society intended to preserve civil and social order. As discussed in chapter one, I define extremism as a powerful combination of violence and ideology that must necessarily always be “correct” in the mind of its believers. For those believers their ideology is invariably “the truth” and must be defended at all costs.

That reasonable minds can reasonably disagree is one of the most treasured values and principles of democratic society; in many ways, it defines liberal society where discussion and debate represent an ideal. Highlighting extremism, then, potentially paints those who ‘think outside the box’ negatively punishing those deemed unconventional, free spirits who push the envelope while living on the edge. Those qualities, while perhaps causing discomfort, do not, inherently, pose a danger to society. The human race has undoubtedly benefited from the contributions of individuals deemed ‘extremist’ by their societies’ mores, norms and conditions.

The litany of such individuals is lengthy; obvious examples include Jesus, Newton, Copernicus and Galileo. Conversely, others *also* considered extremists have caused unimaginable harm both to their own people and to the larger international community. The roster whose short list includes Hitler, Stalin, Pol Pot and Mao reflects the true evil of unbridled extremism facilitated by what Daniel Goldhagen correctly identified as ‘willing executioners’.<sup>20</sup>

Therein lies the tension in undertaking an examination of extremism: is the reference to Galileo or to Hitler; after all, the former was perceived by his society to pose an extraordinary danger for he was challenging basic, long-held convictions. It must be recalled that Galileo was seen as undermining society questioning the basic relationship between man, God and the universe; not by chance was he forced to recant his views and remain under house arrest until his death<sup>21</sup>. Arguing that Hitler was an extremist whose actions killed millions is all

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<sup>20</sup> See DANIEL JONAH GOLDHAGEN, *HITLER’S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* (1996).

<sup>21</sup> Richard Owen & Sarah Delaney, *Vatican recants with statue of Galileo*, Mar. 4, 2008, <http://www.timesonline.co.uk/tol/comment/faith/article3478943.ece>.

but universally accepted as correct<sup>22</sup>; however, in that vein, it would be wrong to ignore public opinion polls in Russia which suggest 21%<sup>23</sup> of the population longs for Communism believing it preferable to Putin's 'managed democracy'.<sup>24</sup> Perhaps it is not too much of a stretch to suggest similar opinions will shortly be articulated in Iraq regarding Sadaam Hussein.

There is, then, risk in highlighting extremism; some individuals, defined as extremists, have made extraordinary contributions to mankind.<sup>25</sup> However, given the polarized age in which we live, failure to both address extremism and explore how to effectively, yet legally, curtail the influence of extremists is more dangerous. The burden, then, is to engage in a narrow discussion regarding individuals that directly threaten both society (in general) and vulnerable group particular or individual specific members of society while neither unduly nor unjustifiably limiting rights of those who 'push' society within the bounds of the law. Hyperbole is the great danger in this discussion; both from the perspective of those who argue that limiting freedom of speech is inherently unlawful and those who argue that broadly limiting free speech is the most appropriate recourse in the face of non-conformity.

Mere thoughts cannot---and should not---be subject to limitation; however, words and actions are subject to scrutiny in order to determine whether they pose a threat. Without doubt, the margin for error demands this demarcation line is clear; otherwise basic rights will be violated in an arbitrary and capricious manner devoid of due process. However, while society must be protected against potential harm, determining whether it is ephemeral or concrete requires careful examination. Otherwise, striking a balance between individual rights and government obligation to protect the public is exceptionally difficult.

Nevertheless, ignoring threats is akin to 'putting one's head in the sand'; it is a risk society cannot tolerate. Deliberately denying or underestimating risks posed to society because of concerns ranging from 'political correctness' to concerns regarding violating otherwise protected rights to inexplicable dismissal of harm are unacceptable alternatives. Equally dangerous, as the pages of history make clear, is over-reaction, collective punishment and unjustified violations of civil and political rights.

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<sup>22</sup> The exceptions are Holocaust deniers, neo-Nazi's and Nazi sympathizers

<sup>23</sup> *Income Gap Reaches A Dangerous Level*, Mar. 8, 2005, [http://www.sptimes.ru/index.php?action\\_id=2&story\\_id=2950](http://www.sptimes.ru/index.php?action_id=2&story_id=2950).

<sup>24</sup> *Id*; While differences clearly exist it would be wrong to ignore public opinion polls in Russia.

<sup>25</sup> Examples of this are clearly seen in Galileo and Martin Luther King Jr.

These contours serve as our guide in examining extremism in six different countries; while the bookends are, perhaps, clear the gray zone is just that, amorphous, vague and complicated. However, because of the danger posed by extremism and the concomitant combination of over-reaction and under-reaction in the face of risk this uncomfortable discussion is essential. Perhaps, that, more than anything else drives this book. In that vein the insightful words of are of particular importance “the narrower question of the relationship between religious liberty and national security has only rarely been explored”.<sup>26</sup>

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<sup>26</sup> Samuel Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STANFORD L. REV. 125 (2012).

## CHAPTER ONE

### Defining Extremism

#### I. Defining Extremism in Civil Society

What is extremism? Many have commented, written, spoken and pontificated on this question.<sup>27</sup> The answer, undoubtedly vague, depends on one's particular perspective, milieu and culture. However, definition is critical to the issue this book addresses. After all, how can we limit something if we do not fully know what it is? Responses to the questionnaire regarding definitions of extremism were varied; the range of proposed definitions highlights its complexity and nuance. It is important to note that respondents did not have difficulty offering a definition of the term rather, their struggle, was in articulating a narrow and circumspect definition that avoids unnecessarily infringing on individual rights.

The tension is obvious; a broad and unwieldy definition both casts too wide a net and imposes limits on otherwise guaranteed rights whereas a narrow definition potentially harms members of society.<sup>28</sup> The 'magical' word is balance; balancing legitimate individual rights with equally legitimate national security rights is, arguably, the most complicated question confronting civil democratic society. Dean Minow addressed the balancing discussion in her law review article, "Tolerance in the Age of Terrorism"<sup>29</sup>:

A single nation may seem to or actually produce both intolerance and too much tolerance, generating both overreactions and under-reactions to terrorism. Because the United States and European nations each have pursued policies that threaten civil liberties and indicate intolerance of immigrants and dissenters, a detailed assessment is necessary—and so is analysis of the rhetorical arguments about overreaction and under-reaction. Moreover, tolerance can be a feature of personal ethics, or national character, or public policy, and the connections between

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<sup>27</sup> See on the notion of extremism: Abou El Fadl, Khaled, *The Great Theft: Wrestling Islam From the Extremists*, Harper San Francisco, New York 2007; Atran, Scott, *Talking to the Enemy: Violent Extremism, Sacred Values, and what it means to be Human*, Allen Lane, Penguin Books, London 2010; Doran, Michael, "The Pragmatic Fanaticism of al Qaeda: An Anatomy of Extremism in Middle Eastern Politics", in: *Political Science Quarterly*, Vol. 117, No. 2 (Summer, 2002), pp. 177-190.; Fennema, Meindert, and Maussen, Marcel, "Dealing with Extremists in Public Discussion: Front National and 'Republican Front' in France", in: *The Journal of Political Philosophy*, Volume 8, Number 3, 2000, pp. 379-400; Guiora, Amos N., "Protecting the Unprotected: Religious Extremism and Child Engangerment", in: *Journal of Law & Family Studies*, Vol. 12, 2010, pp. 391-407; Guiora, Amos, "Religious Extremism: A Fundamental Danger", in: *South Texas Law Review*, Vol. 50, No. 743, (2009), pp. 743-768.

<sup>28</sup> The term society is used to incorporate both the population at large and specific groups and individuals targeted from within and without.

<sup>29</sup> Minow, *supra* note 3.

tolerance and anti-terrorism can take complex forms at each of these levels.<sup>30</sup>

In light of this need for a 'detailed assessment' it is important to explore definitions from multiple sources and varying perspectives in order to fully understand extremism in all its variations. While far from complete, some of the proposed definitions suggested by questionnaire respondents are highlighted below.

**Extremism = violence in the absence of reason, or rather, the belief that committing an act of violence will produce benefits that outweigh the cost of human life. Violent extremism is homicide, genocide, fratricide, and, yes, it can also be terrorism.<sup>31</sup>**

**Single-mindedness, lack of empathy or tolerance for differing points of view. Political extremism is the approval of violence as a means to achieve political goals.<sup>32</sup>**

**Extremism is a term used to describe either ideas or actions thought by critics to be hyperbolic and unwarranted. In terms of ideas, the term extremism is often used to label political ideology that is far outside the political center of a society.**

**Extremism is often used to identify aggressive or violent methodologies used in an attempt to cause political or social change.**

**Taking any idea and distorting it beyond the parameters of the idea generally accepted by the group or groups to which the idea applies.**

**I know you've discussed extremism as involving the threat/use of violence, but some observers also see the possibility of non-violent extremism (in the sense of radical views about society that do not espouse the use of violence to achieve that society), so that will be an issue to address (but may already be included in your initial bullet point about defining extremism).**

**Extremism is a relational term. Therefore, what we consider extreme behavior in contemporary times may have been normative in the past and, whereas, today do we view such behavior as extremist (e.g. Hassidim, "Ultra"-Orthodox).**

**One need to distinguish, I believe, between extremism as a matter of weltanschauung or personal life style as opposed to extremism as a matter of tactics to achieve a particular goal – political or otherwise. Are they the same?**

**I don't think so. (If a lawyer refuses to compromise and litigates it out – is he an extremist? Is that necessarily bad? Why do we admire the tough lawyers of**

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<sup>30</sup> *Id.* at 454.

<sup>31</sup> See generally Jon Mroz, *Lone Wolf Attacks and the Difference between Violent Extremism and Terrorism*, EASTWEST INST. (Apr. 24, 2009, 1:32PM), <http://www.ewi.info/lone-wolf-attacks-and-difference-between-violent-extremism-and-terrorism>.

<sup>32</sup> James Vega, *What is "Right-Wing Extremism?"*. DEMOCRATIC STRATEGIST, Apr. 30 2009, [http://www.thedemocraticstrategist.org/strategist/2009/04/part\\_i\\_what\\_is\\_rightwing\\_extre.ph](http://www.thedemocraticstrategist.org/strategist/2009/04/part_i_what_is_rightwing_extre.ph) p.

**Boston Legal, et al?)**

**Extremism nurtures a mindset of intolerance, permitting the faithful to “curse” and act violently towards the non-faithful.**

The above are but a sample of definitions proposed by questionnaire respondents; reviewing the proposed definitions reinforces the complexity in proffering a definition. Some respondents suggested extremism implies violence; others proposed that non-violent behavior and language are also manifestations of extremism. In suggesting that extremists are not empathetic, other respondents articulated an important point: extremists are absolutists and to that end are ‘locked in’ on their particular viewpoint largely incapable, if not intolerant, of other perspectives. For the purposes of this book, extremism is a powerful combination of violence and ideology that must necessarily always be “correct” in the mind of its believers. For those believers their ideology is invariably “the truth” and must be defended at all costs.

A common theme amongst the proposed definitions was that extremists sought to radically change existing norms and mores. Needless to say, not all members of society view change as a positive; after all, change can ‘upset the apple cart’ and affect pre-existing manners and ways. Whether that is a negative or positive depends, in large part, on a variety of factors. Those factors include perceived self-interest, pre-existing values and principles and the extent to which proposed change directly, or indirectly, affects one’s station in life.

As suggested by participants in a round-table conversation discussing this book, how change is perceived is akin to ‘beauty is in the eye of the beholder’. By example: the end of Jim Crow<sup>33</sup> was perceived by many<sup>34</sup> as beneficial to American society while others<sup>35</sup> believed that Jim Crow represented stability and established ‘clear lines’ between the races. In the language of the times, Jim Crow guaranteed that African-Americans living in the South ‘knew their place.’ That, of course, was a euphemism for racism, denial of full rights, privileges and protections to African-Americans.

The difficulty is determining what value to attach to extremism; while some view the civil rights movement as extremist I suggest it was a ‘positive’ whereas others would argue it was a ‘negative’. Whether extremism is positive or negative depends, then, on one’s perspective and interests. Change can occur in distinct manners, some violent others through traditional democratic means. Re-

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<sup>33</sup> “Jim Crow was the name of the racial caste system which operated primarily, but not exclusively in southern and border states, between 1877 and the mid-1960s. . . Under Jim Crow, African Americans were relegated to the status of second class citizens. Jim Crow represented the legitimization of anti-Black racism.” Ferris State Univ., *What was Jim Crow* (Sept. 2000), <http://www.ferris.edu/jimcrow/what.htm>.

<sup>34</sup> See Sen. James Eastland (D-Miss) “In fact, segregation is desired and supported by the vast majority of the members of both races in the South, who dwell side by side under harmonious conditions.” <http://www.spartacus.schoolnet.co.uk/USAjimcrow.htm>.

<sup>35</sup> For a website discussing Jim Crow laws: See Ferris *supra* note 22.

articulated, do certain dire social, political and economic conditions justify extreme measures in an effort to protect victims of injustice and brutality and mitigate their suffering? Martin Luther King, Jr. answered that question in the negative; Huey Newton and others in the Black Panthers answered that question affirmatively. After all, as Barry Goldwater famously said “extremism in the defense of liberty is no vice.”<sup>36</sup>

The answer is, in many ways, in the question; in certain paradigms change demands dramatic measures rather than acceptable ‘working within the system’ approaches. By example: while Rosa Parks was not an extremist, her simple human action of refusing to give up her seat and move to the back of the bus<sup>37</sup> was instrumental to the civil rights movement. While the decision to choose Rosa Parks was not happenstance, for it was carefully considered and weighed by leaders of the nascent civil rights movement,<sup>38</sup> her actions, ultimately, spoke loudly for rights and freedom.

There are three distinct paradigms relevant to examining extremism: secular, social movements; religious extremism; and movements that combine secular and religious themes that draw on both in articulating their reason d’être. In examining the three it is essential to understand both the existential and practical social structures that impel individuals to articulate, lead and act in a manner that fundamentally challenges existing mores and norms.

In doing so, both violent and non-violent behavior is relevant; while some<sup>39</sup> suggest extremism must be understood to imply violence there is little doubt that extremism can also be non-violent. The most obvious example of the latter is speech; the adage ‘words kill’ is particularly relevant to this discussion.<sup>40</sup> After all, hatred articulated by an individual identified as a leader---whether secular or religious---undoubtedly has the ability to compel *others* to act even though the message, purportedly, was not explicitly violent. Important to recall that words are *also* violent in the atmosphere they create and actions they facilitate. Whereas belief is a private matter the complexity is in regulating and possibly prosecuting conduct (including speech); needless to say, the difficulty is in the ‘gray’ area particularly with respect to determining when speech meets criteria

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<sup>36</sup> Barry Goldwater, *Goldwater’s 1964 Acceptance Speech*, WASHINGTON POST, <http://www.washingtonpost.com/wp-srv/politics/daily/may98/goldwaterspeech.htm> (last visited Nov. 3, 2012).

<sup>37</sup> *The Story Behind the Bus*, THE HENRY FORD, <http://www.hfmgv.org/exhibits/rosaparks/story.asp> (last visited Nov. 3, 2012).

<sup>38</sup> See Jannell McGrew, *An interview with Rosa Parks* (Dec. 1, 2000), [http://www.montgomeryboycott.com/bio\\_rparks2.htm](http://www.montgomeryboycott.com/bio_rparks2.htm).

<sup>39</sup> See, e.g., Eugene Abov, *Interview with new Russian presidential advisor Mikhail Fedotov*, Dec. 1, 2010, <http://www.telegraph.co.uk/sponsored/russianow/politics/8174053/Interview-with-new-Russian-presidential-advisor-Mikhail-Fedotov.html>.

<sup>40</sup> Avalos, Hector, *Fighting Words: The Origins of Religious Violence*, Prometheus Books, Amherst, New York 2005.

Avalos, Hector, *Fighting Words: The Origins of Religious Violence*, Prometheus Books, Amherst, New York 2005.



of incitement. In this vein, ascertaining when speech compels others to act cannot be defined as 'black-white'; rather, determining whether the speaker's words resulted in actions by another depends on a number of conditions and circumstances.

The dilemma with respect to the gray area is significant. Broadly defining permissible speech can directly contribute to unwarranted limitation of freedom of speech; narrowly defining impermissible speech may cause harm either to specifically targeted individuals or to random victims of extremists. Striking a balance that protects constitutional rights while protecting public and individual safety is simultaneously complicated and essential. In assessing whether the speech has the potential to compel another to act requires determining a number of factors including the relationship between the speaker and the audience, the speaker's intent, how specific the speech is and the relevant time frame between the speech and the action. While 'words kill' is, indeed, the common refrain not all words kill and determining which words either have the potential to cause harm or which caused actual harm requires both sensitivity to the principles of freedom of speech and the state's obligation to protect the public and individuals.

By example: some voices in the Netherlands suggested that Theo van Gogh was an inciter whose words had the potential to cause harm; others suggest van Gogh was a provocateur whose words could not cause harm. The distinction is significant; if the former then van Gogh could be liable for prosecution whereas the latter falls under the category of protected speech. The same argument can be made with respect to US radio personalities including Rush Limbaugh and Glenn Beck: the question is ascertaining when the speech has crossed from protected to incitement. In examining extremism in the context of Justice Holmes' famous phrase "shouting fire in a crowded theatre" the question is whether the fire has not already started and to what extent the theatre is burning. Geert Wilders would argue that the theatre is burning and that his voice is the one that should not be muzzled.

Moving from the theoretical to the practical: I propose extremism be defined as "conviction" that tenets of a given belief system---secular or religious--- justify violence against others. This violence can be directed both at people of faith including members of the same religion who have violated the extremist's understanding of how religion is to be practiced or those perceived as insufficiently devout and to those holding secular convictions.<sup>41</sup> In discussing religious extremism Professor Boyer suggests, "extremism is simply an excessive form of religious adherence."<sup>42</sup>

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<sup>41</sup> "[A]n ancient practice in which men kill female relatives in the name of family 'honor' for forced or suspected sexual activity outside marriage, even when they have been victims of rape." Elham Hassan, *Women Victims of honor killing*, YEMEN OBSERVER, Jan. 28, 2006, <http://www.yobserver.com/culture-and-society/1009304.html>.

<sup>42</sup> PASCAL BOYER, RELIGION EXPLAINED: THE EVOLUTIONARY ORIGINS OF RELIGIOUS THOUGHT 292 (2001).

While the liberal, democratic ethos advocates maximum rights of and for the individual the danger posed by extreme religious belief requires re-examining that premise. The burden is convincing the reader both as to the necessity of limiting otherwise protected rights and providing a road map for decision-makers and the public for doing so. That same conviction, in essence ‘absolutism,’<sup>43</sup> representing the extreme manifestation of religious faith that leads people of extreme faith to harm believers and non-believers alike is equally applicable to secular extremists.<sup>44</sup> Absolutism is, without doubt, a judgmental word viewed either ‘positively’ or ‘negatively’ depending on one’s perspective.

The physician referenced in the introduction would view *his* absolutism as justified given his conviction that his truth is absolute. He would, accordingly, view negatively the absolute conviction of a devout Jew or Moslem that their truth is *the* truth. From a secular perspective, absolutism practiced by religious extremists poses dangers because of the obligation it imposes. Religious extremists believe it their responsibility to bring glory onto God; if their faith leader implies (directly or indirectly) that glory requires violence then absolutism poses a danger. In a similar vein, extremists incited to action by a leader’s speech are also absolutists posing a danger whether to broader society or specific individuals. It is important to recognize that actors, while incited by a faith leader are subject to criminal prosecution; the actor is not to be granted immunity simply because he was acting in accordance with the wishes of a faith leader.

In that sense, the principle of absolute conviction of the ‘rightness’ of a particular cause (religious and secular) and the determination that violence (actual or verbal) is justified characterizes secular and religious extremism alike. Timothy McVeigh and Anders Behring Breivik were no less convinced of their extreme secular worldview than was Osama Bin Laden. While McVeigh and Breivik were not motivated by religion their convictions and beliefs were no less absolute and violent than Bin Laden.<sup>45</sup> In other words, different motivations with similar results.<sup>46</sup>

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<sup>43</sup> Absolutism is defined as “a political theory that absolute power should be vested in one or more rulers” Merriam-Webster Online, <http://www.merriam-webster.com/dictionary/absolutism>; Absolutism emerged as a form of government following the religious wars that dominated much of 16th century Europe. In essence, absolutism was based on the theory that a strong central government could prevent anarchy. J.P. Sommerville, *Absolutism and the Divine Right of Kings*, <http://history.wisc.edu/sommerville/351/351-172.htm> (last visited Nov. 3, 2012).

<sup>44</sup> A prime example of secular extremism were the actions taken by Anders Breivik, who claimed that immigration was “ruining his country.” See David Wilkes, *Did schoolboy row turn Anders Breivik into migrant hating monster?*, dailymail.co.uk, July 26, 2011, available at <http://www.dailymail.co.uk/news/article-2018758/Anders-Behring-Breivik-Did-schoolboy-row-turn-migrant-hating-monster.html>.

<sup>45</sup> Seemingly Bin Laden’s worldview has more adherence than Breivik’s or McVeigh’s; See Paul Cliteur, *Cultural Counter-Terrorism*, in *TERRORISM, IDEOLOGY, LAW, AND POLICY* 457, 483 (Gelijm Molier, Afshin Ellianand David Suurland eds., Republic of Letters Pub. 2011).

<sup>46</sup> McVeigh’s bombing killed 168, Breivik’s rampage killed 76 while Bin Laden’s attacks spanning approximately 27 years killed thousands. See *Osama bin Laden: A Chronology of His Political Life*,

It is that conviction coupled with the requirement---whether self-imposed or externally articulated and subsequently internalized---to violently act that most accurately depicts extremism. However, and the caveat is essential to truly understand the power of extremism, the 'act' is based on a belief system (secular or religious) that has, in many cases, been articulated elsewhere by someone other than the actor. For that reason, extremism should not be understood in the narrow context of action exclusively; doing so, unnecessarily and dangerously (from the perspective of broader society) grants the speaker unwarranted and unjustified immunity.

Membership and participation in civil democratic society explicitly demand citizens acknowledge the supremacy of the rule of law. Rousseau argued that as citizens we are all signatories to the grand social contract.<sup>47</sup> In essence, we have given up any truly absolute rights for the safety and comfort that a government/village/family can provide. In other words, members of society have agreed to be subject to laws and regulations that protect them while limiting their rights. That is the essence of the social contract that establishes boundaries of acceptable behavior between the individual and the state. Extremists undermine the social contract; their actions cause extraordinary harm to individuals (victims) and society alike.

In articulating, and subsequently implementing responses to extremism, the state must determine what factors have contributed, directly and indirectly, to individuals uniting for the purpose of committing acts undermining society. This is of the utmost importance both in developing policy that minimizes the impact of a particular group and preventing additional groups from seeking to undermine society's stability.

While extremists challenge, if not undermine, the fragile social structure that describes civil, democratic society the nation state is limited in its response. After all, limited state power defines democratic society; unrestrained measures and responses describe either totalitarian regimes or democratic states engaged in 'panic response'.

However, unlike individuals who commit crimes<sup>48</sup> associated with the traditional criminal law paradigm, the actions of extremists ---regardless of their motivation---are intended to directly impact the social fabric that defines civil society. For that reason the danger posed by extremists---violent and non-violent alike---extends dramatically beyond the specific act they commit. In the criminal law paradigm the victim and immediate family most dramatically feel impact; in the extremist paradigm, the intended audience extends far beyond the victim and

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PBS.org, <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/etc/cron.html> (last visited Nov. 3, 2012).

<sup>47</sup> CHRISTOPHER BERTRAM, ROUTLEDGE PHILOSOPHY GUIDEBOOK TO ROUSSEAU AND THE SOCIAL CONTRACT 74-75 (2004).

<sup>48</sup> For purposes of this book, 'crimes' refers to actions the state has deemed violate the relevant Criminal Code.

family.

In both paradigms the victim *may* be randomly chosen (more so in the case of extremism); one of the principle distinctions between the two is that the extremist actor is focused on sending a message to society whereas the criminal is focused almost exclusively on his/her personal needs (i.e. money for drugs, personal revenge).

## II. The Civil Rights Movement

Defining extremism and its subsequent practical application requires extraordinary sensitivity and caution for governmental over-reach and undue exaggerated response is, inevitably, a legitimate concern. The FBI's unceasing focus on Dr. Martin Luther King raises deeply disturbing and pertinent questions.<sup>49</sup> Was Dr. King an extremist and did he pose a threat to society in a manner that would endanger members of society? There is little doubt that Dr. King was an extraordinary figure whose rhetorical brilliance and sheer force of personality combined with his unique ability to 'capture the moment' and articulate basic demands were, literally, unparalleled. Dr. King preached and practiced non-violence, subjecting himself to pain, suffering and humiliation on behalf of his cause. Others, similarly, truly placed themselves in harm's way: Freedom Riders who challenged segregation laws in the South<sup>50</sup>, those who sought to ensure African-Americans have the right to vote<sup>51</sup> and those who participated in demonstrations against the institutionalized segregation and racism of the American Deep South.<sup>52</sup>

The civil rights movement to which Dr. King dedicated his life challenged basic norms and mores of American society in the 1950's and 1960's; in innumerable ways, it changed America. Obviously, for millions of Americans that was extraordinarily unsettling, if not threatening; one only has to listen to the speeches of George Wallace and Lester Maddox and to see pictures from Birmingham, Alabama to viscerally feel the pure hate and unadulterated racism that defined how much of White (in both the north and south) America reacted

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<sup>49</sup> Jen Christensen, *FBI tracked King's every move*, CNN (Mar. 31, 2008), [http://articles.cnn.com/2008-03-31/us/mlk.fbi.conspiracy\\_1\\_dream-speech-david-garrow-civil-rights?\\_s=PM:US](http://articles.cnn.com/2008-03-31/us/mlk.fbi.conspiracy_1_dream-speech-david-garrow-civil-rights?_s=PM:US); Richard Powers, *Martin Luther King Jr.: FBI's Campaign to Discredit the Civil Rights Leader*, HISTORYNET.COM (June 12, 2006), <http://www.historynet.com/martin-luther-king-jr-fbis-campaign-to-discredit-the-civil-rights-leader.htm>.

<sup>50</sup> See generally *Freedom Riders*, PBS, <http://www.pbs.org/wgbh/americanexperience/freedomriders/> (last visited Nov. 3, 2012).

<sup>51</sup> See the killing of Civil Rights activists James Chaney, Andrew Goodman and Michael Schwerner who were killed in Mississippi <http://law2.umkc.edu/faculty/projects/ftrials/price&bowers/price&bowers.htm>; their killing was depicted in the movie *Mississippi Burning*, <http://www.imdb.com/title/tt0095647/>

<sup>52</sup> See generally, Diane McWhorter, *Carry Me Home* (Simon & Schuster, 2001); TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1988); TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1988); TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68* (2006); NAN ELIZABETH WOODRUFF, *AMERICAN CONGO: THE AFRICAN AMERICAN FREEDOM STRUGGLE IN THE DELTA* (2003).

to Dr. King's message. Governor Wallace's inauguration speech (1963) is a striking and clear example:

Today I have stood, where once Jefferson Davis stood, and took an oath to my people. It is very appropriate then that from this Cradle of the Confederacy, this very Heart of the Great Anglo-Saxon Southland, that today we sound the drum for freedom as have our generations of forebears before us done, time and time again through history. Let us rise to the call of freedom loving blood that is in us and send our answer to the tyranny that clanks its chains upon the South. In the name of the greatest people that have ever trod this earth, I draw the line in the dust and toss the gauntlet before the feet of tyranny . . . and I say . . . segregation today . . . segregation tomorrow . . . segregation forever.

The Washington, D.C. school riot report is disgusting and revealing. We will not sacrifice our children to any such type school system--and you can write that down. The federal troops in Mississippi could be better used guarding the safety of the citizens of Washington, D.C., where it is even unsafe to walk or go to a ballgame--and that is the nation's capital. I was safer in a B-29 bomber over Japan during the war in an air raid, than the people of Washington are walking to the White House neighborhood. A closer example is Atlanta. The city officials fawn for political reasons over school integration and THEN build barricades to stop residential Integration—what hypocrisy!

Let us send this message back to Washington by our representatives who are with us today--that from this day we are standing up, and the heel of tyranny does not fit the neck of an upright man . . . that we intend to take the offensive and carry our fight for freedom across the nation, wielding the balance of power we know we possess in the Southland . . . that WE, not the insipid bloc of voters of some sections . . . will determine in the next election who shall sit in the White House of these United States . . . That from this day, from this hour . . . from this minute . . . we give the word of a race of honor that we will tolerate their boot in our face no longer . . . and let those certain judges put that in their opium pipes of power and smoke it for what it is worth.

Hear me, Southerners! You sons and daughters who have moved north and west throughout this nation . . . we call on you from your native soil to join with us in national support and vote . . . and we know . . . wherever you are . . . away from the hearths of the Southland . . . that you will respond, for though you may live in the farthest reaches of this vast country . . . your heart has never left Dixieland.

And you native sons and daughters of old New England's rock-ribbed patriotism . . . and you sturdy natives of the great Mid-West . . . and you descendants of the far West flaming spirit of pioneer freedom . . . we invite you to come and be with us . . . for you are of the Southern spirit . . . and the Southern philosophy . . . you are Southerners too and brothers with us in our fight. What I have said about segregation goes double this day . . . and what I have said to or about some federal judges goes TRIPLE

this day.<sup>53</sup>

Conversely, the hope and promise that Dr. King expressed for millions of Black American's who believed, as he preached, that "one day . . . little black boys and black girls will be able to join hands with little white boys and white girls as sisters and brothers"<sup>54</sup> is equally powerful and compelling.

The FBI, under J. Edgar Hoover, was unceasing in its efforts regarding Dr. King; the incessant wire-tapping, monitoring and harassing reflected an unmitigated obsession, bordering on seeming irrationality. The unremitting efforts reflecting consistent violations of civil liberties and rights were extraordinary; it was, as if, Hoover were convinced that Dr. King posed a grave danger to US public safety and security.

Actually, as available documents suggest that is *exactly* what Hoover believed.<sup>55</sup> Assessing whether Hoover's efforts reflected objective and somber analysis regarding threats Dr. King and the civil rights movement posed or were a manifestation of unbridled efforts to reign in a challenge to mainstream American thinking depends on your perspective. It also depends on how threat and extremism are defined; clearly Hoover defined both broadly which directly led to excess in an effort to curtail Dr. King.

However, the efforts to discredit King and the civil rights movement were not restricted to FBI wiretapping; they also included extraordinary violations of civil and political rights of American citizens by local law enforcement officials sometimes cooperating with private citizens. Bull Connor,<sup>56</sup> Mississippi Burning<sup>57</sup> and the police dogs of Birmingham, Alabama have come to represent the abuses the civil rights movement was subjected to in its effort to ensure rights and freedoms for African-Americans living in the Deep South. Important to recall the degree to which racism was both institutionalized and internalized; by

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<sup>53</sup> [http://web.utk.edu/~mfitzge1/docs/374/wallace\\_seg63.pdf](http://web.utk.edu/~mfitzge1/docs/374/wallace_seg63.pdf), last viewed June 5, 2013

<sup>54</sup> Martin Luther King Jr., *I Have a Dream Speech*, HUFFINGTON POST (Jan. 17, 2011) (transcript available at [http://www.huffingtonpost.com/2011/01/17/i-have-a-dream-speech-text\\_n\\_809993.html](http://www.huffingtonpost.com/2011/01/17/i-have-a-dream-speech-text_n_809993.html)).

<sup>55</sup> Jen Christensen, *FBI tracked King's every move*, CNN (Mar. 31, 2008), [http://articles.cnn.com/2008-03-31/us/mlk.fbi.conspiracy\\_1\\_dream-speech-david-garrow-civil-rights?\\_s=PM:US](http://articles.cnn.com/2008-03-31/us/mlk.fbi.conspiracy_1_dream-speech-david-garrow-civil-rights?_s=PM:US) (quoting FBI memo calling "King the most dangerous and effective Negro leader in the country"). See also TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63* (1988); TAYLOR BRANCH, *PILLAR OF FIRE: AMERICA IN THE KING YEARS 1963-65* (1988); TAYLOR BRANCH, *AT CANAAN'S EDGE: AMERICA IN THE KING YEARS 1965-68* (2006).

<sup>56</sup> "Eugene "Bull" Connor was Birmingham's Commissioner of Public Safety in 1961 when the Freedom Riders came to town. He was known as an ultra-segregationist with close ties to the KKK. Connor encouraged the violence that met the CORE Freedom Riders at the Birmingham Trailways Bus by promising local Klansmen that, 'He would see to it that 15 or 20 minutes would elapse before the police arrived.'" FREEDOM RIDERS, *supra* note 38.

<sup>57</sup> "Two FBI agents investigating the murder of civil rights workers during the 60s seek to breach the conspiracy of silence in a small Southern town where segregation divides black and white. The younger agent trained in FBI school runs up against the small town ways of his former Sheriff partner." MISSISSIPPI BURNING (Orion Pictures 1986) <http://www.imdb.com/title/tt0095647/> (last visited Nov. 3, 2012).

example, lynching's were widely attended events, often with parents bringing their children.<sup>58</sup>

While those parents---sometimes observing a Sunday lynching after attending church that morning---undoubtedly would gainsay their actions were akin to extremism the suggestion is not far-fetched. While they themselves were not active participants, their willful attendance, regardless of its passive nature, raises legitimate questions regarding the significance and impact of acquiescing behavior. This is not an abstract question: passive conduct is essential to understanding extremism and how it is facilitated.

Thus, an analysis of extremism must not be restricted exclusively to those most clearly partaking in a particular activity. The conduct of both facilitators and observers must be considered to fully appreciate extremism in the context of broader community and group behavior. That is, the issue of extremism---to be understood at its most potent and dangerous---requires a broad examination extending beyond the readily identifiable and visible specific actor. To focus exclusively on *that* actor is to underestimate the importance of additional participants in the extremism paradigm.<sup>59</sup>

However, to cast an unduly wide net is similarly dangerous; while Dr. King clearly challenged conventional American norms and mores of the 1950's and 1960's non-violence was the essence of the civil rights movement he led. That is in direct contrast to those that followed, in particular Stokely Carmichael<sup>60</sup>, H. Rap Brown<sup>61</sup> and Huey Newton.<sup>62</sup> While it has been suggested that Dr. King's power and prestige was on the wane when he was killed,<sup>63</sup> his impact on American culture and politics was extraordinary. Arguably, his "I Have Been to the Mountaintop"<sup>64</sup> speech is one of the most powerful, dramatic and important in American history.

The words conveying his hope for a different, better America were an extraordinary clarion call for all Americans. However, and the caveat is essential, the speech---while undeniably stirring and challenging---did not invoke violence.

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<sup>58</sup> Photographs depicting these lynchings can be found at <http://executions.justsickshit.com/?s=executions&paged=2>

<sup>59</sup> GOLDENHAGEN, *supra* note 6.

<sup>60</sup> Stokely Carmichael participated in the Freedom Rides and later became one of the leading voices for the Black Power movement. He would go on to serve as the chairman for the Student Nonviolent Coordinating Committee (SNCC) starting in 1966 and an honorary prime minister of the Black Panther Party. FREEDOM RIDERS, *supra* note 38.

<sup>61</sup> Former member of the SNCC who was sentenced to life in prison in 2009 for killing a sheriff's deputy. *Life for 60's Radical H. Rap Brown*, CBSNEWS (Feb. 11, 2009, 9:12 PM), <http://www.cbsnews.com/stories/2002/03/13/national/main503687.shtml>.

<sup>62</sup> Co-founder of the Black Panther Party. EYES ON THE PRIZE, PBS, [http://www.pbs.org/wgbh/amex/eyesontheprize/profiles/26\\_newton.html](http://www.pbs.org/wgbh/amex/eyesontheprize/profiles/26_newton.html) (last visited Nov. 3, 2012).

<sup>63</sup> April 4, 1968.

<sup>64</sup> Martin Luther King Jr., Address at the Mason Temple: I've Been To The Mountain Top (Apr. 3, 1968) available at <http://www.drmartinlutherkingjr.com/ivebeentothemountaintop.htm>.

That is in marked distinction to the open calls for violence that characterized the words and actions of the Black Panthers; the distinction between Dr. King and Newton, Brown and Carmichael is, literally, night and day. Similarly, King's 'Letter from a Birmingham Jail' written after he was incarcerated (1963) brilliantly articulates the justness of the civil rights movement, compellingly distinguishing between its inherent moderate principles and the extremism he rejected:

We know through painful experience that freedom is never voluntarily given by the oppressor; it must be demanded by the oppressed. Frankly, I have yet to engage in a direct action campaign that was "well timed" in the view of those who have not suffered unduly from the disease of segregation. For years now I have heard the word "Wait!" It rings in the ear of every Negro with piercing familiarity. This "Wait" has almost always meant "Never." We must come to see, with one of our distinguished jurists, that "justice too long delayed is justice denied."

We have waited for more than 340 years for our constitutional and God given rights. The nations of Asia and Africa are moving with jet like speed toward gaining political independence, but we still creep at horse and buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, "Wait." But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society; when you suddenly find your tongue twisted and your speech stammering as you seek to explain to your six year old daughter why she can't go to the public amusement park that has just been advertised on television, and see tears welling up in her eyes when she is told that Funtown is closed to colored children, and see ominous clouds of inferiority beginning to form in her little mental sky, and see her beginning to distort her personality by developing an unconscious bitterness toward white people; when you have to concoct an answer for a five year old son who is asking: "Daddy, why do white people treat colored people so mean?"; when you take a cross county drive and find it necessary to sleep night after night in the uncomfortable corners of your automobile because no motel will accept you; when you are humiliated day in and day out by nagging signs reading "white" and "colored"; when your first name becomes "nigger," your middle name becomes "boy" (however old you are) and your last name becomes "John," and your wife and mother are never given the respected title "Mrs."; when you are harried by day and haunted by night by the fact that



you are a Negro, living constantly at tiptoe stance, never quite knowing what to expect next, and are plagued with inner fears and outer resentments; when you are forever fighting a degenerating sense of "nobodiness"--then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair. I hope, sirs, you can understand our legitimate and unavoidable impatience. You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: "How can you advocate breaking some laws and obeying others?" The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust. All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of superiority and the segregated a false sense of inferiority. Segregation, to use the terminology of the Jewish philosopher Martin Buber, substitutes an "I it" relationship for an "I thou" relationship and ends up relegating persons to the status of things. Hence segregation is not only politically, economically and sociologically unsound, it is morally wrong and sinful. Paul Tillich has said that sin is separation. Is not segregation an existential expression of man's tragic separation, his awful estrangement, his terrible sinfulness? Thus it is that I can urge men to obey the 1954 decision of the Supreme Court, for it is morally right; and I can urge them to disobey segregation ordinances, for they are morally wrong.<sup>65</sup>

For the FBI King *was* a danger to American society justifying blatant violations of his civil and political rights. Herein lies the critical question: is one who

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<sup>65</sup> MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM JAIL, in THE NORTON ANTHOLOGY OF AFRICAN AMERICAN LITERATURE 1854-66 (Henry Louis Gates, Jr. & Nellie Y. McKay eds., Norton 1997) (1963), available at [http://www.africa.upenn.edu/Articles\\_Gen/Letter\\_Birmingham.html](http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html).

challenges conventional thinking an extremist? If so, does that justify actions and measures akin to those used by the FBI in the 1950's and 1960's? Those questions are essential to understanding the limits of civil discourse and the extent to which society tolerates dissent, criticism and free speech. These are, obviously, not abstract questions; the answers define society, its relationship with the individual and the extent to which voices calling for change challenging society will be tolerated.

Healthy civil society brooks dissent and tolerates challenging voices; however, society need not tolerate calls for violence that *may* lead to harm and place innocent individuals at risk. The lines are not necessarily broad and clear; often times they are subtle and subject to interpretation. When clear, marking boundaries is greatly facilitated; when blurred, over-reaction is a distinct possibility with troubling consequences both for the individual and society. In analyzing whether society is over-reacting it is essential to examine, in depth, context and circumstances. That is, the determination whether actions and words are, indeed, extremist cannot be divorced from the relevant political, social, economic and cultural reality.

### **III. History of Limiting Speech**

To that extent, hate speech is a hotly contested area of First Amendment debate.<sup>66</sup> Unlike fighting words, or true threats, hate speech is a broad category of speech that encompasses both protected and unprotected speech. To the extent that hate speech constitutes a true threat or fighting words, it is unprotected; to the extent it does not reach the level of a true threat or fighting words it is protected.

During the 1980s and early '90s more than 350 public colleges and universities sought to combat discrimination and harassment on campuses through the use of so-called speech codes.<sup>67</sup> Proponents of the codes contend that existing First Amendment jurisprudence must be reversed because the marketplace of ideas does not adequately protect minorities. They charge that hate speech subjugates minority voices and prevents them from exercising their First Amendment rights. Similarly, proponents posit that hate speech is akin to fighting words, a category of expression that should not receive First Amendment protection. In doing so, proponents cite the Supreme Court's holding because in *Chaplinsky* they (fighting words) "are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."<sup>68</sup>

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<sup>66</sup> See *Virginia v. Black*, 538 U.S. 343 (2003); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377 (1992); *Nat'l Socialist Party of Am. v. Vill. of Skokie*, 432 U.S. 43 (1977); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Terminiello v. City of Chicago*, 337 U.S. 1 (1949); *Gitlow v. People of State of New York*, 268 U.S. 652 (1925); *Snyder v. Phelps*, 131 S.Ct. 1207 (2011).

<sup>67</sup> David L. Hudson Jr., *Hate Speech and Campus Speech Codes*, FIRST AMENDMENT CENTER (Sept. 13, 2002), <http://www.firstamendmentcenter.org/hate-speech-campus-speech-codes>.

<sup>68</sup> *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942).

However, speech codes that have been challenged in court have not fared well; though no case has been brought before the Supreme Court on this question, lower courts have struck these policies down as either overbroad or vague. The District Court for the Eastern District of Wisconsin in the University of Wisconsin school code case articulated the reasoning behind the codes' lack of constitutional muster:

This commitment to free expression must be unwavering, because there exist many situations where, in the short run, it appears advantageous to limit speech to solve pressing social problems, such as discriminatory harassment. If a balancing approach is applied, these pressing and tangible short run concerns are likely to outweigh the more amorphous and long run benefits of free speech. However, the suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control.<sup>69</sup>

While a literal interpretation of the First Amendment forbids any law abridging speech in any form, the Supreme Court has taken a more nuanced approach recognizing legitimate competing interests that must be considered. For example, while free speech is a guaranteed right according to the First Amendment the executive branch is similarly charged with protecting the safety and security of the nation's citizens. As Justice Holmes articulated, "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic..."<sup>70</sup>

This statement, which has been endorsed by every Court since, reflects an understanding that with free speech—as with other constitutionally guaranteed protections—there is no absolutism. Powerful interests must be balanced against other powerful interests; the question is whether the balancing reflects a rights minimization or rights maximization paradigm. Free speech jurisdiction has travelled a long road in American jurisprudence, arguably in concert with society, which superficially—at least—is more tolerant of dissent than in the past.

The caveat is pertinent because one must never forget the rigid, Puritan roots of the American culture; a casual perusal of public discussion regarding same sex marriage, children of same sex parents and abortion highlights a constant strain of ideological rigidity, largely premised on a literalist interpretation of religious scripture. While some would argue that the 'marketplace of ideas' should take precedence over efforts to limit free speech protections the reality is, arguably, more complicated. As I have argued elsewhere,<sup>71</sup> the danger posed by religious extremists should give serious pause as incitement occurring in Houses of Worship meets the Supreme Court tests. In that vein, while the Supreme Court

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<sup>69</sup> *UWM Post, Inc. v. Bd. of Regents of Univ. of Wisconsin Sys.*, 774 F. Supp. 1163, 1174 (E.D. Wis. 1991).

<sup>70</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

<sup>71</sup> *GUIORA*, *supra* note 9.

begins its analysis of free speech questions with the presumption that speech is protected it is not an absolute right.

The analysis must determine whether the proposed restriction is content-based or content-neutral; the former refers to restrictions that apply to particular viewpoints then the proposed restriction carries a heavy presumption that it violates the First Amendment. In such a paradigm, the Court applies a strict scrutiny standard in evaluating its lawfulness; to survive strict scrutiny, the restriction must be *narrowly tailored* to achieve *an important governmental interest*. That means that it cannot be, among other things, over-inclusive, under-inclusive, or vague. This standard effectively places a heavy burden on the government in defending the restriction.

However, if the restriction is content-neutral, whereby the concern is not with the speech itself but rather pertains to the details surrounding the speech, then the government is allowed to set certain parameters involving time, place, and manner. Content-neutral restrictions on speech are reviewed under intermediate scrutiny rather than strict scrutiny because the speech is restricted solely in the manner in which the information is communicated rather than the content itself.

In *U.S. v. O'Brien*<sup>72</sup>, the Supreme Court established a four-part test to determine whether a content-neutral restriction on speech is constitutional: (1) Is the restriction within the constitutional power of government, (2) Does the restriction further important or substantial governmental interest, (3) Is the governmental interest unrelated to the suppression of free expression, (4) Is the restriction narrowly tailored, i.e., no greater than necessary. Subsequently, a fifth factor was added in *City of Ladue v. Gilleo*<sup>73</sup> inquiring whether the restriction leaves open ample opportunities of communication.

The American public has been confronted with a number of significant free speech issues in the past few years. I shall examine four: religious extremism incitement; a Koran burning pastor; Christian extremists demonstrating at funerals of US military personnel; and an Assistant Attorney General (Michigan) who specifically (ruthlessly) targeted a University of Michigan student who was student body President and a homosexual. In examining these four examples the core question is whether the test articulated by the Supreme Court in *Brandenburg* sufficiently protects the speaker, his audience, the larger public and the intended target of the speech.

Pastor Terry Jones, of Florida, leads a small but vocal congregation. On March 20, 2011, Jones held a Qur'an burning that resulted in anti-American violence in Afghanistan, killing at least 12 people. Jones was urged not to do it by virtually every national leader including President Obama, Secretary of State Clinton and perhaps most importantly, General Petraeus, the commander of U.S. forces in

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<sup>72</sup> United States v. O'Brien, 391 U.S. 367 (1968).

<sup>73</sup> City of Ladue v. Gilleo, 512 U.S. 43 (1994).

Afghanistan who argued that Pastor Jones' conduct would endanger US military personnel in Afghanistan. While Jones did not go forward with his threat, his possible actions present a significant First Amendment dilemma: is speech protected even though harm is both encouraged and/or *may* result both domestically and internationally.

In that vein, Jones was arrested for attempting to protest outside a Mosque in Dearborn, Michigan. After a brief trial, a jury upheld the city's injunction, claiming that Jones' protest would disturb the peace; ultimately, Jones was held on \$1 bail and then released.<sup>74</sup> While Jones' conduct is considered, by many (never say all), to be reprehensible (at best) numerous constitutional law experts claim the court's action was a gross miscarriage of justice and a violation of Jones' First Amendment rights.

The same concerns are relevant with respect to a pastor who, along with his tiny but vocal community, shouts degrading comments at family and friends of fallen soldiers as they gather to bury their loved one who died while serving the U.S. The basis for the pastor's conduct: the soldier died because God hates the United States for its tolerance of homosexuality, particularly in America's military. The Supreme Court recently addressed this issue in *Snyder v. Phelps*<sup>75</sup>, where members of a small but extremely vocal Westboro Baptist Church, protested the funeral of a U.S. Marine who had been killed in Iraq. The protesters carried signs, as they have done at nearly 600 funerals throughout the country over the past 20 years, displaying placards such as "America is doomed", "You're going to hell", "God hates you", "Fags doom nations", and "Thank God for dead soldiers."<sup>76</sup>

Dissenting Justice Samuel Alito likened the protests of the Westboro Baptist Church members to fighting words and of a personal character, and thus not protected speech. However, the majority disagreed, stating that the protester's speech was not personal but public, and that local laws, which can shield funeral attendees from protesters, are adequate in the context of protection from emotional distress.

Finally, Andrew Shirvell, a former Assistant Attorney General for Michigan sued for stalking Chris Armstrong, the first openly gay University of Michigan student body president. Armstrong claims that Shirvell showed up everywhere he went, including school and home. Shirvell apparently started a blog campaign against Armstrong and his "radical homosexual agenda." Shirvell claims that the stalking charges are moot because he has never actually spoken to Armstrong, and that he is simply exercising his First Amendment rights.<sup>77</sup> Should Shirvell be allowed

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<sup>74</sup> *Pastor Who Planned Mosque Protest Out of Jail*, CBS NEWS (April 22, 2011), <http://www.cbsnews.com/stories/2011/04/22/national/main20056660.shtml>.

<sup>75</sup> *Phelps*, 131 S.Ct. 1207.

<sup>76</sup> *Id.* at 1213.

<sup>77</sup> David Jesse, *Shirvell Fires Back, Claims He's Victim of Gay Agenda*, DETROIT FREE PRESS, May 10, 2011, available at <http://www.freep.com/article/20110510/NEWS05/110510041/Shirvell-fires-back-claims-he-s-victim-gay-agenda?odyssey=mod|mostcom>.

to exercise his free speech rights in this manner? How does the doctrine of hate speech apply? Mike Cox, the state's Attorney General and Shirvell's boss, initially defended Shirvell's actions claiming the First Amendment protected them. However, shortly after Armstrong filed harassment charges, Cox changed his stance and fired Shirvell.<sup>78</sup> A jury later agreed with Armstrong and awarded Armstrong \$4.5 million in damages<sup>79</sup>

The First Amendment has travelled an extraordinary journey; from clear limits imposed on free speech to an understanding that protecting free speech is important to a vital and vibrant democracy. Needless to say, the road taken has been full of pitfalls and pratfalls reflective both of the extraordinary importance of this protection and the dangers that free speech, arguably, pose. The rocky road directly reflects this tension; to suggest that the tension has been resolved and that limitations will not be posed in the future would be to mis-read American history.

After all, American history is replete with 'roll backs' of rights in times of crisis, whether real or imagined. This unfortunate tendency, in the speech context, is compounded by the ever-changing nature of speech and the media. Rearticulated: given the extraordinary power of social media, and the speed with which information can be transmitted, it is not unforeseeable both government and the Courts will consider imposing limits on free speech when public safety is arguably endangered.

While the Supreme Court's holding in *Snyder*<sup>80</sup> suggests an expansive articulation of free speech, American history suggests the possibility of a "roll back"—particularly in the context of national security and public order---cannot be easily dismissed. Though American society has significantly matured over the past 200 years the responses when 'under threat' are surprisingly consistent: accepting a rights minimization paradigm imposed by government and upheld by the Court.

Because of the dangers inherent to this discussion the definition of extremism offered above is deliberately limited; in recommending a minimalist definition of extremism the intention is to protect society while protecting individual rights. In particular, there is a need to protect the rights of those who challenge society but do not 'cross the line' by inciting to violence (directly or indirectly) or causing harm to vulnerable members of society thereby endangering public order. Vibrant democracies benefit from those who think 'outside the box' though discomfort is concomitant to their actions; however, extremists who pose a danger may perceive themselves as merely 'thinking outside the box', whereas in

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<sup>78</sup> Brian Montopoli, *Andrew Shirvell Fired After Harassment Charges*, CBSNews (Nov. 8, 2010), [http://www.cbsnews.com/8301-503544\\_162-20022143-503544.html](http://www.cbsnews.com/8301-503544_162-20022143-503544.html).

<sup>79</sup> Kevin Dolak, *Attorney Andrew Shirvell Ordered to Pay 4.5 Million for Attacks on Gay Student*, ABC NEWS, Aug. 17, 2012, <http://abcnews.go.com/US/attorney-andrew-shirvell-ordered-pay-45-million-attacks/story?id=17028621#.UDeXv9ZISSo>; For the transcript of Andrew Shirvell's interview with Anderson Cooper (CNN).

<http://transcripts.cnn.com/TRANSCRIPTS/1009/28/acd.02.html>

<sup>80</sup> *Phelps*, 131 S.Ct. 1207.

reality the harm they potentially cause warrants limiting their rights.

With this, we turn our attention to ascertaining the harm extremists pose to society. From the perspective of semantics there is significance in the terminology and methodology; the assumption is that extremists do, indeed, pose a threat. That, however, does not mean that rights minimization is an absolute; rather it requires determining the extent to which intolerance is to be tolerated and at what price.

## CHAPTER TWO

### The Dangers Extremism Poses to Society

This chapter's title highlights the inherent tension in this project; while extremism, can pose a danger to society it is important that mature society tolerate dissent, perhaps even encourage, if not facilitate, powerful opposition voices. The question, then, is one of balance; imposing undue and unjustified limits on voices outside the consensus is the antithesis of a vibrant democracy. These voices may well engender discomfort, anger and resentment amongst the mainstream population; however, that does not mean, under any conditions, that these voices need be stifled. However, it is similarly undeniable that extremism, under certain conditions, poses a clear danger to society; the burden is carefully defining a specific danger. Loosely articulating danger is harmful for it facilitates undue silencing of legitimate dissent; however, failure to define---and act against---'danger points' unnecessarily endangers society and individuals alike.<sup>81</sup>

The most obvious harm extremism poses is physical injury to members of society; in that vein, it is the primary responsibility of the nation state to ensure physical safety of the populace, from internal and external threats alike. To dismiss the possibility that extremists<sup>82</sup> have the capability, and under certain conditions the willingness, to cause harm is to undermine the social compact that Rousseau brilliantly outlined in 'The Social Contract'.<sup>83</sup> After all, in exchange for entering into a social compact with the state the individual expects protection and safety. That is, by willfully entering into an association with other individuals under the 'umbrella' provided by the state, the person rightfully demands protection and safety. In addition, the individual in agreeing to the social compact expects laws that reflect the majority will; nevertheless, the individual has the right to oppose particular laws the majority has viewed favorably.<sup>84</sup>

That is, after all, the essence of democracy; while the individual may oppose particular laws he is guaranteed protection from the majority provided the laws do not minimize otherwise guaranteed individual rights or facilitate violence to person or property. The social compact, in establishing an association, articulates a paradigm whereby the individual sacrifices liberty for protection; that, however, does not mean the individual agrees to be subjected to violence and harm. After all, the motivation in forming an association and joining society is to be free from harm and danger. In examining the harm posed by extremism the question is not only existential harm to society but also physical harm to individual members of society who are, potentially, at risk.

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<sup>81</sup> See David Sirota, *Are Evangelicals A National Security Threat?*, SALON (Nov. 29, 2011, 1:50 PM), [http://www.salon.com/2011/11/29/are\\_evangelicals\\_a\\_national\\_security\\_threat/](http://www.salon.com/2011/11/29/are_evangelicals_a_national_security_threat/).

<sup>82</sup> As defined in chapter one.

<sup>83</sup> See generally JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, LONDON J.M. DENT & SONS LTD. (1923), available at <http://www.archive.org/stream/therepublicofpla00rousuoft#page/n3/mode/2up>.

<sup>84</sup> It is important to note that Rousseau rejected the individual's right to resist a general will.



It is important to recall that 'risk' may come both from society at large and from a particular group the individual belongs to. In many ways, the social contract theme is essential to the extremism discussion; the willingness of the individual to voluntarily join society is based on the understanding that loss of some freedom and liberty is voluntarily relinquished in exchange for protection and safety. In other words, the individual has made a 'deal' with society whereby protection is proffered in exchange for minimization of personal rights.

Failure to protect the individual violates the contract; more importantly, it enhances the vulnerability of the individual by exposing him to harm from which he is unprotected. In the context of examining extremism one of the most important ---and troubling---realities is that the nation state tolerates conduct that, as history has consistently demonstrated, harms individuals, whether randomly or specifically. The social contract model articulated by Rousseau sought to create a model whereby harm to individuals is minimized; yet, the pages of history are replete with examples where the contract has been violated by the nation state that turns a blind eye to extremism.<sup>85</sup>

The specific examples discussed in this book reflect the tension between individual rights and national security rights; in many ways, the extremism discussion is at the confluence between national security rights and individual rights. In that vein, the social contract is at the epicenter of that confluence for it articulates state responsibility to the individual. When the nation state chooses not to confront extremism or extremists the social contract has been violated.

The social contract is predicated on an understanding that neither national security nor individual rights are absolute and that respect for both is essential to a thriving civil, democratic society. After all, the voluntary joining of society necessarily implies rights minimization in exchange for protection. One of the great dilemmas from the perspective of the individual is what alternatives exist if the contract is violated; *prima facie*, three options seem viable: submissiveness; peaceful, civil disobedience<sup>86</sup> and violent protest. Circumstances and conditions of particular environments are significant determinants in analyzing how an affected group or specific individual responds to societal tolerance of extremist behavior that directly impacts their security and safety.

It is for that reason, as discussed in chapter one, that the US civil rights movement is of particular importance: societal and institutionalized racism against African-Americans arguably left civil rights leaders no alternative but to organize, demonstrate and protest. The extremism which they confronted on a daily basis, based on deep-seated racism enabling systemic, callous, institutionalized disregard of their constitutionally guaranteed rights was a primary motivation in Dr. King's efforts to seek justice and redress for African-Americans.

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<sup>85</sup> Numerous examples will be discussed in this book. For historical examples see anti-Semitism in Europe, institutionalized racism in the Deep South, and Japanese treatment of Korean sub slaves.

<sup>86</sup> See generally PETER SINGER, *DEMOCRACY AND DISOBEDIENCE* (1st ed. 1973).

While Dr. King was a profound believer in non-violence he was incarcerated on a number of occasions by local law enforcement<sup>87</sup> and convicted for his actions.<sup>88</sup> All of his convictions were for non-violent crimes such as preventing the operation of a business without “just or legal cause,” trespassing, loitering, and obstructing the sidewalk.<sup>89</sup> These stemmed from organizing and participating in sit-ins, boycotts, marches, and simply standing in a public place.<sup>90</sup> King’s political philosophy was distinct from the Black Panthers who were, in response to the racism that gave birth to the civil rights movement, violent extremists in their own right. While King largely, but not exclusively, sought change legally the Panthers conduct was overtly violent, illegal and openly disdainful of government, white society and King. Broadly speaking, albeit with caveats and cautionary flags raised, King’s civil rights movement was inclusionary<sup>91</sup> whereas the Panthers excluded whites and moderate blacks alike.

The King-Black Panthers discussion is important not only with respect to the civil rights movement but also in the context of the larger extremist discussion for it requires addressing the question ‘how to respond to extremism’. Re-articulated: should extremism be fought with extremism or are moderate measures more effective and ultimately more successful. While local circumstances and conditions significantly impact the course chosen, larger principles must not be discounted. If those whose rights are violated reach the conclusion that ‘working within the system’ and calculated/deliberate tolerance of intolerance is no longer effective then more violent measures may be understandably adopted.

The larger question is what is the goal of the relevant group; if the group is dedicated to long-term change then moderate measures, predicated on compromise, are legitimate and perhaps effective. However, if the group’s focus is on immediate impact rather than far-reaching strategic considerations then moderate action is, largely, irrelevant. Determining which tact to adopt is essential; after all, seeking to affect change is inherent to democracy and the democratic process. If society/law enforcement over-reacts to extremism—real or perceived----then not only is government legitimacy in question but the ranks of the extremists may, inadvertently from the perspective of government, increase.

How society reacts to the moderate-extreme paradigm is of the utmost importance; however, as the civil rights movement demonstrated even

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<sup>87</sup> See Mitchell Brown, *Timeline of Events in Martin Luther King, Jr.’s Life*, LSU, available at <http://www.lib.lsu.edu/hum/mlk/srs216.html> (last visited January 10, 2012) (listing dates and locations where Martin Luther King, Jr. was arrested by local law enforcement).

<sup>88</sup> See Dr. Martin Luther King, Jr. *Chronography*, UNIV. OF HAW., available at <http://www.hawaii.edu/mauispeech/html/mlk.html> (last visited June 11, 2012) (listing dates, arrests and convictions of Martin Luther Kind, Jr.).

<sup>89</sup> The King Center, *The Life and Legacy of Dr. King*, GWIRED, [http://gwired.gwu.edu/sac/index.gw/Site\\_ID/7/Page\\_ID/13579/](http://gwired.gwu.edu/sac/index.gw/Site_ID/7/Page_ID/13579/) (last visited Aug. 24, 2012).

<sup>90</sup> *Id.*

<sup>91</sup> Pictures from civil rights marches consistently show significant white participation; that is in direct contradiction to the Panthers.

moderate groups (though engaged in illegal activity as defined by the criminal code) may be subjected to extremist responses by society and law enforcement alike. Government's extreme response to real or perceived extremism is, generally, justified as necessary to protect society; in accordance with the social contract which ironically, is violated when government denies otherwise guaranteed rights. In addressing rights guaranteed either by a national constitution or specific laws it is necessary to inquire whose rights are at stake and what protections can be demanded.

## **I. Failure To Act**

The decision to protect harmful religious practices rather than protecting the individual endangers vulnerable members of society. It, frankly, reflects an unjustified defense of extremism by government reflecting misguided priorities largely predicated on a disturbing failure to understand the direct harm posed by extremism, whether religious or non-religious. The concept of misguided priorities suggests a protection paradigm that endangers individuals----whether belonging to a closed society or members of larger society----in the name of protecting particular rights and privileges. That decision, however, represents a failure of the larger responsibility owed by the nation state; the 'duty owed' paradigm requires protecting individuals from extremists and extremism. In that sense, the danger emanating from government's failure to minimize the potential threat of extremism is no less potent than the harm caused by extremists.

Protecting religious extremism has the clear potential to result harm to vulnerable individuals; it is the modern day articulation of appeasement. Churchill's "Munich Speech" captures appeasement brilliantly:

"Many people, no doubt, honestly believe that they are only giving away the interests of Czechoslovakia, whereas I fear we shall find that we have deeply compromised, and perhaps fatally endangered, the safety and even the independence of Great Britain and France. This is not merely a question of giving up the German colonies, as I am sure we shall be asked to do. Nor is it a question only of losing influence in Europe. It goes far deeper than that. You have to consider the character of the Nazi movement and the rule which it implies.

The Prime Minister desires to see cordial relations between this country and Germany. There is no difficulty at all in having cordial relations between the peoples. Our hearts go out to them. But they have no power. But never will you have friendship with the present German Government. You must have diplomatic and correct relations, but there can never be friendship between the British democracy and the Nazi power, that power which spurns Christian ethics, which cheers its onward course by a barbarous paganism, which vaunts the spirit of aggression and conquest, which derives strength and perverted pleasure from

persecution, and uses, as we have seen, with pitiless brutality the threat of murderous force. That power cannot ever be the trusted friend of the British democracy.

What I find unendurable is the sense of our country falling into the power, into the orbit and influence of Nazi Germany, and of our existence becoming dependent upon their good will or pleasure. It is to prevent that that I have tried my best to urge the maintenance of every bulwark of defence - first, the timely creation of an Air Force superior to anything within striking distance of our shores; secondly, the gathering together of the collective strength of many nations; and thirdly, the making of alliances and military conventions, all within the Covenant, in order to gather together forces at any rate to restrain the onward movement of this power. It has all been in vain. Every position has been successively undermined and abandoned on specious and plausible excuses.”<sup>92</sup>

Churchill’s warnings are particularly disturbing because it reflects an unwillingness to learn from history; true extremism (as compared to perceived extremism) is emboldened in the face of government weakness. While Warren Jeffs, the Prophet (head) of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (FLDS) was ultimately convicted, the harm he caused both underage girls and young males (specifically) and members of FLDS society (generally) are extraordinary. That damage could have been significantly mitigated had law enforcement officials acted decisively years, if not decades, before. Not doing so reflects a troubling failure to understand the clear and present danger posed by extremism, in this case religious extremism. Essential to this discussion is recognizing that government policy resulted in a failure to protect those to whom a duty is owed.

Asking ‘to whom is a duty owed’ is integral to a discussion regarding the decision to try Geert Wilders, the head of the Dutch Party of Freedom; important to recall that the decision to prosecute Wilders was imposed on the public prosecutor by the Amsterdam Court of Appeals.<sup>93</sup> Comparing Wilders to Jeffs is, on the face of it, akin to comparing apples and oranges. Nevertheless, a closer examination of decisions taken by prosecutors and judges alike suggests interesting, if not disturbing, parallels. Warren Jeffs is, as a thoughtful observer commented, a serial pedophile<sup>94</sup>, responsible for untold forced marriages of underage girls; when the Utah Fifth District Court convicted him of ‘accomplice to rape’<sup>95</sup> the relevant question was ‘what took you so long’?

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<sup>92</sup> <http://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/101-the-munich-agreement>, last viewed June 5, 2013

<sup>93</sup> See Andrew G. Bostom, *Geert Wilders and the Rise of Islamic Correctness*, AMERICAN THINKER (Oct. 18, 2010), [http://www.americanthinker.com/2010/10/geert\\_wilders\\_and\\_the\\_rise\\_of.html](http://www.americanthinker.com/2010/10/geert_wilders_and_the_rise_of.html).

<sup>94</sup> Private email in my records.

<sup>95</sup> Lateshia Beachum, *Sect Leader Jeffs Convicted of Rape by Accomplice*, NOW.ORG (Sep. 26, 2007), <http://www.now.org/issues/violence/092607jeffs.html>.

The question should, obviously, have been directed at the State of Utah Attorney General and public prosecutors who, for an extended period of time, granted a criminal, whose actions based on extremist interpretation of religious scripture were known to the public and state officials alike, immunity. While various theories were suggested justifying the failure to aggressively prosecute Jeffs the reality is that state action (inaction) directly facilitated the heinous crimes committed. Jeffs' subsequent life conviction in 2011 for sexually assaulting two teenage girls in Texas<sup>96</sup> does not remove the State of Utah's tolerance of his conduct. In many ways, the studied non-action by Utah law enforcement officials reflects both unjustified tolerating intolerance and an institutionalized failure to protect vulnerable members of society facing known and documented threats.

This stands in direct contrast to Wilders whose prosecution was ordered by the District Court of Amsterdam after the public prosecutor determined insufficient grounds existed warranting prosecution. In over-ruling the Prosecutor the Court held that both Wilders' movie "Fitna"<sup>97</sup> and a series of public statements and writings violated section 137 c and d of the Dutch criminal code<sup>98</sup> and therefore ordered his prosecution.

While the Amsterdam District Court subsequently acquitted Wilders, after a mistrial had initially been declared,<sup>99</sup> the importance of the case is less in the judicial process and more in its legal, political and social connotations. In a nutshell, the Wilders trial requires addressing a number of issues including free speech limits, growing concern in the Netherlands (and elsewhere in Europe) regarding Islam<sup>100</sup> and the increasing tension between traditional European

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<sup>96</sup> In Texas, Jeffs was convicted of sexually assaulting two girls he claimed were his spiritual wives. Jeffs was sentenced to life in prison for aggravated sexual assault of a 12yr old and 20 years for sexual assault of a 15 year old. He must serve at least 35 years of the life sentence and half of the 20-year sentence. See generally SAM BROWER, *PROPHET'S PREY: MY SEVEN-YEAR INVESTIGATION INTO WARREN JEFFS AND THE FUNDAMENTALIST CHURCH OF LATTER-DAY SAINTS* (2011); CNN Wire Staff, *Polygamist Leader Warren Jeffs Sentenced to Life in Prison*, CNN JUSTICE (August 9, 2011), [http://articles.cnn.com/2011-08-09/justice/texas.polygamist.jeffs\\_1\\_warren-jeffs-sexual-assault-brent-jeffs?\\_s=PM:CRIME](http://articles.cnn.com/2011-08-09/justice/texas.polygamist.jeffs_1_warren-jeffs-sexual-assault-brent-jeffs?_s=PM:CRIME); Paul Bentley, *Shaved and shamed: haunting prison photos show paedophile 'prophet' Warren Jeffs as he begins life sentence for raping girls*, DAILY MAIL (Aug. 10, 2011, 3:49 PM), <http://www.dailymail.co.uk/news/article-2024530/Warren-Jeffs-trial-Prison-photos-paedophile-shaved-ashamed.html>.

<sup>97</sup> See Geert Wilders, *Fitna*, YOUTUBE (Feb. 5. 2001), <http://www.youtube.com/watch?v=kIKCgRIwQUA>.

<sup>98</sup> *Netherlands: Hate Crimes*, LEGISLATIONLINE, <http://www.legislationline.org/topics/country/12/topic/4> (last visited June 21, 2012).

<sup>99</sup> See Geert Wilders Cleared of Hate Charges by Dutch Court, BBCNEWS, <http://www.bbc.co.uk/news/world-europe-13883331> (last updated June 23, 2011, 6:34AM).

<sup>100</sup> See Bill Muehlenberg, *Free Speech on Trial: Geertz Wilders*, NEWS WEEKLY, Feb. 6, 2010, <http://www.newsweekly.com.au/article.php?id=4173>; Steven Erlanger, *Amid Rise of Multiculturalism, Dutch Confront Their Questions of Identity*, N.Y. TIMES, Aug 13, 2011, <http://www.nytimes.com/2011/08/14/world/europe/14dutch.html?pagewanted=all>.

societies and the integration and acculturation of immigrants.<sup>101</sup>

In ordering Wilders' prosecution, the Amsterdam Court of Appeal *believed* his conduct was offensive to Moslems<sup>102</sup>; this in direct contrast to the decades long decision by Utah state officials not to prosecute Jeffs for conduct that *unequivocally* harmed vulnerable members of society.<sup>103</sup> The two reflect distinct approaches to protecting individuals and society. While Wilders' public statement and film were, undoubtedly, controversial and perhaps offensive to Moslems they were not intended to harm or threaten individuals; undoubtedly they were intended to raise, in a provocative and 'edgy' manner, social issues highly relevant to contemporary Dutch society.

Conversely, Jeffs' actions while cloaked in religious scripture unequivocally caused harm for statutory rape is a crime. Invoking religion does not, and must not, grant it either legitimacy or immunity. Extending protections to extremism, whether religious or non-religious, violates the social compact whereas unwarranted and over-broad limits on free speech, devoid of rigorous analysis of possible harm to larger society, is antithetical to the values and traditions of Western society. The decision to prosecute Wilders is troubling on numerous levels, particularly because it seeks to silence non-harmful provocation while those who incite to harm based on interpretation of religious scripture are, largely, granted immunity.<sup>104</sup> The Wilders-Jeffs comparison is stark: provocation is deemed to be 'silence-able' whereas a serial pedophile is, until recently, granted immunity by State officials protecting the criminal at the expense of innumerable victims. The danger that extremism poses to society occurs on multiple levels; to view it otherwise is to deliberately minimize its powerful impact. Though convenient to gainsay its larger import, the reality is that extremism endangers individuals and society alike.

## II. Tolerating Intolerance

To cut to the chase: those members of white society who chose to ignore the horrors of lynching in the Deep South adopted the same attitude that secular Jews in Israel did in the face of unremitting incitement by extremist Jewish rabbis prior to Prime Minister Rabin's election. The attitude is best described as tolerating intolerance. The failure of the mainstream Israeli public, as well as the

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<sup>101</sup> See Racheal Donadio, *Fears About Immigrants Deepen Divisions in Europe*, N.Y. TIMES, April 12, 2011, <http://www.nytimes.com/2011/04/13/world/europe/13europe.html>.

<sup>102</sup> See David Jolly, *Dutch Court Acquits Anti-Islam Politician*, N.Y. TIMES, June 23, 2011, <http://www.nytimes.com/2011/06/24/world/europe/24dutch.html>

<sup>103</sup> See generally Danielle Tumminio, *Warren Jeffs' Appalling Abuse of Religion*, THE HUFFINGTON POST (Aug. 6, 2011, 10:34 AM), [http://www.huffingtonpost.com/danielle-tumminio/warren-jeffs-trial-religious-abuse\\_b\\_919607.html](http://www.huffingtonpost.com/danielle-tumminio/warren-jeffs-trial-religious-abuse_b_919607.html); <http://www.latimes.com/news/la-na-sect12may12,0,5778341.story>

<sup>104</sup> See generally Paul Canning, *The Netherlands: Islamic extremists call for lesbian's death*, LGBTQNATION (Dec. 14, 2011) <http://www.lgbtqnation.com/2011/12/islamic-extremists-call-for-lesbians-death/>; Soeren Kern, *German Cartoon Riots: Clubs, Bottles, and Stones*, GATESTONE INST. (May 8, 2012, 5:00 AM), <http://www.gatestoneinstitute.org/3052/german-cartoon-riots>.

stunning failure of law enforcement and Justice Ministry officials to fully appreciate the power of religious extremist incitement prior to the Rabin assassination is a collective tragedy. More disturbing, or at least no less disturbing, is the continued failure to recognize the danger extremist rabbis pose to civil democratic society.

Recent examples of this danger are found in remarks made by right wing extremists towards former Defense Minister Ehud Barak when West Bank settlements were put on a 10 month freeze: "If you think of destroying the settlements, you are mistaken, and I will kill you...I will harm you or your children, be careful...If not now, then when you are no longer a minister and have no security around you."<sup>105</sup> An additional example is a warning given by the former Head of the Israeli Security Agency, Yuval Diskin, to Prime Minister Benjamin Netanyahu and Defense Minister Ehud Barak: "The Rabin assassination can repeat itself. There are extremist Jews within the Green Line as well, not only in the territories. It's an optical illusion that they're all in the territories...There are dozens willing to use firearms against their Jewish brothers..."<sup>106</sup>

On the face of it, refusal of religious male soldiers to attend official military ceremonies where women either participate or sing seems quaint and insignificant.<sup>107</sup> Nothing could be further from the truth. The refusal is a direct challenge by extremist rabbis to civil, secular Israeli society; the IDF, after all, is the true melting pot where Israelis---Jews, Druze, Bedouin, Circassian, religious, secular, male, female---contribute to society in the name of collective national defense. While political maneuvering in the state's infancy justified religious based deferments<sup>108</sup> from service in the IDF the larger question today is whether the State will 'bow' to the demands of extremist rabbis.

While public criticism is occasionally voiced with respect to deferments granted to 18-year-old male Yeshiva students (Haredim) the Israeli public has largely accepted them in the context of political reality and machinations.<sup>109</sup> In addition, the deferments were largely legalized when the Israeli Knesset enacted

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<sup>105</sup> See Amos Harel, *Barak gets death threat over West Bank settlement freeze*, HAARETZ (Jan. 5, 2010, 8:23 PM), <http://www.haaretz.com/news/barak-gets-death-threat-over-west-bank-settlement-freeze-1.260859>.

<sup>106</sup> See Chaim Levison, *Yuval Diskin: West Bank evacuation could lead to another political assassination*, HAARETZ (Apr. 28, 2012, 7:08 PM), <http://www.haaretz.com/news/diplomacy-defense/yuval-diskin-west-bank-evacuations-could-lead-to-another-political-assassination-1.426979>.

<sup>107</sup> See Barak Ravid, *Israeli Secular, Religious Ministers Hold heated Debate Over Women's Rights*, HAARETZ (Nov. 27, 2011, 5:12 PM), <http://www.haaretz.com/news/national/israeli-secular-religious-ministers-hold-heated-debate-over-women-s-rights-1.398061>; Rabbi Leibowitz, *It Aint' Over 'til the IDF Soldier Sings*, HAARETZ (Nov. 27, 2011, 2:25 PM), <http://www.haaretz.com/jewish-world/it-ain-t-over-til-the-idf-soldier-sings-1.398037>.

<sup>108</sup> DONNA ROSENTHAL, *THE ISRAELIS: ORDINARY PEOPLE IN AN EXTRAORDINARY LAND* 176 (2003).

<sup>109</sup> A yeshiva or yeshivah (ישיבה) (Hebrew: ישיבה, "sitting (n.)" ; pl. yeshivot or yeshivas) is a Jewish institution for Torah study and the study of Talmud. Yeshivot are usually Orthodox Jewish institutions, and generally cater to boys or men. <http://yeshiva.askdefine.com/>

the “Tal Bill”<sup>110</sup>; while the legislation created a bi-furcated responsibility paradigm public opposition was mild and inconsistent. However, the more disturbing threat posed by extremist rabbis clearly inciting<sup>111</sup> male soldiers to disrespect their female colleague’s presents a deeper threat to both the IDF and society. The issue goes beyond whether male soldiers choose to not participate in a military ceremony where women sing<sup>112</sup>; the larger question is whether secular society acquiesces to religious extremist demands that violate the existential core of the IDF.<sup>113</sup>

A military unit is distinct from civilian society; its codes and rules are different as exemplified by separate disciplinary and punishment rules. To that end, for a military to be divided between religious and secular soldiers, with the former determining under what conditions they can (and cannot) participate in specific events poses an extraordinary danger to the military and larger society. In the same vein, the continued incitement by extremist rabbis against members of the Israeli political left<sup>114</sup> and Israeli Arabs<sup>115</sup> presents a threat both to specific individuals and members of a particular group. It also undermines larger society whose silence emboldens extremism. Underestimating the threat posed by extremism raises profound questions regarding human nature; whether it reflects a calculated unwillingness to understand the danger posed or suggests disinterested apathy is uncertain.<sup>116</sup>

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<sup>110</sup> See Gideon Alon, *Knesset committee expected to pass Haredi draft bill*, HAARETZ (July 15, 2012, 12:00 AM), <http://www.haaretz.com/news/knesset-committee-expected-to-pass-haredi-draft-bill-1.39643> (explaining that Tal bill grants deferments to yeshiva students).

<sup>111</sup> See Israel Hayom, *IDF bans talks by advocates of women’s exclusion*, ISRAELHAYOM, Jan. 2, 2012, available at [http://www.israelhayom.com/site/newsletter\\_article.php?id=2475](http://www.israelhayom.com/site/newsletter_article.php?id=2475) (discussing recent discriminatory acts against women in the Israeli military); ‘*Women sit in cockpits, they can sit anywhere*’, THE JERUSALEM POST, Dec. 29, 2011, <http://www.jpost.com/NationalNews/Article.aspx?id=251441> (discussing rising discrimination against Jewish women).

<sup>112</sup> Some Orthodox Jews believe that a man is forbidden to hear a woman sing. This prohibition is known as Kol Isha and is derived from Song of Solomon 2:14: “Let me hear your voice, for your voice is sweet (“arev”) and your face is beautiful.” The Talmud classifies this as *ervah* (literally “nakedness”). See Shmuel Rosner, *The Voice of a Woman*, N.Y. TIMES, Nov. 18, 2011, <http://latitude.blogs.nytimes.com/2011/11/18/the-voice-of-a-woman/>; Amos Harel, *IDF: Soldiers cannot skip ceremonies with women singing*, HAARETZ (Sep. 14, 2011, 3:14 AM), <http://www.haaretz.com/print-edition/news/idf-soldiers-cannot-skip-ceremonies-with-women-singing-1.384288>.

<sup>113</sup> See Amos Harel, *IDF Freezes Implementation of Report Calling for Gender Equality*, HAARETZ (Nov. 30, 2011, 2:07 AM), <http://www.haaretz.com/print-edition/news/idf-freezes-implementation-of-report-calling-for-gender-equality-1.398544>.

<sup>114</sup> See Oz Rosenberg, *‘Price Tag’ Suspect emailed Death Threats from House Arrest, Police Says*, HAARETZ (Nov. 27, 2011, 8:45 PM), <http://www.haaretz.com/news/diplomacy-defense/price-tag-suspect-emailed-death-threats-from-house-arrest-police-says-1.398087>.

<sup>115</sup> See Dan Williams, *Israel Targets Top Rabbis for Anti-Arab Incitement Backing “King’s Doctrine”*, REUTERS (July 3, 2011), <http://blogs.reuters.com/faithworld/2011/07/03/israel-targets-top-rabbis-for-anti-arab-incitement-backing-kings-doctrine/>.

<sup>116</sup> The danger posed to individuals and society alike by a failure to actually minimize extremist behavior. See generally Parliamentary Assembly, *Doc. 9890: Threat posed to democracy by extremist parties and movements in Europe*, COUNCIL OF EUR. (July 25, 2003), available at



Arguably that question is relevant to the child abuse tragedy at Penn State University<sup>117</sup>; whether Jerry Sandusky's fellow coaches and employers deliberately disregarded horrors he committed because protecting the Penn State 'brand' was more important than coming to the rescue of innocent and vulnerable under-age boys is a distinct possibility. In many ways, the Penn State crisis reflects the dangers of both a closed society<sup>118</sup> and harm caused by ignoring risk to the vulnerable.<sup>119</sup> The alleged failure of university officials who are state employees to respond forcefully to an eyewitness report<sup>120</sup> is, obviously, deeply troubling. It reflects, a deliberate minimization of a clear threat and manifests a disturbing prioritization paradigm. Not to 'mix apples and oranges' but it reminds the silence of mainstream German society to a string of murders committed by Neo-Nazi's over the past decade.<sup>121</sup> It took German authorities almost ten years to piece together evidence revealing a Neo-Nazi group linked to a string of murders (mostly immigrants), bank robberies, and bomb attacks.<sup>122</sup>

The ignoring of clear danger signs manifests violation of the social contract; there is little doubt that extremism benefits from this willful blindness, which, depending on the circumstance is either a criminal act or an extraordinary moral failure. In either paradigm---criminal or moral---the results are arguably similar: harm is caused to the vulnerable because mainstream society and those in official positions failed to sufficiently protect those most in need of that very protection. It seems, then, that there is something about extremist behavior that fosters reticence on the part of larger society; that very weakness emboldens extremists committed to a worldview intolerant of compromise that brooks no dissent.

That reality defines an internal society which poses extraordinary dangers to those deemed apostates or insufficiently devout; in other words, those declared

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<http://assembly.coe.int/documents/workingdocs/doc03/edoc9890.htm>; James Zumwalt, *Extremes stream a common theme*, UPI.COM (May 31, 2012, 6:30 AM), [http://www.upi.com/Top\\_News/Analysis/Outside-View/2012/05/31/Outside-View-Extremes-stream-a-common-theme/UPI-91841338460200/?spt=hs&or=an](http://www.upi.com/Top_News/Analysis/Outside-View/2012/05/31/Outside-View-Extremes-stream-a-common-theme/UPI-91841338460200/?spt=hs&or=an);

<sup>117</sup> See Ken Belson, *Sandusky Trial Opens With Accuser's Testimony*, N.Y. TIMES, June 11, 2012, <http://www.nytimes.com/2012/06/12/sports/ncaafotball/jerry-sandusky-child-sexual-abuse-trial-begins.html>.

<sup>118</sup> See Jason Sickles, *Report: Penn State Officials May Have Tried to Conceal Jerry Sandusky Child Abuse Allegations*, YAHOO NEWS (June 11, 2012, 3:47 PM), <http://news.yahoo.com/blogs/lookout/report-penn-state-officials-may-tried-conceal-jerry-154753288.html>.

<sup>119</sup> See Mark Gado, *The Kitty Genovese Murder*, TRUTV (copyright 2012), [http://www.trutv.com/library/crime/serial\\_killers/predators/kitty\\_genovese/1.html](http://www.trutv.com/library/crime/serial_killers/predators/kitty_genovese/1.html).

<sup>120</sup> Sickles, *supra* note 100.

<sup>121</sup> See *Neo-Nazi Murders, Film Confession Shock Germany*, REUTERS (Nov. 13, 2011, 1:23 PM), <http://www.reuters.com/article/2011/11/13/us-germany-crime-neonazis-idUSTRE7AC0TQ20111113>; Nicholas Kulish, *Neo-Nazis Suspected In Long Wave of Crimes, Including Murders, In Germany*, N.Y. TIMES, Nov. 13, 2011, <http://www.nytimes.com/2011/11/14/world/europe/neo-nazis-suspected-in-wave-of-crimes-in-germany.html?pagewanted=all>.

<sup>122</sup> *Id.*

by the group's leaders to not be 'true believers' are at risk. As history demonstrates, vulnerable members of an internal society are subject to unrelenting abuse with little hope of external mitigation of their distress. In other words, the price of tolerating intolerance is neither abstract nor ephemeral; it is very real with tragic consequences.

Society's turning of a blind eye to extremism is a pattern that tragically repeats itself. It is, in many ways, insignificant whether the deliberate ignoring of the threat posed by extremists is a crime or 'only' a moral failure. In both cases, the victims of extremism are unprotected; whether Penn State officials in positions of power able to ensure that child abuse desist and Sandusky be prosecuted committed a crime (i.e. child endangerment) or failed morally (brand/institution protection rather than child protection) will be determined by prosecutors and courts. An investigative report written by former FBI director Louis Freeh finds Penn State officials guilty not of by simple negligence but rather of willfulness in covering up Sandusky's abuses.<sup>123</sup> Currently, the Penn State officials responsible for the cover up are awaiting trial.<sup>124</sup> What is clear, similar to the response of the Catholic Church to horrific and unceasing reports of child abuse by priests, is a deliberate policy intended to protect the institution rather than the victim. In both cases, Penn State and the Church, the damage to the institution would be extraordinary; in both cases, institution leaders made egregious errors reflecting willful blindness at its most unconscionable extreme.<sup>125</sup>

While neither Penn State nor the Catholic Church is the focus of this book each is instructive in examining dangers extremism poses to society; the failure to act in the face of a clear wrong largely defines society's response to extremist behavior. Perhaps, by analogy, it is akin to the schoolyard bully whose actions fellow students and authorities know yet response time, traditionally, has been painfully delayed. Whether that hesitation, recently the subject of extensive media attention<sup>126</sup>, will change is an open question; the historical pattern reflects a policy best described as 'fear of confronting'. The extremist not only poses a danger to victims (specific or random) but also benefits from society's reticence to confront a clear and present danger.

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<sup>123</sup> Rana L. Cash, *Penn State report: Freeh says Paterno, administrators engaged in Sandusky cover-up*, AOL SPORTINGNEWS, (July 12, 2012), <http://aol.sportingnews.com/ncaa-football/story/2012-07-12/penn-state-report-joe-paterno-role-sandusky-scandal-louis-freeh-investigation>.

<sup>124</sup> *Jan. Trial for Ex-PSU Officials Curley, Schultz*, N.Y. TIMES, Aug. 17, 2012, <http://www.nytimes.com/aponline/2012/08/17/us/ap-us-penn-state-abuse-administrators.html>.

<sup>125</sup> *See Roman Catholic Church Sex Abuse Cases*, N.Y. TIMES, Mar. 12, 2012, [http://topics.nytimes.com/top/reference/timestopics/organizations/r/roman\\_catholic\\_church\\_sex\\_abuse\\_cases/index.html](http://topics.nytimes.com/top/reference/timestopics/organizations/r/roman_catholic_church_sex_abuse_cases/index.html); see also Erik Kain, *How Penn State And The Catholic Church Covered Up Sexual Abuse And What We Can Do To Stop It*, FORBES (Nov. 7, 2011, 2:19 PM), <http://www.forbes.com/sites/erikkain/2011/11/07/how-penn-state-and-the-catholic-church-covered-up-sexual-abuse-and-what-we-can-do-to-stop-it/>.

<sup>126</sup> *See Kirk Semple, Army Charges 8 in Wake of Death of a Fellow G.I.*, N.Y. TIMES, December 21, 2011, <http://www.nytimes.com/2011/12/22/us/8-charged-in-death-of-fellow-soldier-us-army-says.html?pagewanted=all>.

The cost is not only to a particular victim; the consequence of failing to 'draw a line in the sand' is the emboldening of the extremist. In the Israeli context, for example, the failure to prosecute rabbis who directly incited Rabin's assassination was, undoubtedly, perceived as weakness by both the inciters and incited. While mainstream society was horrified by the assassination the unvarnished truth is that the proverbial handwriting was on the wall; no less disturbing than the failure to prevent the assassination was the inexplicable failure to prosecute inciters in its aftermath. Nearly two decades later the drumbeat of religious extremism goes unabated in Israel. To secular society the issue of women singing may not be perceived as cardinal, to the extremist religious community it has both religious and political significance. The former predicated on an extremist interpretation of gender separation<sup>127</sup>, the latter because it serves as an effective rallying cry intended to harness political power.

Political tests of will are inherent to a vibrant democracy; however, the broader, and more disturbing, sub-text is the challenge to state legitimacy posed by opposition to participation in IDF ceremonies. The issue of women singing in the presence of men is a convenient stakeholder for religious extremists determined to aggressively pursue their agenda regarding the shape of Israeli society in the years ahead. The clarity of vision, in conjunction with a ready willingness to use legitimate political means is largely in contrast to mainstream society's apathy or minimizing the depth of the threat posed.

Extremist's ability to successfully pursue their agenda is facilitated by mainstream society's failure, or refusal, to recognize the larger significance of specific issues that, seemingly, are isolated and devoid of a larger purpose. The danger of miscalculating, perhaps deliberately, threats posed by extremists to the very legitimacy of civil democratic society and state legitimacy is enormous. What, tragically, facilitates extremism is the consistent failure to directly confront extremists.

What Dean Minow phrased as tolerating intolerance is intellectually and philosophically akin to Winston Churchill's prophetic words in the 1930's.<sup>128</sup> After all, Churchill more than any other public figure, clearly recognized the threat posed by Hitler. That recognition, in direct contrast to Neville Chamberlin's appeasement policy, is as appropriate today as it was 80 years ago. Chamberlin's failure to recognize, much less appreciate, Hitler's true intentions are akin to those who prefer to understate direct and indirect threats alike. Both the 'tolerating intolerance' paradigm suggested by Minow and Churchill's warnings highlight tactical and strategic dangers extremism poses. Tactical in that harm is incurred by individuals; strategic because mainstream society

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<sup>127</sup> See generally *Israel Beit Shemesh Protests Continue*, THE HUFFINGTON POST (Dec. 28, 2011), [http://www.huffingtonpost.com/2011/12/28/israel-beit-shemesh-protests\\_n\\_1173018.html](http://www.huffingtonpost.com/2011/12/28/israel-beit-shemesh-protests_n_1173018.html); *Thousands in Israel Protest Against Ultra Orthodox Violence*, NTB (Dec. 30, 2011, 3:08 PM), [http://english.ntdtv.com/ntdtv\\_en/news\\_middleeast\\_africa/2011-12-30/thousands-in-israel-protest-against-ultra-orthodox-violence.html](http://english.ntdtv.com/ntdtv_en/news_middleeast_africa/2011-12-30/thousands-in-israel-protest-against-ultra-orthodox-violence.html).

<sup>128</sup> WINSTON CHURCHILL, *THE GATHERING STORM* (Houghton Mifflin 1948).

flinches in the face of clear danger.

There is, obviously, grave danger in over-stating the danger; after all, history is replete with examples of abuses and harms incurred by otherwise innocent people wrongly suspected posing a threat to society. That is the harm of finger pointing and painting broad strokes regarding possible threats to society. Extremists arguably benefit from over-reaction because perceived excess by the state can serve to galvanize supporters feeling like outliers and enhance recruitment of new membership. In that sense, government excess can directly facilitate unintended growth of extremist organizations. There is, then, a danger in both insufficiently reacting and preventing extremism and in over-reacting to perceived threats posed by extremists. After all, the essence of a vibrant and robust democracy is free speech; the tension is in articulating, developing and implementing a balance regime that protects society while respecting guaranteed rights.

Clearly, multiple themes and threads are woven into this discussion; whether current examples conjure visions of Chamberlin returning to London promising 'peace in our time'<sup>129</sup> is a matter of debate. However, the warning signs that Churchill so eloquently expressed were overwhelmingly ignored both by his fellow Englishman and much of the Western world. Whether Churchill's warnings, if articulated by a different politician, would have been disregarded as cavalierly as they were is a moot question; the reality is that Western society and leadership alike believed that Hitler could be appeased were Sudetenland made part of Germany.<sup>130</sup> While historical analogies are inherently dangerous, the quick discarding of lessons offered by history comes with a cost.

Four traits---vision, dedication, energy and will—are essential to understanding extremists. Equally importantly, those traits do not depict society at large except in times of crisis and national emergency. Furthermore, mainstream society largely emphasizes inclusivity; this in contrast to the exclusivity of extremist groups which focus on a particular issue. The difference between inclusivity and exclusivity is essential to understanding extremists; by emphasizing the centrality of their group, at the expense of the state, they deny state legitimacy and, by extension, laws and institutions. In creating an internal governance system divorced from the nation state extremists pose a direct challenge to the social contract. That is not to say they necessarily challenge the very survival of the nation state but potential harm to individual members of the nation state is a very real possibility. That, in and of itself, endangers society.

The tolerance/intolerance debate is critical to understanding extremism in the context of the social contract. When extremism that poses harm is tolerated, the contract is violated; when society, on rare occasions, rebukes or rejects extremism the social contract is honored. When the social contract is violated the 'at harm' individual or group are vulnerable; they are forced to either accept

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<sup>129</sup> DAVID FABER, *MUNICH: 1938 APPEASEMENT CRISIS* 5-7 (Simon & Schuster UK Ltd. 2008).

<sup>130</sup> See generally PETER NEVILLE, *HITLER AND APPEASEMENT* (Continuum 2007).

their fate or to engage in 'self help'. Needless to say, both reflect a violation of the social contract. From the abstract to the concrete: whereas law enforcement attacked Dr. King and the civil rights movement at the behest of state agents, child brides in the FLDS religion were abandoned by state officials. While abdication is distinguishable from proactive denial of rights and facilitation of unmitigated violence by non-state and state forces alike the impact on the 'at risk' individual is painfully similar. In both cases, whether state actors actively or passively violate the social contract, harm to the individual is all but ensured.

However, on innumerable occasions decision makers have failed to decisively act in the face of internal harm to an individual. The reasons for this failure are varied ranging from 'political correctness' to unjustified deference to religion/race/ethnicity to ignorance regarding the influence of internal group leaders. As an Israeli journalist ruefully commented<sup>131</sup> the failure of the Israeli media (including this journalist) to soberly assess clear danger posed by extremist right-wing rabbis inciting against former Prime Minister Rabin was based on a belief (secular) that religious based incitement is not a sufficient motivator for action. In other words, to paraphrase the journalist, 'no one really takes religious extremist seriously'.

Needless to say, the media's failure to sufficiently appreciate the power of religious extremist speech was a malady that permeated throughout Israeli society prior to Rabin's assassination. It was only after Yigal Amir assassinated Rabin, acting in the spirit of unrestrained and unmitigated religious extremist incitement, that mainstream society asked 'where were we'? The question, posed in anguish and deep remorse by many, was the wrong question; the correct query is 'why did we consistently fail to underestimate the power of religious extremist speech'? In many ways, the answer is arrogance; a secular arrogance that religious leaders must not be taken 'seriously' by their congregants who should understand that religious speech is just that, religious speech and is therefore inapplicable to modern society.

This arrogance born of inability to understand the power of religious extremist speech is not restricted to a powerful disconnect between religious extremists and secular members of society for it extends to secular extremist speech. That, too, is minimized by mainstream society largely convinced that extremist speech represents mere 'venting' by a disaffected few and does not pose a threat to society or individuals. As McCarthyism made clear, ignorance is not bliss and the price to be paid for willfully disregarding extremist speech is high, indeed. The sheer numbers of careers ruined, lives destroyed and irreversible harm caused to innumerable innocent victims highlights the dangers of speech 'dismissed' by society as the ranting of a lone individual.<sup>132</sup>

### III. Extremist Speech

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<sup>131</sup> Notes in author's records.

<sup>132</sup> See generally ELLEN SCHRECKER, *THE AGE OF MCCARTHYISM: A BRIEF HISTORY WITH DOCUMENTS* (Bedford 2nd Ed. 2001) (1994).

Without doubt, Senator McCarthy benefited from the Red Scare that pervaded American culture in the aftermath of the Second World War; just as importantly, the acquiescence of American leadership and society in the face of McCarthy's rants was outrageous. The former, in particular President Eisenhower, chose to ignore the extraordinary harm McCarthy's speech caused; the latter were either scared into silence or deliberately chose to ignore the danger posed by McCarthy. Perhaps, some identified with McCarthy believing American society was, indeed, threatened by Communists holding positions of influence and power in the State Department, Hollywood or leading intellectual circles. President Eisenhower's shameful silence violated the social compact. In doing so, Eisenhower and others who turned a deaf ear to McCarthy and a blind eye to the harm caused illustrate the risk in not standing up to extremism.

In the same manner that mainstream Israeli society's ignoring the incitement Rabin was subjected to left him unprotected, mainstream American society similarly responded in the 1950's. Deafening silence is the most apt description of the response. While right wing rabbis directed their venom largely at one person, McCarthy targeted particular categories of American society, particularly the 'elites' easily identified by their liberal values and broadminded thinking. That, largely, was 'tolerated' by mainstream society; what, ultimately, caused McCarthy's downfall were unabated and virulent attacks on the US Army. Then, and only then, did President Eisenhower respond; however, the true hero in confronting McCarthy was CBS correspondent Edward R. Murrow and the Secretary of the Army, Joseph N. Welch.<sup>133</sup>

In examining the power of extremism and the tragic consequences of acquiescence by mainstream society the importance of McCarthyism as 'teaching moment' must not be minimized. The silence that pervaded American society is akin to the tranquility, until recently, in the face of statutory rape in the name of religion.<sup>134</sup> The cost of unabated extremism in the form of violence, segregation, deprivation and injustice, can be extraordinarily powerful with devastating consequences.

The unlimited power Hitler exercised in implementing the Final Solution reflects government extremism in its most violent and powerful form. As William Shirer suggested<sup>135</sup>, in the aftermath of World War I extremism in Germany was 'in the air' predicated on a number of factors including disintegration of the national economy and an individual and national sense of powerlessness and disaffection.

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<sup>133</sup> See AdmiralMoo, *Army-McCarthy Hearings*, YOUTUBE (Mar. 9, 2008), [http://www.youtube.com/watch?v=IAur\\_I077NA](http://www.youtube.com/watch?v=IAur_I077NA); see also W.H. Lawrence, *Welch Assails M'Carthy's 'Cruelty' And 'Recklessness' In Attack On Aide; Senator, On Stands, Tells Of Red Hunt*, N.Y. TIMES, June 9, 1954, <http://www.nytimes.com/learning/general/onthisday/big/0609.html>.

<sup>134</sup> See Lindsay Whitehurst, *Jeff's trial: 'It's time for everything to come out'*, S.L. TRIBUNE, July 23, 2011; Will Weissert, *Texas Town Braces For Polygamist Leader Warrant Jeffs' Trial*, HUFFINGTON POST, July 25, 2011; Nate Carlisle, *With Warren Jeff's trial finished in Texas, eyes turn to Utah*, S.L. TRIBUNE, August 23, 2011;

<sup>135</sup> See generally WILLIAM L. SHIRER, *THE RISE AND FALL OF THE THIRD REICH* (Simon & Schuster, 50th Anniv. ed. 2011) (1960).

Hitler's successful channeling of those emotions demonstrates the extraordinary impact of a powerful leader, concise message and unifying symbols.<sup>136</sup>

Those three ingredients---powerful leader, concise message and unifying symbols----facilitate 'rallying' around a particular idea whose consequences, if unchecked, may destroy society. Message framing, verbal or symbolic, requires intimate knowledge of the audience and its core needs and beliefs. The ability of extremists, religious or secular, to concisely frame an idea, devoid of nuance, is essential to shaping public opinion. The message is critical to the dissemination of extremism; the more concise and direct, the more powerful and compelling. The concise message is essential to extremist movements; the 'simpler' the message, the more powerful the 'punch'. Nuance is perceived as weakness whereas themes that are focused, short and clear have a much greater ability to move people to action particularly when a target group has been identified.

Extremist speech creates a 'black-white' paradigm of 'us-them' with the 'other' clearly identified and castigated. Important to the extremist is identifying the 'other'; someone not like me; the 'other' can be a member of the same internal group, a member of a particular external community or larger society as a whole. Important to recall that members of an internal group viewed as insufficiently toeing the 'party line' are deemed legitimate targets in the same vein as members of larger society. An effective message clearly defines individuals---internal and external communities alike---as legitimate targets based on their race, ethnicity, religion, degree of devoutness and sexual preference. Whether the 'other' is immigrants, members of a particular faith or race the recurring theme is identification of a distinct group deemed to be the outlier posing a threat to larger society that only the extremists understand. In that context, the extremists have assumed the position ---existentially and practically---of society's defenders as they define society.

In addition to protecting society, extremists are also wedded to the absolute requirement to protect their way of life, regardless of possible harm caused to others. It is that absolutism which the message, to be effective, must capture and bottle. In doing so, the message must articulate both the threat posed either to larger society or the particular group by the identified target and measures essential to protecting threatened values, mores and ways. Extremists articulate a paradigm whereby they are the last bastions of protecting 'at risk' values that if not for their efforts, determination and resolve larger society or the specific group will be endangered. However, unlike mainstream groups—including NGO's that focus on particular issues whether the environment, human rights or child safety---extremists articulate a paradigm whereby compromise and dialogue with existing institutions and infrastructure is rejected.

The requirement to 'protect' --whether a group or society--is an essential aspect of the extremists worldview; in the protection paradigm the extremist has clearly

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<sup>136</sup> For an extended discussion regarding symbols see JOAN DAYAN, *HAITI, HISTORY, AND THE GODS* (U. Cal. Press, 1998).

identified both what needs to be protected (group or society) and what poses the threat. In other words, clearly identifying who-what is the legitimate target; identifying the target justifies the legitimacy of their actions. What facilitates the extremists' ability to act against the target defined as legitimate is mainstream society's traditional lethargic response to extremism. Simply put, message and speaker are dismissed, reflecting a troubling and consistent reluctance to appreciate that the extremists' message resonates with a segment of the population, some willing to act in accordance with the message.

However, the response to extremist speech must not be excessive for freedom of speech is a guaranteed right; the tension is in balancing between the two competing interests. That is, while the message articulated by extremists may be objectionable to a majority of the population that does not, inherently, mean the speech must be banned and the speaker defined as an inciter. Conversely, freedom of speech must not be viewed so broadly that the speaker be granted immunity regardless of the potential harm his speech may cause. Freedom of speech, after all, is not an unlimited right. The requisite line drawing requires great sensitivity: not recognizing the potential harm posed by extremist speech is clear and the harm to democratic values when harmful speech goes unabated is equally troubling.

#### **IV. Extreme Expressions of Faith**

While religious extremism presents a significant threat to contemporary society, this does not mean that all religions or all people of religious faith present a threat. It does, however, suggest that religious extremism needs to be analyzed, discussed and understood. It is not religion, but religious extremism as understood, articulated and practiced by extremists that must draw our greatest attention. In analyzing religious extremism the principle of Free Speech is paramount. The danger with casting too broad a net is clear; in the same vein it is essential to not minimize the threat posed by religious extremism for there is great danger in underestimating its power. For that reason, the debate whether limits should be imposed on the practice of religion is legitimate.

If viewed on a spectrum or sliding scale, belief is the most private and intimate of the three aspects of religiosity and, therefore, the least subject to the imposition of limitations. Conversely, speech and conduct - if outside the intimacy of the home - are the most public manifestations of religion. However, speech and conduct in the home is not immune from the imposition of limitations for crimes committed within the home in the name of religion<sup>137</sup> are punishable and justice must be meted out to the perpetrators.

While clear distinctions are drawn between private and public religion, the home - the essence of private religion - is not immune from law enforcement, even if the motivation for the crime is religion. In proposing that limits be imposed on the freedom of speech: it is not faith itself that I suggest limiting, rather, how

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<sup>137</sup> Honor killings are a prime example of religious-based crimes committed within the home.



faith is expressed, articulated, conveyed, practiced and executed. In essence, the limiting question that this project proposes goes to the conduct of extreme faith.

Relying on the 1878 Supreme Court's holding in *Reynolds v. United States*<sup>138</sup> that federal law prohibiting polygamy did not violate the Free Exercise Clause of a Mormon who claimed polygamy a fundamental tenet of his faith,<sup>139</sup> I propose that religious belief be protected but that religiously inspired conduct need not necessarily be protected. Similarly in *Employment Division, Department of Human Resources of Oregon v. Smith*,<sup>140</sup> the Supreme Court ruled that even were peyote used as part of a religious ceremony if the Oregon Supreme Court prohibited religious use of peyote, it was proper to deny unemployment benefits to those fired for using the drug.<sup>141</sup>

In suggesting that some religious based conduct be limited, the obvious questions are what, why, where, when and how. The answers lie in the essence of modern day religion.<sup>142</sup> Whether religious extremism is a function of the manipulation of religion or an extremist understanding of sacred scripture is an important question. It is, however, not the critical question. Hundreds of millions of individuals worldwide practice their faith while not imposing themselves on the rights of their neighbors and not endangering them. Recommending that limits be imposed on how religion is practiced directly affects the rights of religious moderates. How does society protect itself against religious extremism without unnecessarily trammeling on the rights of those whose religious beliefs and practices are in full accordance of the law? That is, how should the rights of those who engage in moderate expressions of faith be protected while similar protections are not extended to those who engage in religious extremism? Resolving this conundrum requires great sensitivity; the dangers in over-protecting are as great as the harm in under-protecting.

In April 2008, I had dinner with the District Mayor of Slotervaart, a "ward" of Amsterdam,<sup>143</sup> Mr. Ahmed Marcouch.<sup>144</sup> The dinner was held shortly after Sheikh Fawaz Jneid, a radical imam of the As-Soenna mosque in The Hague, issued a fatwa<sup>145</sup> against Mr. Marcouch, who suggested on a national TV show

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<sup>138</sup> *Reynolds v. U.S.*, 98 U.S. 145 (1878).

<sup>139</sup> *Id.* at 166.

<sup>140</sup> *Emp't Div. v. Smith* 485 U.S. 660 (1988).

<sup>141</sup> *Id.* at 672.

<sup>142</sup> In many cases modern day religion has become more and more extreme as evidenced in the ideology that accompanied the Iranian revolution, where leaders such as Khomeini believed that everyone (not just Muslims) required "guardianship" in the form of rule or supervision by the leading Islamic jurists. See HAMID DABASHI, *THEOLOGY OF DISCONTENT: THE IDEOLOGICAL FOUNDATION OF THE ISLAMIC REVOLUTION IN IRAN* 443 (Transaction Publishers 1993).

<sup>143</sup> Amsterdam is divided into thirteen sub-districts.

<sup>144</sup> The dinner was one of innumerable meetings organized on my behalf during a week-long visit to the Netherlands (April 2008). Similar meetings were held in December 2007.

<sup>145</sup> A fatwa is "a legal opinion or decree handed down by an Islamic religious leader." Webster's Dictionary 456 (11th ed. 2003).

that Islam must "come to terms with homosexuality."<sup>146</sup> In addition, Marcouch said that full assimilation into the Netherlands was possible only if young Islamic men sought gainful employment and learned Dutch.<sup>147</sup>

Marcouch said on the television program Pauw & Witteman, during a debate with Fawaz Jneid that the Imam had signed a statement referring to Marcouch as a "hypocrite" and "disguised unbeliever." According to Marcouch, the statement has the status of a Fatwa (Islamic curse), as a result of which his life may be in danger.<sup>148</sup> On the day we met, the Volkskrant published Mr. Marcouch's open letter to Mr. Fawaz Jneid, challenging him both to rescind the fatwa and to openly debate the issues.<sup>149</sup> Mr. Marcouch indicated he had received numerous private expressions of support but none publicly. Shortly thereafter at an academic conference,<sup>150</sup> the fatwa was discussed at my initiative. Reaction was limited, as many participants were unaware (at least publicly) of its existence; one individual sought to limit its importance by arguing, "you must understand its context."<sup>151</sup> My obvious - but unstated - response would (should) have been: "if Mr. Marcouch were to be killed by a follower of Mr. Fawaz Jneid, would his three children have understood its "context?" This is not meant to trivialize the discussion; quite the opposite.

Proposing limiting rights regarding religious conduct requires concretizing the discussion. With respect to Mr. Fawaz Jneid, his words could have had the same effect that the pronouncements of right-wing rabbis in Israel had on Yigal Amir when he assassinated Prime Minister Rabin. While Mr. Fawaz Jneid subsequently retracted the fatwa<sup>152</sup> and moderate Islamic leaders denounced it, there are a number of irrefutable, inescapable conclusions germane to this discussion.

The criticism of the fatwa was not immediate; to an outside observer dependent on translation of culture and language, the response (of moderates, decision-makers and thought leaders) seems best described as "wait and see." As

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<sup>146</sup> Penwtv, *Pauw & Witteman – 2 April 2008*, YOUTUBE (Apr. 3, 2008), <http://www.youtube.com/watch?v=xkr8RGtX89g> (Pauw & Witteman Show, VARA Television Broadcast).

<sup>147</sup> *Id.*

<sup>148</sup> *Fatwa Against PvdA Politician Marcouch*, NIS NEWS BULL. (Apr. 26, 2008), [http://www.nisnews.nl/public/260408\\_2.htm](http://www.nisnews.nl/public/260408_2.htm).

<sup>149</sup> Forum, *Imam Fawaz vs. Broeder Marcouch*, DE VOLKSKRANT (Amsterdam, Neth.), Apr. 25, 2008, at 11, available at [http://extra.volkskrant.nl/opinie/artikel/show/id/410/Imam\\_vs.\\_Ahmed\\_Marcouch](http://extra.volkskrant.nl/opinie/artikel/show/id/410/Imam_vs._Ahmed_Marcouch).

<sup>150</sup> Exit Strategies for Terrorists, April 2008, at The Hague (organized by the Center for Terrorism and Counterterrorism by the University of Leiden and the National Counterterrorism Coordinator).

<sup>151</sup> I found this comment troubling, so much so that I immediately phoned an American colleague who suggested such a response echoes statements more closely associated with Europe in the late 1930s.

<sup>152</sup> See Claudia van Zanten, *Marcouch: Code Should Ban Fatwa Record*, ELSEVIER (Apr. 25, 2008), <http://www.elsevier.nl/web/10191369/Nieuws/Nederland/Marcouch-Wetboek-moet-verbod-fatwa-opnemen.htm>.

evidenced both by the killing of Theo van Gogh<sup>153</sup> and other acts of religious-based violence in the Netherlands, extreme religious doctrine or belief threatens both specific individuals and the general population. Is that - however - sufficient to advocate limiting the right of individuals to engage in the religious practice of their choice? Is that sufficient cause to restrict the rights of innocent people of faith?

Religion and violence have gone hand-in-hand for thousands of years. A casual perusal of religious texts of Christianity, Judaism and Islam makes this readily apparent. While the teachings of Jesus emphasized peacefulness and "love thy neighbor," not to mention "turn the other cheek," the pages of history are filled with untold victims of Christianity. The Crusaders are the obvious examples of extraordinary violence in the name of Christianity; clearly, they are not the only guilty ones.<sup>154</sup> The Old Testament is imbued with countless victims of violent battles. The Koran, while stressing that Islam is the religion of peace, exhorts its followers to be uncompromising in attacking those that deny Islam.

While controversy rages as to whether jihad, or warfare on behalf of Islam, is defensive or offensive, the reality is that the Koran is very clear with respect to a fundamental message: kill the non-believer (external) and the hypocrite (internal).<sup>155</sup> The question, then, is how is extremism is to be limited; ignoring its dangers comes with great peril. However, before fully responding to that query we turn to multiculturalism to help us better understand the "tolerating intolerance" discussion.

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<sup>153</sup> Van Gogh, a Dutch columnist, film-maker, social critic, and radio personality was shot seven times and stabbed to death in Amsterdam on November 2, 2004 by Mohammed Bouyeri.

<sup>154</sup> On the crusades, I was impressed by the original declarations of the popes in: TYERMAN, CHRISTOPHER, ED., CHRONICLES OF THE FIRST CRUSADE 1096-1099 (Penguin Books, London 2012)(2004); PHILLIPS, JONATHAN, HOLY WARRIORS: A MODERN HISTORY OF THE CRUSADES (Random House, 2009); see also *Urban II (1088-1099): Speech at Council of Clermont, 1095, Five versions of the Speech*, FORDHAM INTERNET MEDIEVAL SOURCEBOOK (1997), <http://www.fordham.edu/halsall/source/urban2-5vers.html>.

<sup>155</sup> See REUVEN FIRESTONE, JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM 63 (Oxford Univ. Press, 1999).

## CHAPTER THREE

### Multiculturalism

The liberal democratic nation-state is founded on a contract between the individual and the state; the former willingly joins the latter primarily for protection and safety. In so doing, he voluntarily waives certain freedoms and rights he would otherwise enjoy were he to remain truly independent; he does not, however, waive protections. Quite the opposite. For that reason, the nation-state's failure to directly confront extremism and its resulting harms reflects re-articulation of Rousseau's Social Contract.<sup>156</sup> In seeking to preserve one set of rights (freedom of religion/freedom of speech), the state is relinquishing its responsibility to protect other, equally important, rights. While different definitions of multiculturalism have been proposed,<sup>157</sup> I suggest the following: acceptance and accommodation of every practice even when that practice is counter to the laws of the host country.

That said, how one defines multiculturalism is less important than what it represents philosophically, morally and practically: an embrace, or at least, 'understanding', by society of different communities, ethnicities and religions living in the nation-state. Without doubt, a laudatory goal; nevertheless, we must ask whether an embrace of *all* aspects of *all* cultures comes at a cost. After all, society must not tolerate institutions nor people with extremist beliefs who seek to limit otherwise protected rights of others whether secular or persons of moderate faith).

In *The Last Days of Europe: Epitaph for an Old Continent*,<sup>158</sup> Walter Laqueur notes that radicalization and poverty are occurring in Europe's immigrant communities. This, according to Laqueur, despite government largesse and positive, preferential discrimination designed to right historical wrongs and facilitate educational and employment opportunities for those historically denied

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<sup>156</sup> Jean-Jacques Rousseau, *The Social Contract* (1762).

<sup>157</sup> The classical defense of multiculturalism is: Taylor, Charles, "The Politics of Recognition", in: Taylor, Charles, *Multiculturalism: Examining the Politics of Recognition*, Edited and introduced by Amy Gutman, Princeton University Press, Princeton, New Jersey 1994, pp. 25-75. A critical evaluation is: Barry, Brian, *Culture & Equality: An Egalitarian Critique of Multiculturalism*, Polity, Cambridge 2001. Other valuable comments are: Alibhai-Brown, Yasmin, *After Multiculturalism*, The Foreign Policy Centre, London 2000; Baber, H.E., *The Multicultural Mistique: The Liberal Case against Diversity*, Prometheus Books, Amherst, New York 2008; Fish, Stanley, "Boutique Multiculturalism, or Why Liberals Are Incapable of Thinking about Hate Speech", in: *Critical Inquiry*, Vol. 23, No. 2 (Winter, 1997), pp. 378-395; Guiora, Amos, "Multiculturalism and Religious Extremism: Whose Human Rights Do We Protect?", in: Geliijn Molier, Afshin Ellian, and David Suurland, eds., *Terrorism, Ideology, Law, and Policy*, Republic of Letters Publishing, Dordrecht 2011, pp. 337-361; Hasan, Rummy, *Multiculturalism: Some Inconvenient Truths*, Politico's Publishing Ltd 2010.

<sup>158</sup> Walter Laqueur, *The Last Days of Europe: Epitaph for an Old Continent*, St. Martin's Press, 2008.

access to educational and employment opportunities. Whether radicalization and poverty reflect a cognitive dissonance between articulated government policy and its actual outcome is not an insignificant concern.

### Language Requirement for Citizenship<sup>159</sup>

| Required     | Not Required |
|--------------|--------------|
| Netherlands* | Netherlands* |
| Norway       | Spain        |
| UK           |              |
| France       |              |

If dwindling resources are made available but do not have the desired impact, then we must examine the forces countering, perhaps actively, the state's efforts. In other words: what internal forces within the state are contributing to radicalization and who ultimately benefits from this development.

#### I. The Effects of Multiculturalism

Some, such as Will Kymlicka<sup>160</sup>, embrace multiculturalism, arguing it reflects acknowledgment and acceptance of minority rights by government recognizing and celebrating the uniqueness of diverse and distinct groups comprising the nation-state's population. According to this theory, multiculturalism ensures the

<sup>159</sup> **Norway:** (1) have to complete an approved tuition in the Norwegian language, or (2) you can document that you have sufficient knowledge of Norwegian or Sami. See *Requirement for completed tuition in the Norwegian language for you who are applying for citizenship*, UDI, <http://www.udi.no/Norwegian-Directorate-of-Immigration/Central-topics/Citizenship-/Requirement-for-completed-tuition-in-the-Norwegian-language-/#suffic>; **Netherlands:** Two options for obtaining citizenship. One requires language test and the other does not. See *Becoming a Dutch national*, GOVT. OF THE NETH., <http://www.government.nl/issues/nationality/becoming-a-dutch-national>; **France:** France just implemented stricter language requirements. Must speak at a level of a 15yr old. See *Key formalities*, SOCIETE GENERALE, [https://particuliers.societegenerale.fr/international\\_guide/conditions\\_for\\_applying.html](https://particuliers.societegenerale.fr/international_guide/conditions_for_applying.html); **Spain:** Does not have a language requirement. See *¿Cómo se adquiere la nacionalidad española?*, MINISTERIO DE JUSTICIA,

[http://www.mjusticia.gob.es/cs/Satellite/es/1215198282620/Estructura\\_P/1215198293183/Detalle.html](http://www.mjusticia.gob.es/cs/Satellite/es/1215198282620/Estructura_P/1215198293183/Detalle.html); **UK:** Requires language to an acceptable degree. See *Requirements for naturalization*, UK BORDER AGENCY, <http://www.ukba.homeoffice.gov.uk/britishcitizenship/eligibility/naturalisation/spouseorcivilpartnerofcitizen/>.

<sup>160</sup> William Kymlicka, *Multicultural Odysseys: Navigating the New International Politics of Diversity* (Oxford Univ. Press, 2009).

protection of a minority's human rights by enabling groups, to varying degrees, to conduct their lives in accordance with their particular norms and mores. Protecting a minority groups' human rights is undeniably a core principle of civil democratic society manifested both by domestic legislation and international conventions.<sup>161</sup> By seeking to embrace all –whether equally or selectively remains to be analyzed—the state engages in ‘disaggregation’,<sup>162</sup> in which state power declines relative to group power.

While enabling group power is not inherently a ‘negative,’ and may even be considered a ‘positive,’ the state cannot absolve itself from responsibility to prevent harm to group members. For the state to suggest otherwise is to relinquish state responsibility; non-state actors free from state encumbrances of responsibility and in particularly accountability fill the resulting void.<sup>163</sup> Although the embrace of multiculturalism is perhaps understandable in the context of expanding rights to minority groups, I suggest that not all is well with respect to multiculturalism. Discussion regarding multiculturalism inherently requires addressing group rights in direct contrast to the previous discussion regarding individual rights.<sup>164</sup>

In seeking to respect and advance the rights of minority groups the state potentially endangers two distinct categories. These two categories are individual members of the minority group identified as having violated group morals or values and the larger national population potentially at risk as a result of over-protection extended to minority groups. The latter is Melanie Phillips' focus in ‘Londonistan’;<sup>165</sup> the former has been proposed in literature regarding unprotected group members.<sup>166</sup> To more thoroughly examine these threats, multiculturalism must be viewed through the lens of immigrant communities who came to the ‘host’ country largely in search of work.

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<sup>161</sup> See International Covenant on Civil and Political Rights (members of minority groups shall not be denied the right to profess and practice their religion) and European Convention on the Protection of Human Rights and Fundamental Freedoms (individuals have the right to freedom of religion including the right to manifest religion in practice and observance).

<sup>162</sup> I borrow the term from Neil Craik and Joseph DiMento *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=128557](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=128557) (last viewed November 13, 2009; selected for inclusion in Amos N. Guiora, (ed) *Top Ten Global Justice Law Review Articles* (Oxford University Press, 2009).

<sup>163</sup> The issue of non-state governance was addressed at a University of Utah Law School symposium, Non-state Governance, February, 2009; Symposium, Non-State Governance, 2010 Utah L. Rev.

<sup>164</sup> See on the notion of group rights: Stapleton, Julia, ed., *Group Rights: Perspectives since 1900*, Thoemmes Press, Bristol 1995.

<sup>165</sup> See generally MELANIE PHILLIPS, LONDONISTAN (2006); see generally Hans O. Staub & Harry Z. Daedalus, *The Tyranny of Minorities*, 109 THE END OF CONSENSUS? 159-168 (Encounter books, 1980).

<sup>166</sup> See STEPHANIE T. JARRETT, MINORITY RIGHTS HARM ABORIGINAL WOMEN (Bennelong Soc., 2006); Cf. see generally EUR. PARL. ASS., *Report of the Comm. on Equal Opportunities for Women and Men*, Doc. No. 9720 (2003) *available at* <http://assembly.coe.int/Documents/WorkingDocs/doc03/edoc9720.htm>.  
<http://www.washingtontimes.com/news/2009/sep/25/muslim-apostates-in-us-ask-for-protection/>.

Examining immigrant communities and multiculturalism requires answering the following question: what is the relationship between the immigrant community and the host country? In essence, if members of the immigrant community live in a 'parallel' society, segregated from mainstream culture, rather than functioning as vibrant, contributing members of the host country, red flags regarding multiculturalism's beneficence must be raised. Brian Barry has suggested that while assimilation requires ratification by the receiving group, in acculturation the individual comes to acquire cultural practices belonging to a tradition of another group.<sup>167</sup> Parallel societies, or what Tariq Modood calls 'creating an alternative society',<sup>168</sup> pose a significant danger to liberal society because, as Modood explains, they foster or shelter radicalism.

Disturbingly, radicalism manifests itself in the immigrant community in two primary ways: sexual and political violence. The inherent isolationism of parallel societies makes the state largely unable—perhaps unwilling is a more accurate term—to engage those that it *otherwise* would. In doing so, the state facilitates non-state governance unencumbered by government oversight or intervention.<sup>169</sup>

Political philosophers argue that the essence of liberal society is tolerance of diverse communities predicated on state encouragement of individual expressions of speech and conduct. Minow's question regarding the degree of intolerance that can be tolerated is particularly poignant in the context of immigrant communities whose illiberalism—predicated on the mores of their 'former' cultures—runs counter to liberal societies that, nevertheless, tolerate them even though harm occurs to internal, apostate members.<sup>170</sup> State tolerance of group intolerance that causes harm comes at a significant cost, raising questions about the limits of liberalism. This dilemma suggests an intellectual paradox, if not practical conundrum: the liberal state has fostered illiberalism that, as Phillips suggests, goes unabated.

While multicultural manifestations including distinct language, attire, music and food are celebrated,<sup>171</sup> other manifestations are, frankly, less deserving of laudatory embrace or even tolerance. The tension is both complex and stark: if

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<sup>167</sup> BRIAN BARRY, *CULTURE AND EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM* 73 (Harvard Univ. Press, 2001).

<sup>168</sup> TARIQ MODOOD, *MULTICULTURALISM* (Polity Press, 2007).

<sup>169</sup> For additional information see FRANK J. BUIJS, FROUKJE DEMANT AND ATEF HANDY, *STRIJDERS VAN EIGEN BODEM. RADICALE EN DEMOCRATISCHE MOSLIMS IN NEDERLAND* (Amsterdam Univ. Press 2006). (However, they have cited other sources. On p. 207 they mention that 40 percent of the Dutch Moroccans think that Islamic and European lifestyles do not reconcile. For this information they cite a study of K. Phalet, C van Lotringen and H. Entzinger from 2000. In this study, the researchers have only studied the youths in Rotterdam.)

<sup>170</sup> Modood, *supra* note 157. This theme, articulated by Modood, was similarly discussed at the University of Utah Law Review Symposium, see fn 29; see *generally* Interview by Jennifer Dunham with Syylvia Maier, SNYU professor, scholar, and activist, in *Perspectives on Global Issues* (Spring 2008) available at <http://www.perspectivesonglobalissues.com/0302/SylviaMaier.htm>.

<sup>171</sup> In the American context, ethnic fairs/weeks are a representative example.

multiculturalism is not embraced the liberal state may be accused of illiberalism. For the liberal democratic state, predicated on 'the ingathering of the exiles,' the majestic words on the Statue of Liberty ring as loudly today as when Emma Lazarus wrote them:

***Give me your tired, your poor,  
your huddled masses yearning to breathe free,  
The wretched refuse of your teeming shore.  
Send these, the homeless, tempest-tost to me,  
I lift my lamp beside the golden door!***<sup>172</sup>

However, the crux of the contemporary existential dilemma facing the liberal European state is this: disturbing evidence suggests that some in immigrant communities, despite welcoming host country largesse and embrace, subsequently reject that embrace, in particular values of tolerance and inclusiveness.<sup>173</sup> This is clearly seen in a recent report conducted by the German Interior Ministry which found that nearly one in four non-German Muslims rejects integration, questions western values and tends to accept violence.<sup>174</sup> In France, a study by the French Domestic Intelligence Services revealed that many French city suburbs are becoming ethnic ghettos. These suburbs are plagued with unemployment, crime and violence and a high proportion of immigrant families - some still practicing polygamy – hold anti-Western and anti-Semitic opinions. Particularly, the intelligence services noted “many families of immigrant origin were rejecting French values and even the French language, following instead more traditional ways of life associated with their ethnic origin - including an increasing religious radicalisation among young Muslims, and a backlash against young Muslim women who wore Western clothing.”<sup>175</sup>

In other words, the radicalization<sup>176</sup> that defines particular immigrant communities stands at variance with liberal values and culture of the home country. While Europe has witnessed extraordinary—and unimaginable—acts of inhumanity throughout history, the European nation-state is, at its core, liberal and tolerant. However, that liberalism is being challenged, literally, on a daily

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<sup>172</sup> See Emma Lazarus, *The New Colossus*, available at <http://www.libertystatepark.com/emma.htm>.

<sup>173</sup> See generally Andrew Reding, *Can Europe keep its Western values with unassimilated immigrants?*, PACIFIC NEWS SERVICE (May 22, 2002), <http://www.worldpolicy.org/sites/default/files/uploaded/image/SAEN-2002-Can%20Europe%20keep%20values%20despite%20its%20immigrants.pdf>; Emily Abbey, *Ventriloquism: The Central Role of an Immigrant's Own Group Members in Negotiating Ambiguity in Identity*, CULTURE & PSYCHOLOGY, Dec. 2002 at 409-15; Leon de Winter, *Tolerating a Time Bomb*, N.Y. TIMES, July 16, 2005, [http://www.nytimes.com/2005/07/16/opinion/16winter.html?\\_r=2&pagewanted=all](http://www.nytimes.com/2005/07/16/opinion/16winter.html?_r=2&pagewanted=all).

<sup>174</sup> *Many German Muslims 'refuse to integrate'*, THE LOCAL (Mar. 1, 2012), <http://www.thelocal.de/society/20120301-41079.html>; see Toni Johnson, *Europe: Integrating Islam*, COUNCIL ON FOREIGN RELATIONS, (July, 25, 2011), <http://www.cfr.org/religion/europe-integrating-islam/p8252>.

<sup>175</sup> Caroline Wyatt, *France 'forming ethnic ghettos'*, BBCNEWS, <http://news.bbc.co.uk/2/hi/europe/3871447.stm> (last updated July 6, 2004, 4:49PM).

<sup>176</sup> For an important study examining radicalization see JEAN TILLIE, PROCESS OF RADICALISATION, INSTITUTE FOR MIGRATION AND ETHNIC STUDIES (Universiteit van Amsterdam, 2006).



basis in the current milieu, through threats or harm to both internal members and the population at large.<sup>177</sup>

As Bruce Bawer suggested:

in recent years, something has happened to complicate the left's fanciful picture even further: Western European voters' widespread reaction against social democracy.

The shift has two principal, and related, causes. The more significant one is that over the past three decades, social-democratic Europe's political, cultural, academic and media elites have presided over, and vigorously defended, a vast wave of immigration from the Muslim world—the largest such influx in human history. According to Foreign Affairs, Muslims in Western Europe numbered between 15 million and 20 million in 2005. One source estimates that Britain's Muslim population rose from about 82,000 in 1961 to 553,000 in 1981 to two million in 2000—a demographic change roughly representative of Western Europe as a whole during that period. According to the London Times, the number of Muslims in the U.K. climbed by half a million between 2004 and 2008 alone—a rate of growth 10 times that of the rest of the country's population.

Yet instead of encouraging these immigrants to integrate and become part of their new societies, Western Europe's governments have allowed them to form self-segregating parallel societies. Many of the residents of these patriarchal enclaves subsist on government benefits, speak the language of their adopted country poorly, if at all, despise pluralistic democracy, and support—at least in spirit—terrorism against the West. A 2006 Sunday Telegraph poll, for example, showed that 40% of British Muslims wanted Sharia in Britain, 14% approved of attacks on Danish embassies in retribution for the Mohammed cartoons, 13% supported violence against those who insulted Islam, and 20% sympathized with the July 2005 London bombers. Too often, such attitudes find their way into practice. Ubiquitous youth gangs, contemptuous of infidels, have made European cities increasingly dangerous for non-Muslims—especially

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<sup>177</sup> The hijab and burqa are the two modest dresses that Islamic culture insists for women to wear. A hijab is a headscarf worn over the head which covers the head and the hair. With a hijab, the face is seen. A burqa is a loose dress that covers the whole body from the head to the foot. As the whole body is covered, there is a face veil that is usually a rectangle and made of semi-translucent cloth. This veil is stitched to the topside of the headscarf of the burqa which makes it loose from the headscarf. This helps the women to lift the veil. For an analysis regarding the wearing religious attire in state-functions vs. private functions, see Patrick Weil, *Why the French Laicite Is Liberal*, 30 CARDOZO L. REV. 2699 (2009); Paul Cliteur, *State and religion against the backdrop of religious radicalism*, 10 INT'L J. OF CONST. L. 127 (2012); See generally Adam Silverman, *Drift into Extremism: Immigrant Communities*, A COMMITTEE OF CORRESPONDENCE (Jan. 6, 2010), [http://turcopolier.typepad.com/sic\\_semper\\_tyrannis/2010/01/drift-into-extremism-immigrant-communities-and-terrorism-adam-silverman-ph-d.html](http://turcopolier.typepad.com/sic_semper_tyrannis/2010/01/drift-into-extremism-immigrant-communities-and-terrorism-adam-silverman-ph-d.html); Stephen Borthwick, *Immigrant violence in Sweden reaches new high*, EXAMINER, June 10, 2010, <http://www.examiner.com/article/immigrant-violence-sweden-reaches-new-high>; AP, *State of Emergency Declared in France*, FOXNEWS (Nov. 8, 2005), <http://www.foxnews.com/story/0,2933,174868,00.html>.

women, Jews and gays. In 2001, 65% of rapes in Norway were committed by what the country's police call "non-Western" men—a category consisting overwhelmingly of Muslims, who make up just 2% of that country's population. In 2005, members of immigrant groups, the majority of them Muslims committed 82% of crimes in Copenhagen.<sup>178</sup>

Religious extremists<sup>179</sup> question the state's legitimacy; for them, state law is not inherently superior to religious law. As Margit Warburg explains,

In some religious circles the emphasis in human rights on the individual above all is a thorn in the flesh. For example, an outstanding Danish right-wing Lutheran theologian, Søren Krarup argues against the concept of human rights precisely because it places humans and not God in the centre (Krarup 2000). A parallel to this is the Muslim argument that in an Islamic state any acceptance of such a human-centred concept of universal human rights would be a denial of the religious supremacy of Allah and an acceptance of secularism. In both cases, it concerns the relationship between religion and state. The extreme interpretation of the Lutheran doctrine of two kingdoms which calls for a sharp division between religion and politics, or the extreme Islamic call for the adoption of shari'a in family law are both challenged by human rights as universal rights that can only be exercised in a secular state.<sup>180</sup>

While faith is celebrated, harm caused in the name of faith must be aggressively addressed by law enforcement regardless of 'sensitivities.' Tragically, in the context of embracing multiculturalism—including religious extremism—the nation state is choosing to ignore a clearly identifiable class of wrongdoers. Government philosophy, if not policy, that grants 'license' to internal communities to engage in self-regulation (non-state governance) is, perhaps, reflective of liberalism espousing a 'hands-off' approach. However, the practical impact of this places vulnerable members of an internal community at harm, subservient to the 'will' of the group devoid of state protection. That is a profound danger posed by multiculturalism and a failure to address the potential harms emanating from it.

## **II. The State's Role and Responsibility**

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<sup>178</sup> See Bruce Bawer, *Heirs to a Fortuyn?*, WSJ, Apr. 29, 2009, [http://online.wsj.com/article\\_email/SB124043553074744693-IMyQjAxMDI5NDUwMDQxMzA1Wj.html](http://online.wsj.com/article_email/SB124043553074744693-IMyQjAxMDI5NDUwMDQxMzA1Wj.html).

<sup>179</sup> It is critical to distinguish clearly between religious extremism/extremists and religion as practiced by people of moderate faith. The fundamental distinction is that the former's conviction regarding the supremacy of their divine leads to violence against the non-believer, while the latter combine their belief with a deep and abiding respect for the state and an intellectual understanding and tolerance for different faiths.

<sup>180</sup> Margit Warburg, *Dynamics of Religious Boundaries: A European Perspective*, Europeanization, Welfare and Democracy – International Conference, Centre for Modern European Studies.

On the premise that the state *does* owe a duty, the question to *whom* is not a rhetorical question, asked in the abstract. Rather, it is –perhaps–one of the most important contemporary questions, particularly when the nation-state is under attack, principally from within. Recent polls have suggested that most Europeans feel their state has failed in its duty; this sentiment is predicated on a belief that the nation state is devoting resources, time, and protection to those perceived as “attacking” their country—immigrants.<sup>181</sup> This sentiment has been manifested in recent European elections with the rise in popularity of anti-immigrant groups.<sup>182</sup> This rise in popularity has pushed mainstream parties to interject anti-immigrant themes into their campaigns and messages.<sup>183</sup> As Phillips suggests, the unwillingness of state actors to recognize (or acknowledge) that the nation state is under attack is particularly disconcerting.<sup>184</sup>

International legal norms regarding intervention in failed states offer an instructive analogy. Scholars examining contemporary trends in international law suggest states justify intervention in failed states to protect both vulnerable population groups in the failed state and their own national self-interest. While there is not a general consensus regarding the definition of a failed state common characteristics are agreed upon by many scholars.<sup>185</sup> These

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<sup>181</sup> Soeren Kern, *European Concerns Over Muslim Immigration Go Mainstream*, GATESTONE INSTITUTE (Aug. 15, 2011), <http://www.gatestoneinstitute.org/2349/european-concerns-muslim-immigration>.

<sup>182</sup> See generally Rachel Donadio, *Hard Times Lift Greece's Anti-Immigrant Fringe*, N.Y. TIMES, Apr. 12, 2012, [http://www.nytimes.com/2012/04/13/world/europe/far-right-golden-dawn-sees-opening-in-greeces-woes.html?\\_r=2](http://www.nytimes.com/2012/04/13/world/europe/far-right-golden-dawn-sees-opening-in-greeces-woes.html?_r=2); *Golden Dawn: leader of far-right party lashes out at Greece's 'traitors'*, GUARDIAN, May 6, 2012, <http://www.guardian.co.uk/world/2012/may/06/golden-dawn-far-right-greece>. Jon Henley, *Marine Le Pen's 17.9% is not a breakthrough for the far right*, GUARDIAN, Apr. 25, 2012, <http://www.guardian.co.uk/world/french-election-blog-2012/2012/apr/25/marine-le-pen-french-elections-2012>; Andrew Willis, *Gains for Wilders' anti-immigration party in Dutch elections*, EU OBSERVER (Apr. 3, 2010), <http://euobserver.com/political/29605>.

<sup>183</sup> *Sarkozy: 'We have too many foreigners in France'*, FRANCE 24 (July 3, 2012), <http://www.france24.com/en/20120306-france-sarkozy-immigrants-presidential-election>.

<sup>184</sup> I reached a similar conclusion while researching “Freedom from Religion” in the UK (December, 2008). An article written in 1888 states that the duty of the state is first to its own citizens. To aid them in maintaining the degree of civilization to which they have attained and in improving on the same....more important than duty to humanity.....serves humanity by maintaining its own civilization...when applied to immigration to watch and regulate closely and to stop any evil that comes of it.....(page 8 of the article). Available at <http://www.jstor.org.ezproxy.lib.utah.edu/openurl?volume=3&date=1888&spage=409&issn=00323195&issue=3&>

<sup>185</sup> Hugo Grotius, a jurist who laid the foundations of international law in *De Jure Belli ac Pacis*, (1625; On the Law of War and Peace) writes that, ‘where a tyrant “should inflict upon his subjects such a treatment as no one is warranted in inflicting” other states may exercise a right of humanitarian intervention’. Thus, it is widely accepted that military intervention is justified where massive violations of human rights occur.

Although Ferdinand Teson acknowledges the fact that international law in general bans the use of force, he contends that ‘cases that warrant humanitarian intervention disclose ... serious violations of international law: genocide, crimes against humanity, and so on’. In some cases, Teson writes regardless of what action we take we tolerate the ‘violation of some fundamental rule of international law’ therefore ‘either we intervene and put an end to the massacres, or we

characteristics, according to the US think tank Fund for Peace, include a central government that is so weak or ineffective that it has little practical control over much of its territory, non-provision of public services, widespread corruption and criminality, refugees and involuntary movement of populations, and sharp economic decline.<sup>186</sup> The failed state concept was used to justify both the American military presence in Afghanistan<sup>187</sup> and the policy of firing drone missiles into western Pakistan in an effort to target al-Qaeda and Taliban targets.<sup>188</sup> Identifying a state as 'failed' is grounds for intervention; by analogy, the failure to protect individuals within the immigrant community is just that: failure regarding a duty owed to a domestic population group.

With respect to the question to whom does the state owe a duty, Winston Churchill's response was unequivocal: protect the general public and thwart danger. That duty, according to Churchill, was essential and primary. Churchill was unique in that he both 'saw the future' and acted on what he saw; unlike many who 'prophesize', Churchill's genius was not in saying 'I told you so' but in minimizing the damage done by others that he had correctly foreseen. In doing so, he was a lone and brave voice against appeasement and an advocate for the use of necessary force in resisting evil. His infamous phrase 'never have so many owed so much to so few' applies to him with a small twist "never have so many owed so much to one individual". Although some suggest that comparing historical paradigms and social contexts is an exercise fraught with danger, I would respond that the pages of history provide invaluable lessons and important warning lights.<sup>189</sup>

Contrast Churchill with Tony Blair, the darling of European liberals.<sup>190</sup>

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abstain from intervening, in which case we tolerate the violation by other states of the general prohibition of gross human rights abuses'. Ferdinando R Teson, 'The Liberal Case for Humanitarian Intervention,' in J. L. HOLZGREFE AND ROBERT O. KEOHANE ED., HUMANITARIAN INTERVENTION: ETHICAL, LEGAL, AND POLITICAL DILEMMAS 110 (Cambridge Univ. Press, 2003).

Christopher Greenwood rightly argues that 'it is no longer tenable to assert that whenever a government massacres its own people or a state collapses into anarchy international law forbids military intervention altogether'. Christopher Greenwood, quoted in OLIVER RAMSBOTHAM AND TOM WOODHOUSE, HUMANITARIAN INTERVENTION IN CONTEMPORARY CONFLICT: A RECONCEPTUALIZATION 143 (Polity Press, Cambridge, 1996).

<sup>186</sup> *The Failed States Index: Frequently Asked Questions: What does "state failure" mean?*, FUND FOR PEACE, <http://www.fundforpeace.org/global/?q=fsi-faq#5>.

<sup>187</sup> Failed in the Afghanistan paradigm is defined as a failure to prevent the presence of al-Qaeda pre-9/11 and the resurgence of the Taliban; both are considered to simultaneously threaten the domestic Afghan population and present a threat to American national interests.

<sup>188</sup> This is, perhaps, more in accordance with a 'partial failed state' as, according to conventional wisdom, Pakistan has all but relinquished control of western Pakistan (Bachistan) to al-Qaeda and the Taliban. Whether the US policy is in accordance with Pakistani agreement (tacit or complicit) is besides the point; what is of critical importance is US violation of Pakistani sovereignty.

<sup>189</sup> As an example, it would behoove American decision makers to recall Churchill's warning that no foreign power can conquer Afghanistan.

<sup>190</sup> Until his decision to send British forces to Iraq, for which he was subsequently castigated both in the UK and Europe.

Blair's response to 9-11 is reflective, frankly, of blind acceptance of multiculturalism devoid of significant and rigorous analysis of its dangers: "[w]e celebrate the diversity in our country, we get strength from the cultures and races that go to make up Britain today."<sup>191</sup> Apparently, the British public viewed Blair's words favorably: "a Mori poll for the BBC in August 2005, following the London July bombings<sup>192</sup>, showed that, although 32% of the population thought that multiculturalism 'threatens the British way of life', 62% believed that 'multiculturalism makes Britain a better place to live.'"<sup>193</sup> Some might suggest the poll numbers reflect an unwillingness to accept certain realities;<sup>194</sup> others would respond that modern society is predicated on different communities living under 'one roof'. However, a YouGov poll conducted shortly after the July bombings asked Muslims how loyal they felt towards Britain: 18% stated they felt little loyalty. When asked how they felt about Western Society and whether, if at all, Muslims should adapt to it, 32% stated they believed Western Society is decadent and immoral and that Muslims should seek to bring it to an end. 24% had some sympathy with the feelings and motives of those who carried out the July 7 attacks. 56%, whether or not they sympathized with the bombers, at least understand why some people might want to behave this way; in addition, 6% insisted that the bombings were fully justified. In absolute numbers that amounts to about 100,000 people whom, if not willing to carry out terrorist attack, support those who do.<sup>195</sup>

In the middle of this discussion is the 'delta'—human rights. Numerous conventions<sup>196</sup> and treaties<sup>197</sup> create obligations for states to protect human

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<sup>191</sup> The Anglican Church, Jews and British Multiculturalism, Margaret Brearley, <http://sicsa.huji.ac.il/ppbrearley.pdf> last visited November 13, 2009. *See generally* *Conform to our society, says PM*, BBCNEWS, [http://news.bbc.co.uk/2/hi/uk\\_news/politics/6219626.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/6219626.stm) (last updated Dec. 8, 2006). Important to add that surveys regarding multiculturalism are inherently controversial because of different definitions regarding the term.

<sup>192</sup> 52 people were killed in the attacks with over 770 injured. *7 July Bombings*, BBCNEWS, [http://news.bbc.co.uk/2/shared/spl/hi/uk/05/london\\_blasts/investigation/html/introduction.stm](http://news.bbc.co.uk/2/shared/spl/hi/uk/05/london_blasts/investigation/html/introduction.stm) (last visited Jan. 7, 2013).

<sup>193</sup> MARGARET BREARLEY, THE ANGLICAN CHURCH, JEWS AND BRITISH MULTICULTURALISM, available at <http://sicsa.huji.ac.il/ppbrearley.pdf> (last visited Jan. 7 2013); for an additional perspective on this issue see Norman Berdichevsky, *Multiculturalism in the U.K.: Faith Based and Ethnic Schools*, ENGLISH REVIEW (Feb. 2008), [http://www.newenglishreview.org/custpage.cfm?frm/9971/sec\\_id/9971](http://www.newenglishreview.org/custpage.cfm?frm/9971/sec_id/9971).

<sup>194</sup> In researching "Freedom from Religion" I traveled to London. In response to my question regarding what I define as extreme 'political correctness', more than one interlocutor explained that the British suffer from 'colonial guilt'; while meant sardonically, I would suggest there is more than a grain of salt of truth in that self-assessment.

<sup>195</sup> *See generally* MUHAMMAD TAHIR-UL-QADRI, JOHN ESPOSITO, AND JOEL HAYWARD, *FATWA ON TERRORISM AND SUICIDE BOMBINGS* (Minhaj-al-Quran Pub. 2011); Michael Radu, *London 7/7 and Its Impact*, FOREIGN POLICY RESEARCH INSTITUTE (July 2005), <http://www.fpri.org/ww/0605.200507.radu.londonbombings.html>; *See also* Anthony King, *One in four Muslims sympathises with the motives of terrorists*, THE TELEGRAPH, Jul. 23, 2005, <http://www.telegraph.co.uk/news/uknews/1494648/One-in-four-Muslims-sympathises-with-motives-of-terrorists.html>.

<sup>196</sup> Charter of Fundamental Rights of the European Union; European Council's Framework Treaty for the Protection of National Minorities, available at <http://www.un.org/en/documents/udhr/> (last visited Jan. 7, 2013).

rights and facilitate monitoring by non-government organizations.<sup>198</sup> In the aftermath of World War II human rights became a critical component of international geo-politics.<sup>199</sup> The essence of human rights is to protect the individual<sup>200</sup> from egregious governmental action that violates otherwise protected or valued rights. Discussing human rights requires asking whose human rights and how are competing concepts of human rights balanced. In the ‘balancing’ dilemma, the human rights community places greater emphasis on legitimate individual rights rather than equally legitimate national security considerations of the state,<sup>201</sup> which inherently tips the scale in favor of the former. A legitimate and defensible position, this approach has been upheld in both courts of law<sup>202</sup> and the court of international opinion.<sup>203</sup> Nonetheless, one must question whether it adequately and equally protects both society and an otherwise unprotected class.<sup>204</sup>

To protect both larger society and vulnerable individuals the state must impose limits on human rights for human rights are not an absolute. Multiculturalism ostensibly celebrates human rights, but it has the unintended opposite effect: it directly contributes to violations of human rights for the reasons discussed above. To better understand this it is appropriate to recognize that human rights demands that the rights of all human beings to fair treatment and justice, and to basic needs, such as food, shelter and education are respected and met.<sup>205</sup> Multiculturalism, when examined theoretically is intended to ensure the protection of religious, cultural and moral rights in accordance with human rights as traditionally understood. However, multiculturalism in practice is not individualistic but rather communistic.

Jens-Martin Eriksen and Frederik Stjernfelt termed this version as “hard” multiculturalism<sup>206</sup>; the practice of multiculturalism, then, is contrary to that of

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<sup>197</sup> The core international human rights treaties can be found at <http://www2.ohchr.org/english/law/>, last visited Jan. 7, 2013.

<sup>198</sup> See Amnesty International Reports, etc available at [www.amnesty.org](http://www.amnesty.org).

<sup>199</sup> See the Jackson-Vanik amendment in Title IV of the 1974 Trade Act which denies most favored nation status to countries with non-market economies that restrict emigration. See <http://georgewbush-whitehouse.archives.gov/news/releases/2001/11/20011113-16.html>, last viewed Jan. 7, 2013.

<sup>200</sup> See David Koller, *The Moral Imperative: Toward a Human Rights—Based Law of War*, 46 Harv. Int’l L.J. 231 (2005).

<sup>201</sup> *Id.*

<sup>202</sup> See generally *Sahin v. Turkey*, Application no. 44774/98, Council of Europe: European Court of Human Rights, 10 November 2005, available at <http://www.unhcr.org/refworld/docid/48abd56ed.html> (last visited Jan. 17, 2013); Immigration and Refugee Board of Canada, *Turkey: Situation of women who wear headscarves*, 20 May 2008, TUR102820.E, available at <http://www.unhcr.org/refworld/docid/4885a91a8.html> last visited Jan. 17, 2013).

<sup>203</sup> See generally, *Germany: Headscarf Bans Violate Rights*, HUMAN RIGHTS WATCH, (Feb. 26, 2009), <http://www.hrw.org/news/2009/02/26/germany-headscarf-bans-violate-rights>.

<sup>204</sup> See University of Utah conference, <http://www.law.utah.edu/news/show-news.asp?NewsID=206> last visited November 13, 2009.

<sup>205</sup> Jens-Martin Eriksen and Frederik Stjernfelt, *The Democratic Contradictions of Multiculturalism*, E-INTERNATIONAL RELATIONS (Mar. 22, 2012), <http://www.e-ir.info/2012/03/22/the-democratic-contradictions-of-multiculturalism/>.

<sup>206</sup> *Id.*



human rights and freedom. Instead it allows a community to legally and socially enforce its own mores and traditions, whatever it holds sacred.<sup>207</sup> In its most extreme form “the community may even mobilize its own police force and legal system in order to demand, to some extent or another, the conformity of individuals.”<sup>208</sup> This is especially evident in domestic affairs: a compelling example of this is found in Canada when a father, wife, and son were accused and convicted of killing three of their family members in the name of honor.<sup>209</sup> Tarek Fatah, founder of the Muslim Canadian Congress, when speaking on the case lamented, “These girls went to the school, the cops, child services and everyone wanted to protect multiculturalism — not the lives of these young women.”<sup>210</sup>

Similarly, in advocating the supremacy of religious law rather than civil law, religious extremism inherently limits human rights. According to Eriksen and Stjernfelt:

A concrete example...can be seen in the famous case of the Danish cartoons of Muhammad. An analysis of the central drawing of Muhammad with a bomb in his turban points out that it is normal, in everyday international caricature, to portray the originator of a doctrine as a symbol of that doctrine. Thus, the famous Muhammad caricature addresses the doctrine of Islam rather than targeting Muslims as worshippers of the doctrine. In the same vein, equipping politicians or thinkers with bombs, grenades or other weapons to convey their violent intent is just as common a device in caricature drawing. Despite the normalcy of such drawings, many of the arguments against them (in Muslim countries as in the West) rest on a multiculturalist assumption that certain groups are entitled not to be offended, to have religious belief protected, to attack people taken to offend them, etc. The Cartoon Crisis thus offers a conspicuous example of the clash between basic, universal human rights claimed for all individuals, such as free speech, and the group rights claims of hard multiculturalism.<sup>211</sup>

While civil law and liberal society celebrate individual rights extremism emphasizes absoluteness and justifies, even authorizes, violence in the name of a particular belief. Extremists, after all, are convinced of their truth; absolutism requires adherence to a conviction that *the truth* is known but to members of *that group* and compromise is not possible. This conviction applies whether the group is secular or religious.

The notion of human rights as a zero-sum game demonstrates a fundamental misunderstanding of the tenuous relationship between different

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<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> See *Jury hears wiretap of accused in canal deaths*, CBC News, Nov. 10, 2011, <http://www.cbc.ca/news/canada/montreal/story/2011/11/10/shafia-trial-nov10.html>.

<sup>210</sup> Stephanie Fidler, *Were Shafia murders ‘honour killings’ or domestic violence?*, THE STAR, Jan. 30, 2012, <http://www.thestar.com/news/gta/article/1123403--were-shafia-murders-honour-killings-or-domestic-violence>.

<sup>211</sup> Eriksen, *supra* note 200.

internal communities and between those communities and the nation-state. A more realpolitik approach would be to ask the following: human rights—at what cost and to whom. This question is particularly relevant in examining multiculturalism whose is the acceptance of competing values, interests and cultures when devoid of external restraints. In an age fraught with extraordinary danger, the instinctive reaction that all rights must be equally respected is both a philosophical fallacy and a practical misconception.

To that end, in examining multiculturalism I recommend specific measures intended to protect society and individuals alike. If the state's ultimate responsibility is to protect its citizens, then it cannot make allowances for multiculturalism even if contemporary 'political correctness' advocates such an approach. The state's duty is to minimize the harm caused to citizens; duty is not owed to concepts. In the face of dangers posed by multiculturalism, the state has a number of appropriate responses, according to political scientists and political philosophers. Rafael Cohen-Almagor and Marco Zambotti have suggested, for example:

The business of government is to protect and foster the interests of the public, and allowing entry to this group does not coincide with these aims. Democracy ought to defend itself against threats, even if sometimes the measures include steps which exclude members of intolerant groups altogether from a democratic state. Thus, we have a strong case for exclusion where fascists are concerned, since their ideas are incompatible with a commitment to human dignity and respect for others, and since they are likely to resort to violence to achieve their political aims. Similarly, what countermeasures should the government of a liberal democracy put in place if a considerable number of radical Islamist zealots were to immigrate in mass to England with the aim of pursuing a political agenda based on the literal application of the Qur-an? We refer here to the verses regarding the relations between Muslim believers and infidels, that – if read in their literal meaning – would escalate the level of inter-faith violence within the country. In this case, again, the principles and values characterizing the community of immigrants are not compatible with the preservation of a liberal democratic society. Just as in the case of fascists, England's democratic society would be entitled to defend itself and the bases on which peaceful coexistence in a liberal democracy rest. Access into the country, therefore, could be legitimately denied on the grounds that instigation to violence and inter-faith hatred are not compatible with the rules of a liberal democracy.<sup>212</sup>

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<sup>212</sup> Raphael Cohen-Almagor and Marco Zambotti, *Liberalism, Tolerance and Multiculturalism: The Bounds of Liberal Intervention in Affairs of Minority Cultures*, in KRZYSZTOF WOJCIECHOWSKI AND JAN C.



Domestic legislation, judicial holdings and political paradigms influence how society can most effectively protect belief in the face of multiculturalism that tolerates intolerance, therefore placing individuals and society at risk. Important to recall that insular groups benefit from liberal society's tolerance of multiculturalism; the irony, of course, is that this tolerance results in tolerating intolerance. To protect society, the following measures can serve as a blue print:

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|---|
| <b>Limit the civil and political rights of those who limit the rights of others (e.g., the group suppressing/ repressing the individual rights of group members);</b> |
| <b>Re-articulate rights otherwise granted by constitution or statute;</b>   |
| <b>Language as a condition for citizenship;</b>   |
| <b>Impose limits on independent (e.g., beyond the purview of state control) educational systems;</b>  |
| <b>Impose limits on attire (e.g., the veil/burkha);</b>   |
| <b>Re-articulate judicial regimes so that family issues are adjudicated not in religious courts, but in the pre-existing national court structure;</b>                |
| <b>Enforce the criminal law;</b>  |
| <b>Investigate and prosecute crimes committed in the name of religious extremism and facilitated by multiculturalism;</b>   |
| <b>Impose restrictions on religious extremist speech;</b>   |
| <b>Re-articulate criminal codes to broaden the definition of crimes predicated on religious extremism/multiculturalism;</b>   |
| <b>Combat the immunity from which religious extremism and multiculturalism currently benefit;</b>   |
| <b>Minimize non-state governance;</b>   |
| <b>Engage immigrant communities;</b>  |
| <b>Resolve to protect the unprotected</b>   |

Although each of the options above warrants a detailed and thorough examination, discussion will be limited to the last premised on a deeply held conviction that the state must not grant immunity to religious practices and religion. International law has, as previously discussed, increasingly limited national sovereignty but that does not –*must not*— suggest by analogy that

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JOERDEN (EDS.), *ETHICAL LIBERALISM IN CONTEMPORARY SOCIETIES* 79-88 (Frankfurt am Main: Peter Lang, 2009).

extremist communities step into the shoes of the sovereign. National constitutions protect the practice and conduct of religion,<sup>213</sup> but must not protect crimes committed in the name of religious belief.

### III. Responding to the Dangers: Recommendations

The harm produced at the intersection of multiculturalism and religious and secular extremism must be acknowledged even if contemporary democratic civil society embraces multiculturalism while railing to recognize its inherent intolerance. While understandable from an intellectual and visceral perspective, embracing multiculturalism must not be tolerated if it causes harm to otherwise unprotected individuals. By embracing multiculturalism and insufficiently responding to the threat extremism poses, the state has facilitated (whether deliberately or not) the emergence of the non-state actor whose *known* criminal actions are largely unchallenged. Prof Amnon Rubenstein has concisely articulated the paradigm:

The Islamist crisis administered a serious blow to this concept and led to a renewed awareness of the need to defend the freedom and equality of individuals as well as to the right of the majority to preserve its culture and identity. The multicultural approach in its absolutist interpretation – the claim that all cultures are equal and have an equal legal status – has been weakened, but the multicultural approach in its liberal–tolerant interpretation – consideration given to religious traditions and cultures of various communities – remains intact. In cases in which the multicultural approach clashes head-on with human rights, it must vacate its place and withdraw. Otherwise, this collision can be readdressed by balancing the two interests. Demarcation of borders between the two types of collisions and balancing those interests is within the field of expertise of judges and jurists.<sup>214</sup>

If immigrant communities want to assimilate, society benefits; if they want to remain self-enclosed, then society is at risk. The former produces enculturation educationally, economically, socially and politically; the latter engenders isolation (from larger society), radicalization, poverty, anger and, in many cases, religious extremism. While this paints a stark picture of clear diametric opposites, it represents a reality in much of Europe today. Simply put, while the ‘original’ population may welcome<sup>215</sup> multiculturalism, there are increasing reports and significant anecdotal evidence that the immigrant

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<sup>213</sup> See the constitutions of the United States, Turkey, France, Australia, Germany etc for examples of constitutional protection of religious conduct/choice.

<sup>214</sup> Amnon Rubenstein, *The Decline, but not Demise, of Multiculturalism*, IDC, Oct. 30, 2006, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=941370](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=941370).

<sup>215</sup> An example of ‘original’ society rejecting immigrants can be seen in Russia, Owen Matthews, *The Kremlin Vigilantes*, NEWSWEEK, Feb. 13, 2009, <http://www.newsweek.com/id/184777>. Measures against immigrants can be seen in many countries where there are language requirements and cultural teachings such as in the Netherlands, Rubenstein, *Id.*

community is turning inward and looking increasingly to religion and, specifically, religious extremism.<sup>216</sup>

Thomas Friedman described the world as 'flat' in the age of globalization, but perhaps the reality is that of a flat world with walls.<sup>217</sup> The walls, it is important to emphasize are largely self-imposed by particular immigrant and ethnic communities who choose to separate themselves thereby shunning the mainstream society of host countries. This trend raises interesting philosophical questions, but in the interim it raises practical concerns regarding the physical well being of internal group members. A flat world with walls is extraordinarily dangerous for those living within the walls. The proverbial 'proof in the pudding' is female genital mutilation and honor killing.<sup>218</sup>

These two practices highlight the dangers of religious extremism. Ayaan Hirsi Ali<sup>219</sup> and Fauziya Kassindja<sup>220</sup> describe the former graphically and unflinchingly. Law enforcement officials, whether in the US, Europe or Middle East, are aware of the harm caused to private individuals in the name of religious extremism. However, the disturbing reality is that—almost by conscious design—there is a universal decision not to engage. For clarity sake failure to engage is defined as establishing intelligence gathering mechanisms, proactively seeking information, aggressively prosecuting extremists engaged in wrongdoing. The possibility that the state is afraid of religious extremists is an alarming thought; it is also a

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<sup>216</sup> *Muslims in Europe: Economic Worries Top Concerns About Religious and Cultural Identity*, THE PEW GLOBAL ATTITUDES PROJECT (July 6, 2006), <http://pewglobal.org/reports/pdf/254.pdf>. (Only 7% of British Muslims think of themselves as British first (81% say 'Muslim' rather than 'Briton'); *Muslim Americans: No Signs of Growth in Alienation or Support Extremism*, PEW RESEARCH, (Aug. 30, 2011), <http://www.people-press.org/2011/08/30/section-6-terrorism-concerns-about-extremism-foreign-policy/>. (21% of Muslim-Americans say there is a fair to great amount of support for Islamic extremism in their community); *Muslim Americans: Middle Class and Mostly Mainstream*, Pew Research, (May 22, 2007), <http://pewresearch.org/assets/pdf/muslim-americans.pdf#page=60>; Denis MacEoin, *Sharia Law or 'One Law For All?'*, Civitas, (June 2009), <http://www.civitas.org.uk/pdf/ShariaLawOrOneLawForAll.pdf>. (26% of younger Muslims in America believe suicide bombings are justified. 35% of young Muslims in Britain believe suicide bombings are justified (24% overall). 42% of young Muslims in France believe suicide bombings are justified (35% overall). 22% of young Muslims in Germany believe suicide bombings are justified. (13% overall). 29% of young Muslims in Spain believe suicide bombings are justified. (25% overall).). AP, *Life For '60s Radical H. Rap Brown*, CBSNews, <http://www.cbsnews.com/stories/2006/08/14/opinion/main1893879.shtml&date=2011-04-06>. (62% of British Muslims do not believe in the protection of free speech. Only 3% adopt a "consistently pro-freedom of speech line.")

<sup>217</sup> THOMAS L. FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY* (Farrar, Straus and Giroux, 2005).

<sup>218</sup> FGM is considered by its practitioners to be an essential part of raising a girl properly—girls are regarded as having been cleansed by the removal of "male" body parts. It ensures pre-marital virginity and inhibits extra-marital sex, because it reduces women's libido. Women fear the pain of re-opening the vagina, and are afraid of being discovered if it is opened illicitly. See *Female genital mutilation*, World Health Organization, (Feb. 2012), <http://www.who.int/mediacentre/factsheets/fs241/en/index.html>; The tradition underlying honor killing defines a woman's chastity as her family's property. It "comes from our ancient tribal days, from the Hammurabi and Assyrian tribes of 1200 B.C. - Norma Khouri, a Christian Arab and author of *HONOR LOST: LOVE AND DEATH IN MODERN-DAY JORDAN* (Atria Books 2003).

<sup>219</sup> AYANAN HIRSI ALI, *INFIDEL* (Free Press 2007).

<sup>220</sup> FAUZIA KASSINDJA AND LAYLI MILLER BASHIR, *DO THEY HEAR YOU WHEN YOU CRY* (Delta 1999).

potential reality.

The practice of female circumcision varies from country to country and in its degree of intrusiveness. Even in its least invasive form the description is often hard to stomach. The World Health Organization classifies the practice in four degrees. The following is a witness's description of one of the more intrusive forms:

It is the twelfth of June, a day that promises to be as hot and as demanding as any yet experienced. I am to witness the circumcisions of the two little girls. Zaineb calls for me at sunup; it seems we are late. We run to a *hosh* (courtyard) in the interior of the village. When we arrive, we find that Miriam, the local midwife, has already circumcised one sister and is getting ready to operate on the second. A crowd of women, many of them grandmothers (*habobat*), has gathered outside the room, not a man in sight. A dozen hands push me forward. 'You've got to see this up close,' says Zaineb, 'it's important.' I dare not confess my reluctance. The girl is lying on an *angareeb* (native bed), her body supported by several adult kinswomen. Two of these hold her legs apart. Then she is administered with a local injection. In the silence of the next few minutes Miriam takes a pair of what look to me like children's paper scissors and quickly cuts away the girl's clitoris and labia minora. She tells me this is the *lahma djewa* (the inside flesh). I am surprised that there is so little blood. Then she takes a surgical needle from her midwife's kit, threads it with suture, and sews together the labia majora, leaving a small opening at the vulva. After liberal application of antiseptic, it is all over.<sup>221</sup>

According to the World Health Organization there are currently 100 to 140 million girls and women worldwide who have been subjected to FGM.<sup>222</sup> In Africa alone there is an estimated 3 million girls at risk of undergoing FGM.<sup>223</sup> While most of the girls and women who have undergone FGM or who are at risk of undergoing FGM are predominantly located in under developed countries residing in Africa recent statistics indicate that the practice is prevalent in western countries. A study conducted in 2007 estimated that over 24,000 girls in England and Wales are at risk of undergoing FGM each year.<sup>224</sup>

Honor killings are beyond description; they are also, tragically, not uncommon in

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<sup>221</sup> Janice Body, *Womb as Oasis: The Symbolic Context of Pharaonic Circumcision in Rural Northern Sudan*, 9 AMERICAN ETHNOLOGIST NO. 4, (1982).

<sup>222</sup> *Female genital mutilation and other harmful practices*, WHO, <http://www.who.int/reproductivehealth/topics/fgm/prevalence/en/index.html> (last visited Jan. 8, 2013).

<sup>223</sup> *Id.*

<sup>224</sup> See *A Statistical Study to Estimate the Prevalence of Female Genital Mutilation in England and Wales*, FORWARD (2007), <http://www.forwarduk.org.uk/download/96>.

certain cultures that treat women as property whose actions directly impact a family's reputation.<sup>225</sup> According to the principle justifying honor killings, if a woman brings dishonor to her family, her family members must kill her.<sup>226</sup> In the overwhelming majority of honor killings, those responsible go unpunished. It is estimated, by women's groups, that over 20,000 women are killed each year in the Middle East and Asia in the name of honor.<sup>227</sup> In addition, this crime is committed in western countries: in 2011 there were almost 3,000 victims of honor-based violence in the UK. Nevertheless, precise statistics on how many women die in honor killings in European countries and other parts of the world are hard to come by. This is largely due to the fact that most honor crimes are rarely ever reported and are a political hot potato. Politicians, community leaders, and feminist groups fear singling out one group of perpetrators, especially immigrant groups, and are reluctant to call honor killings for what they really are.<sup>228</sup> Rather, they use terms such as domestic violence to describe the crimes. In the Middle East and Asia honor killings are rarely ever prosecuted and when they are, the sentences are often light.<sup>229</sup>

Equally disturbing: in the name of multiculturalism (and political correctness), these murders are defined as 'domestic violence.' While the violence does indeed occur in the home, the reality is simultaneously far more complicated and yet uncomplicated. When I sat as a judge in an honor killing case, involving two brothers killing their sister at the behest of their mother, I was struck by the overwhelming lack of remorse those involved expressed and their absolute conviction in the rightness of the killing. In particular, the mother had instructed her sons to kill her daughter in a manner that was beyond gruesome. As was explained to me removing the alleged stain to family honor caused by the daughter's alleged behavior requires the killing be conducted in a particularly brutal manner. In the case before me the two brothers killed their sister over 8

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<sup>225</sup> For a discussion regarding honor killings see *Case Study: "Honour" Killings and Blood Fueds*, GENDERCIDE, [http://www.gendercide.org/case\\_honour.html](http://www.gendercide.org/case_honour.html) (last visited Jan. 8, 2013); Phyllis Chesler, *Are Honor Killings Simply Domestic Violence?*, MIDDLE EAST QUARTERLY 61-69, (Spring 2009) available at <http://www.meforum.org/2067/are-honor-killings-simply-domestic-violence>; Hillary Mayell, *Thousands of Women Killed for Family "Honor"*, NATIONAL GEOGRAPHIC, Feb. 12, 2002, [http://news.nationalgeographic.com/news/2002/02/0212\\_020212\\_honorkilling.html](http://news.nationalgeographic.com/news/2002/02/0212_020212_honorkilling.html).

<sup>226</sup> For a discussion regarding the controlling of women in certain cultures, see Susan Moller Okin, *Feminism and Multiculturalism: Some Tensions*, Ethics, Vol 108, No. 4 (Jul., 1998); SUSAN MOLLER OKIN, IS MULTICULTURALISM BAD FOR WOMEN, IN IS MULTICULTURALISM BAD FOR WOMEN (Joshua Cohen and Matthew Howard eds., Princeton Univ. Press, 1999).

<sup>227</sup> Robert Fisk, *Robert Fisk: The crimewave that shames the world*, THE INDEPENDENT, Sep. 7, 2010, <http://www.independent.co.uk/voices/commentators/fisk/robert-fisk-the-crimewave-that-shames-the-world-2072201.html>.

<sup>228</sup> See Chesler, *supra* note 220; Phyllis Chesler, *A civilized Dialogue About Islam and Honor Killing. When Feminist Heroes Disagree*, available at <http://muslimsagainstharia.blogspot.com/2009/03/civilized-dialogue-about-islam-and.html>; Jordanian Journalist Rana Hussein on "Murder in the Name of Honor: The True Story of One Woman's Heroic Fight Against an Unbelievable Crime", DEMOCRACY NOW (Oct. 21, 2009), [http://www.democracynow.org/2009/10/21/jordanian\\_journalist\\_rana\\_hussein\\_on\\_murder](http://www.democracynow.org/2009/10/21/jordanian_journalist_rana_hussein_on_murder).

<sup>229</sup> Yotam Feldner, "Honor" Murders—Why the Perps Get off Easy, MIDDLE EAST QUARTERLY 41-50, (Dec. 2000) available at <http://www.meforum.org/50/honor-murders-why-the-perps-get-off-easy>.

hours, ultimately dismembering her by tying her legs to two different beds pulled in separate directions. The description is important not for purposes of sensationalism nor to dishonor her memory but to emphasize, graphically, the sheer horror of honor killings. The horror is magnified by a disconcerting failure by state agents to consistently prosecute those responsible for honor killings including inciters and perpetrators alike.

But if the state defers to the cultural mores accepting – even demanding – such behavior, it abdicates its duty to the individual. The very fact that honor killings go unpunished in many cultures highlights the direct harm multiculturalism can cause. In questioning whether society owes a duty to the culture or to the individual harmed by that culture, the answer must resoundingly be that the primary obligation is to the latter; the celebration of the former must be tempered by the reality of the harm caused.

Additional problems arise when the criminal law accommodates religious and cultural extremism. In the United States, for example, the “cultural defense” has been argued and, in some cases, accepted as a mitigating factor or defense to violent crimes. For example, in *People v. Wu*,<sup>230</sup> the Court of Appeals of California held that “upon retrial [for murder of her child, ANG] defendant is entitled to have the jury instructed that it may consider evidence of defendant’s cultural background in determining the existence or nonexistence of the relevant mental states.”<sup>231</sup> I am neither the first—nor the last— to ask this question: “at what point must the criminal law be willing to undermine culture.”<sup>232</sup> In the ideal, society would respect culture and cultural heritage, mores and norms; but just as important, society must protect those who are harmed by cultural heritage, mores and norms. That is not to suggest that culture necessarily harms, but rather to advocate, indeed emphasize, that *when* culture harms it must be viewed as just that—a harm to an otherwise unprotected population group that society owes a clear duty too. The weakness of the embrace of multiculturalism and its ensuing celebration is the inability to address when and how society protects those harmed (directly and indirectly) by that very multiculturalism. After all, the defendant in *Wu* argued that her “cultural background”<sup>233</sup> was a major reason why she murdered her child.

No less problematic, the world is also dangerous for those outside the walls described above. After all, members of immigrant communities have committed post 9/11 terrorist attacks in Europe. Madrid, London, Glasgow and Amsterdam all represent domestic terrorism committed in the name of Islamic extremism; those committing acts of terrorism in Europe are immigrants and their children. That is not to say, under any condition, that all immigrants are terrorists; it is, however, to highlight that immigrants commit terrorist attacks in contemporary Europe. This is distinguishable from the 1970’s when radical groups comprised of native Europeans committed terrorist attacks in West

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<sup>230</sup> *People v. Wu*, 286 Cal. Rptr. 868, 887 (Ct. App. 1991).

<sup>231</sup> *Id.*

<sup>232</sup> JOHN KAPLAN, ROBERT WEISBERG, GUYORA BINDER, CRIMINAL LAW 378 (Wolters Kluwer, 6th ed. 2008).

<sup>233</sup> *Wu*, *supra* note 225..

Germany and Italy. The contemporary trend whereby immigrants commit terrorism in Europe suggests that rather than becoming fully engaged members<sup>234</sup> of the home country, some immigrants are retreating to their community, vulnerable to religious extremist faith leaders encouraging and facilitating acts of terrorism.

As a government policy, therefore, unmitigated multiculturalism enables harm to both specific individuals within closed groups and random targets within the general population. It is harmful to those within specific immigrant communities deemed to have violated their mores; it is also harmful to the random victims of terrorism within the larger population. Both categories are victims – unintentionally by the government; intentionally by the actors—of multiculturalism. By embracing the concept that non-governmental groups can engage in governance (non-state governance) without government monitoring, much less accountability, the state is neglecting its primary responsibility. In the context of embracing different cultures and—in essence—facilitating their operation beyond the state’s reach, the nation-state is actually minimizing its own sovereignty, thereby re-articulating the definition of the state.

#### IV. Societal Responses

A government’s fundamental responsibility is to protect the community at large; determining what protections must be extended to particular communities within the larger community is a critical question in the ‘limits of freedom’ discussion. Those protections are not absolute; indeed, no rights can be absolute.<sup>235</sup> Rousseau’s social contract depends on an understanding that the rights of an individual are not absolute. In essence, the individual ‘trades’ rights (such as freedom) for protection (as part of the larger community); in so doing, the individual both implicitly and explicitly recognizes that individual rights are not absolute. As John Locke explained:

The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light. . . But, however, that some may not colour their spirit of persecution and unchristian cruelty with a pretence of care of the public weal and observation of the laws; and that

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<sup>234</sup> Some readers will point to the physicians involved in the Glasgow attack as a sign that terrorists are fully integrated into the home country; I would respond that although the individual was a physician, ‘at the end of the day’ he was a terrorist acting in accordance with religious extremist principles.

<sup>235</sup> Thomas Hobbes 1651 book *Leviathan* describes the structure of society and legitimate governments and is one of the best known examples of social contract theory—the idea that in exchange for social order/rule of law people give up some rights. John Stuart Mill’s *On Liberty*, first published in 1859, can be viewed as a reaction to social contract theory. Mill believed that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.”

others, under pretence of religion, may not seek impunity for their libertinism and licentiousness; in a word, that none may impose either upon himself or others, by the pretences of loyalty and obedience to the prince, or of tenderness and sincerity in the worship of God; I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth. The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests.<sup>236</sup>

The obvious challenge to individual and state is in defining the limits the latter may impose on the former. The equation, however, is not binary because there is an additional—critical—variable that must be factored in: members of society potentially injured by the individual actor's actions. That is, while the individual seeks protection by joining society (and therefore voluntarily agreeing to limitations on his otherwise absolute rights), other members of society must be similarly protected from that individual. The state has an obligation to protect members of society; doing so may well require imposing limits on specific religious-based conduct. These limits do not gainsay either the centrality or vitality of religion; rather, they clearly demonstrate that rights—even if predicated on religious belief—are not absolute. At its basic level, this appears to be an obvious truism, but the more complicated issue is determining both which rights should be limited and how in the face of potential conflict with divinely-ordained conduct.

Government, in protecting society, must both define threats and assess the dangers they pose. In so doing, it is essential to weigh the costs of action and inaction alike in response to those threats. Obviously, this is not a scientific exercise because threats cannot be empirically determined, but the potential harm they pose must be carefully analyzed even in the absence of numerical certainty.<sup>237</sup> To cut to the chase: as I have suggested, multiculturalism as presently practiced by government and religious extremists alike directly poses a clear and present danger to two distinct population groups, specific targets and the broader population. Although the intended consequence of multiculturalism is not to cause harm, the failure to aggressively rectify the harm it causes is—if not intended—certainly inexcusable and reflects a fundamental governmental failure with respect to an absolute obligation to protecting innocent citizens. It is also not the essence of the nation-state, but may perhaps be the reality of the contemporary nation-state.

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<sup>236</sup> John Locke, *A Letter Concerning Toleration*, available at <http://www.constitution.org/jl/tolerati.htm> (last visited Jan. 8, 2013).

<sup>237</sup> See RAF Charts in *FUNDAMENTALS OF COUNTERTERRORISM* (Aspen Law & Business 2008).



Human rights of the individual must be deemed more important than governmental policies 'playing to' particular groups and communities. What Churchill called appeasement regarding Chamberlain has, I suggest, once again reared its extraordinarily dangerous head. That appeasement was in response to an external threat; today's threat is largely internal. McCarthyism, a manifestation of the great harm of domestic 'finger-pointing', showed us the great risks in suggesting internal threats and dangers, but its remaining scars and fears are the extreme. Society cannot turn a blind eye to harm caused by an excessive embracing of a policy—however well intended—that causes harm. There is a middle ground: after all the essence of human rights is to balance competing rights of individuals and groups living under one roof in the nation-state that is responsible for the public good and welfare.

<sup>1</sup> See RAF Charts in FUNDAMENTALS OF COUNTERTERRORISM (Aspen Law & Business 2008).

## CHAPTER FOUR

### Religious Extremism: Causes and Examples of Harm

#### I. State Law vs. Religious Law

In liberal Western democracies, religion - while important - is not superior to state law. Religion must not be granted unlimited powers or special rights; this need be the case both theoretically and practically for practitioners of faith and theologians alike. An individual accused of violating state law must find little recourse in claiming before a court of law that the illegal conduct was premised on adherence to religious law. Despite this premise, which need be at the core of the modern nation state, the concept of the supremacy of state law is met with resistance in numerous quarters.

The resistance is particularly acute when lives of 'at risk' individuals are at risk. That is, when the tension between religious law and state law moves from the abstract and philosophical to the concrete and real. While the state is obligated to respect faith it must never tolerate extreme manifestations of faith that endanger vulnerable members of closed, religious communities. As the case law discussed in this chapter highlights, the risk posed to children in the context of religious extremism reflects the tension between state law and religious law. That tension, simply put, cuts to the issue to whom does the state owe a duty and whether religious doctrine, regardless of the harm it potentially causes, is to receive precedence over state law intended to protect vulnerable members of society.

In many ways, child endangerment laws intended to ensure the safety and welfare of children represent the state's efforts to protect society's most vulnerable members. As discussed in this chapter, the harm caused to children in the name of religious extremism is, tragically, a reality that must be directly confronted by law enforcement and larger society alike. To suggest that religious law has precedence and, therefore, injury to children is justified is a clear violation of the social contract that must be extended, unequivocally, to children. Otherwise, children at risk resulting from their parents belief will be abandoned by the state, vulnerable and helpless in the face of harm based on religious extremism.

As both child endangerment and case law suggest the duty owed is to the 'at risk' child, not the relevant harmful belief system. However, the state fails to consistently meet this obligation; 'turning a blind eye' describes the actions of some officials who, doubtlessly, understand the harm that stands to befall children. While laws are clear, their implementation requires state officials understand that limits need be imposed on religious extremism; otherwise, harm is inevitable.

Civil laws have been imposed on citizens in order to protect individual rights and

society alike. Change in these laws is inevitable; that is how society progresses reflecting modernity and changes in society and culture. Protecting the democratic process is the obligation of government; the rule of law is based on due process and equal protection. Checks and balances and separation of powers ensure change reflect protection of civil and political rights; otherwise, rights - created by man for man - will be "trampled on" threatening the very essence of civil democratic states.

Conversely, religious law is governed by God and may not be altered by man who is obligated to live in accordance with God's laws. That is, it is not for man to question God whose infallibility is unquestioned. As the conversation with my airplane seatmate<sup>238</sup> made clear people of extremist faith are convinced both of the supremacy of their faith and the infallibility of their God. Questioning God's laws is, therefore, akin to heresy for the obligation of man is to respect and accept, unquestioningly, God's laws. In many ways, that is the essence of religious extremism: the requirement to live in absolute accordance with God's laws which cannot be questioned by man whose sole obligation is to respect those laws in full. Religious law dictates how people of faith live their lives. Civil democratic regimes are endangered when religious extremists - violently or through dangerous intimidation - seek to impose religious law on civil society.

It is critical to recognize the difference between civil law and religious law, as well as the difference between democratic speech and religious speech. Unlike democratic values, which are inherently broad and liberal, religious extremists aspire to impose a narrow, dogmatic interpretation of religious scripture both on civil society and their co-religionists. To that end, there is significant danger to civil society when absoluteness dictates the conduct of religious extremists. Tolerance of religion is a core value of democracies; however, that tolerance must not be unlimited or otherwise harm may befall innocent members of society.

Does this suggestion correctly identify the primary source of potential danger facing civil society? It may be suggested that religion is a convenient scapegoat and that other significant dangers are lurking around the proverbial corner. In discussing the question of religious-based violence, the inevitable comparison to non-religious violence is raised. Is the supremacy of faith different than the supremacy of mass movements? Is death in the name of a god different than death in the name of ideology? Is religion another form of "absolutism" undistinguishable from mass movements that have wreaked well-documented havoc throughout history?

The Rev. Dr. John Lentz wisely observed:

In general religion is not, by definition, another form of absolutism. However, any religious perspective that seeks to control behavior of believers, limits the access to other points of

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<sup>238</sup> See Introduction.

view, and demands strict adherence to a particular world-view, code of ethics, or manner of living moves along the trajectory toward absolute control and is hardly distinguishable from other forms of political or social absolutism.<sup>239</sup>

## II. Harm Caused by Religious Extremism

There is no intention to engage in "religion bashing;" it is important to recall that millions have been killed for purely non-religious reasons. Obvious examples include Nazism, Italian Fascism, Pol Pot (Cambodia) and the Cultural Revolution (China); all four regimes were marked by absolute loyalty, in particular to a national leader. In fulfilling real or perceived loyalty requirements, citizens of those regimes committed mass murder on an unparalleled scale.

### Deaths Caused by Non-Religious Regimes

|                     | Nazism                    | Italian<br>Fascism         | Pol Pot                           | Cul.<br>Rev.(China)         |
|---------------------|---------------------------|----------------------------|-----------------------------------|-----------------------------|
| Estimated<br>Deaths | 17 million <sup>240</sup> | 1-2 million <sup>241</sup> | 1.7-2.5<br>million <sup>242</sup> | 7.73 million <sup>243</sup> |

<sup>239</sup> Email correspondence with the author, email in author's records.

<sup>240</sup> According to Donald Niewyk (Donald L. Niewark and Francis R. Nicosia, *The Columbia Guide to the Holocaust*, Columbia University Press, 2000, pp. 45-52) Nazism caused the mass murder, using the broadest definition, of roughly 17 million people. Estimates of the death toll of non-Jewish victims vary by millions, partly because the boundary between death by persecution and death by starvation and other means in a context of total war is unclear. Overall, about 5.7 million (78 percent) of the 7.3 million Jews in occupied Europe perished (Gilbert, Martin. *Atlas of the Holocaust* 1988, pp. 242–244). This was in contrast to the five to 11 million (1.4 percent to 3.0 percent) of the 360 million non-Jews in German-dominated Europe. (MELVIN SMALL AND J. DAVID SINGER, *RESORT TO ARMS: INTERNATIONAL AND CIVIL WARS 1816–1980* (SAGE Pub. 1982); MICHAEL BERENBAUM, *A MOSAIC OF VICTIMS: NON-JEWS PERSECUTED AND MURDERED BY THE NAZIS* (N.Y. Univ. Press, 1990).

<sup>241</sup> Mussolini's Fascist dictatorship was responsible for over a million premature deaths. These deaths resulted from political violence during the regimes rise to power, its violence needed to maintain power, and its domestic policies that favored certain social classes. However most of the deaths during the regime's reign were in its empire and wars abroad. While 'restoring order' in Libya, the regime allowed 50,000 to die in camps and generally did nothing to halt the appalling decline of the Libyan population, which had fallen from some 1.2 million on Italy's invasion in 1911 to 800,000 by the mid-1930s. Italian historians have never bothered to tally the death toll produced by the invasion and subsequent annexation of Ethiopia from 1935-41, but Ethiopians estimate that between 300,000 and 600,000 perished.

<sup>242</sup> Pol Pot was a Cambodian Maoist Revolutionary who came into power in the 1970's. During his reign he imposed agrarian socialism forcing urban dwellers to relocate to the countryside to work in collective farms and forced labor projects. The combined effects of forced labor, malnutrition, poor medical care, and executions resulted in the deaths of approximately 21% of the Cambodian population. ("The Cambodian Genocide Program". *Genocide Studies Program*. Yale University. 1994-2008. ) In all, an estimated 1.7 to 2.5 million people (out of a population of slightly over 8 million) died as a result of the policies of his three-year premiership. Heuveline, Patrick (2001). "The Demographic Analysis of Mortality in Cambodia." In *Forced Migration and Mortality*, eds. Holly E. Reed and Charles B. Keely. Washington, D.C.: National Academy Press. Marek Sliwinski, *Le Génocide Khmer Rouge: Une Analyse Démographique* (L'Harmattan, 1995). Banister, Judith, and Paige Johnson (1993). "After the Nightmare: The Population of Cambodia." In *Genocide and*

Is the absolutism that characterized certain non-religious regimes similar to murder committed in the "name of God?" The doctrine of certitude<sup>244</sup> proposes that religious actors are (1) certain of a deity and (2) certain that they are acting in the name of that deity. The certitude, then, is a two-step process that requires the believer to fully internalize both belief in a higher power and belief in action on behalf of a higher power. Otherwise, the religious belief is not absolute. Furthermore, religious belief is predicated on the notion that its deity (or deities) is supreme.

The concept of supremacy has led individuals of faith throughout history to commit horrific acts of violence against two categories of "non-believers" - those who are nominally members of the same faith, but whose fervency is doubted by the actor, and those of other faiths. Does that differ from individuals who believe in the supremacy of a secular belief, such as communism? Is there something specific about religious supremacy that significantly distinguishes it from secular movement supremacy?

Perhaps the more appropriate question is this: given the choice between absolute devotion to a secular cause and absolute certainty in extremist religious beliefs, which of the two presents the greatest danger to society today? Given that the vast majority of recent terrorist attacks in the surveyed nations have been carried out in the name of God, not in the name of non-religious causes - I propose that religious extremism currently poses a greater threat to civil society. That is not to gainsay the horrors caused by secular regimes throughout history or to automatically dismiss the possibility that secular extremism may, in the future, replace religious extremism as the most important cause of violence and terrorism. It is, however, to emphasize the current threat posed to contemporary

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Democracy in Cambodia: The Khmer Rouge, the United Nations and the International Community, ed. Ben Kiernan. New Haven, Conn.: Yale University Southeast Asia Studies.

<sup>243</sup> The Cultural Revolution was a social-political movement that took place in the People's Republic of China from 1966 through 1976. Set into motion by Mao Zedong, then Chairman of the Communist Party of China, its stated goal was to enforce socialism in the country by removing capitalist, traditional and cultural elements from Chinese society, and to impose Maoist orthodoxy within the Party. The widespread phenomenon of mass killings in the Cultural Revolution consisted of five types: 1) mass terror or mass dictatorship encouraged by the government – victims were humiliated and then killed by mobs or forced to commit suicide on streets or other public places; 2) direct killing of unarmed civilians by armed forces; 3) pogroms against traditional "class enemies" by government-led perpetrators such as local security officers, militias and mass; 4) killings as part of political witch-hunts (a huge number of suspects of alleged conspiratorial groups were tortured to death during investigations); and 5) summary execution of captives, that is, disarmed prisoners from factional armed conflicts. The most frequent forms of massacres were the first four types, which were all state-sponsored killings. The degree of brutality in the mass killings of the Cultural Revolution was very high. Usually, the victims perished only after first being humiliated, struggled and then imprisoned for a long period of time. Owing to difficulties that scholars in and outside China encounter in accessing "state secrets," the exact figure of the "abnormal death" has become a recurring debate in the field of China studies. Estimates by various scholars range from one-half to eight million. According to Rummel's 1991 analysis of, the figure should be around 7.73 million (R. J. RUMMEL, CHINA'S BLOODY CENTURY : GENOCIDE AND MASS MURDER SINCE 1900 (Transaction Publishers 1991).

<sup>244</sup> Phrase used in private conversation with author, details in author's records.

society by religious extremism. To that end, religious extremists pose a danger that must be responded to legislatively, politically, and, if need be, forcefully in order to protect the innocent. That, after all, is the nation state's primary obligation.

The FLDS Church has, recently, been the focus of intense government and media scrutiny regarding the practice of plural marriage involving under-age girls. Girls, as young as fourteen, when their prophet proclaims that God has commanded them to marry men (in some cases three times their age), are forced to engage in full sexual relations with their husbands. These girls, and their parents, submit to the command based on a belief that the prophet's words are, in fact, the words of God.

Similarly—and just as tragically—boys in the FLDS community, some as young as thirteen, are placed in compromising and dangerous situations. While it is difficult to determine the exact number, as many as 1,000 boys have been expelled from the community for breaking its strict standards after Warren Jeffs became the prophet.<sup>245</sup> Breaking these standards involves doing things as simple as wearing short-sleeved shirts, listening to CDs, watching movies and TV, staying out past curfew and having girlfriend.<sup>246</sup> According to experts, these “lost boys”<sup>247</sup> are banished from their community *primarily* in order to minimize competition for older men seeking to marry child brides. Simply put, male and female children alike are victims of child abuse and neglect in the name of FLDS religious doctrine.<sup>248</sup>

While others have addressed “terror in the name of God”<sup>249</sup> attacking internal

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<sup>245</sup> Julian Borger, *The Lost Boys, Thrown Out of US Sect so that Older Men Can Marry More Wives*, GUARDIAN, June 14, 2005, <http://www.guardian.co.uk/world/2005/jun/14/usa.julianborger>.

<sup>246</sup> David Kelly, *Polygamy's 'Lost Boys' Expelled From Only Life They Knew*, BOSTON GLOBE, June 19, 2005, [http://www.boston.com/news/nation/articles/2005/06/19/polygamys\\_lost\\_boys\\_expelled\\_from\\_only\\_life\\_they\\_knew/](http://www.boston.com/news/nation/articles/2005/06/19/polygamys_lost_boys_expelled_from_only_life_they_knew/).

<sup>247</sup> The term “lost boys” refers to teenage boys who have been asked to leave, or have voluntarily left the FLDS community. According to The Diversity Foundation, the lost boys are also referred to as the “Children of Diversity.” The Diversity Foundation, *Strengthening and Aligning Global Communities*, available at <http://www.smilesfordiversity.org/cod.php> (last visited Jan. 8, 2013).

<sup>248</sup> 4 The Juvenile Court Act of 1996, UTAH CODE ANN. § 78A-6-105(1)(a) (2006) defines abuse as “(i) nonaccidental harm of a child, (ii) threatened harm of a child, (iii). Electronic copy available at: <http://ssrn.com/abstract=1659783>

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<sup>249</sup> JESSICA STERN, *TERROR IN THE NAME OF GOD* (Harper Perennial 2004); Seibert, Eric A., *The Violence of Scripture: Overcoming the Old Testament's Troubling Legacy*, Fortress Press, Minneapolis 2012; Avalos, Hector, *Fighting Words: The Origins of Religious Violence*, Prometheus Books, Amherst, New York 2005; Cliteur, Paul B., “Religion and Violence or the Reluctance to Study this Relationship”, in: *Forum Philosophicum* 15 (2010), pp. 205-226; Hoffmann, Joseph R., ed., *The Just War and Jihad: Violence in Judaism, Christianity, & Islam*, Prometheus Books, Amherst, New York 2006; Juergensmeyer, Mark, *Terror in the Mind of God: The Global Rise of Religious Violence*, Third Edition, Revised and Updated, University of California Press, Berkeley / Los Angeles/London

and external targets alike, child endangerment in the religion paradigm is, I suggest, fundamentally different. Simply put, it is the deliberate injury to *one's own* child predicated on religious faith, in particular religious extremism. Though God tested Abraham<sup>250</sup> with respect to the sacrifice of his son, Isaac,<sup>251</sup> the sacrifice (thankfully, never brought to fruition) was the result of a direct interaction between God and Abraham. The modern day religious extremism predicated endangerment of children is not between the divine and man; rather, it is between man and man when one of the two *purports to act in the name of God*.

This is fundamentally and philosophically different from the original sacrifice. Unlike Abraham, who ultimately did *not* sacrifice Isaac—for God ordered him to not do so—religious extremists *do* endanger their children.<sup>252</sup> From a theological perspective, polygamy as practiced by FLDS is an essential tenet of how FLDS members articulate and practice their faith. Members believe that plural marriage is a requirement for exaltation and entry into the highest “degree” of the Celestial Kingdom (the highest of the three Mormon heavens).<sup>253</sup> The FLDS Church perceives itself as the “true” Mormon Church; and asserts that its members practice what the prophet Joseph Smith *truly* believed. The practice of child brides in plural marriages is essential in ensuring obedience and subservience; needless to say, the practice involves sexual contact between adult males and under-age girls. Sexual contact with a minor is illegal and should result in criminal liability. FLDS parents *do* endanger their children,<sup>254</sup> which raises profoundly important legal, moral and theological questions pertaining to the essence of two relationships: parent-child and individual-faith/father leader. The question before us is who protects the otherwise unprotected<sup>255</sup>; the question,

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2003; Midlarsky, Manus I., *Origins of Political Extremism: Mass Violence in the Twentieth Century and Beyond*, Cambridge University Press, Cambridge 2011.

<sup>250</sup> *Why Did God Tell Abraham to Sacrifice Isaac?*,

[http://www.rationalchristianity.net/abe\\_isaac.html](http://www.rationalchristianity.net/abe_isaac.html) (last visited Jan. 31, 2010).

<sup>251</sup> *See generally Abraham's Sacrifice of Isaac*, <http://www.apocalipsis.org/Abraham.htm> (last visited Jan 8, 2013).

<sup>252</sup> *See generally* Gen. 22:5 & 8; *Why Did God Tell Abraham to Sacrifice Isaac?*,

[http://www.rationalchristianity.net/abe\\_isaac.html](http://www.rationalchristianity.net/abe_isaac.html) (last visited Jan. 8, 2013); *Id.*

<sup>253</sup> JOHN KRAKAUER, *UNDER THE BANNER OF HEAVEN: A STORY OF VIOLENT FAITH* 6 (Anchor 2003).

<sup>254</sup> This is, undoubtedly, a relative point for people of faith. Those who engage in practices related to their children's health, safety and welfare would argue that their actions are in accordance with their faith whereas the State attaches criminal liability to those same practices. *See generally* Adam Lamparello, *Taking God Out of the Hospital: Requiring Parents to Seek Medical Care for their Children Regardless of Religious Belief*, 6 TEX. F.

ON C.L. & C.R. 47 (2001); Jennifer L. Hartsell, *Mother May I . . . Live? Parental Refusal of Life-Sustaining Medical Treatment for Children Based on Religious Objections*, 66 TENN. L. REV. 499 (1999).2010] PROTECTING THE UNPROTECTED 393.

<sup>255</sup> The Juvenile Court Act of 1996, UTAH CODE ANN. § 78A-6-317(4) (2008), specifies: In every abuse, neglect, or dependency proceeding . . . the court shall order that the child be represented by a guardian ad litem, in accordance with Section 78A-6-902. The guardian ad litem shall represent the best interest of the child, in accordance with the requirements of that section, at the shelter hearing and at all subsequent court and administrative proceedings, including any proceeding for termination of parental rights in accordance with Part 5, Termination of Parental Rights Act.

complicated as it is, is exponentially more complex when framed in a religious paradigm.

‘Who owes what duty to whom’ is the subtext of this chapter; the intellectual, philosophical and constitutional premise must be that the State owes a duty and obligation to children *regardless* of their parents’ faith. That is neither to delegitimize faith nor to cast aspersions on people of faith; it is however, to articulate the position that the State has the proactive, positive responsibility to protect children. This is particularly true when the threat to the child is faith based. While this is neither the first, nor tragically the last time this issue will require resolution, it is one that urgently requires candid examination and analysis.

### **III. History of the Church of Jesus Christ of Latter-Day Saints**

According to the Church of Jesus Christ of Latter-Day Saints (Mormon Church), its founder, Joseph Smith, had revelations and visions that he was ordained as a prophet of God. Smith’s followers believed that he had a relationship with God and was his spokesman and prophet on earth. Unquestioning obedience to the latter day prophet was instrumental to Church members who believed that the only way to heaven was to follow Smith’s commandments. That faith was tested in the 1830s as Smith gradually began introducing polygamy,<sup>256</sup> claiming that it was a divinely inspired practice. Brigham Young led the Mormons across the continent ultimately settling in Utah in order to “escape the intense persecution members faced for their unique religious beliefs.”

As members of the Church began to live in Utah, “polygamy became a part of their culture and religion.” While Utah quickly developed into a unique frontier theocracy under Young’s guidance, Church leaders understood the benefit of becoming a state. However, the U.S. government strongly opposed polygamy and refused to grant statehood unless the practice was rescinded. Outside pressure to forbid polygamy increased as the Church grew in Utah. In 1856, the newly created Republican Party declared that, “[i]t is the duty of Congress to prohibit in the territories those twin relics of barbarism, polygamy and slavery.”<sup>257</sup> True to its promise, the federal government sent law enforcement officials to Utah to end polygamy, confiscating land and possessions of those who practiced plural marriage.

### **IV. History of Polygamy**

The Republican Party first compared polygamy to slavery in 1856;<sup>258</sup> in 1862,

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<sup>257</sup> 1 NATIONAL PARTY PLATFORMS 1840-1956, at 27 (Donald B. Johnson & Kirk H. Porter, eds., 1973). Cf. HENRY CHARLES LEA, BIBLE VIEW OF POLYGAMY BY MIZPAH 1 (n.d.) (asserting the American liberty to possess “as many slaves as Abraham, and as many wives as Solomon.”).

<sup>258</sup> 24 *Republican Philadelphia: GOP Convention of 1856 in Philadelphia*, July 4, 1995, [http://www.ushistory.org/gop/convention\\_1856.htm](http://www.ushistory.org/gop/convention_1856.htm).



Congress passed the Morrill Act for the Suppression of Polygamy (the “Morrill Act”). Section One of the Morrill Act states:

Every person having a husband or wife living, who shall marry any other person, whether married or single, in a Territory of the United States, or other place over which the United States have exclusive jurisdiction, shall . . . be adjudged guilty of bigamy, and, upon conviction thereof, shall be punished by a fine not exceeding five hundred dollars, and by imprisonment for a term not exceeding five years.<sup>259</sup>

However, the Morrill Act proved to be ineffective in outlawing the practice of polygamy primarily because those involved are also key witnesses who, generally, have no interest in cooperating with the prosecution. Additionally, “no grand jury in Utah would indict Church leaders for violating the [Morrill] Act, so the Act was never used or challenged in court.”<sup>260</sup>

In 1878, the question of polygamy reached the Supreme Court for the first time in *Reynolds v. United States*. George Reynolds, a member of the Church of Jesus Christ of Latter-day Saints, was charged with bigamy under the Morrill Act after he married Amelia Jane Schofield while still married to his first wife. Reynolds was originally convicted in the District Court for the 3rd District of the Territory of Utah. Before the Supreme Court, Reynolds argued that his conviction should be overturned for a number of reasons: the statute exceeded Congress’ legislative power; his challenges to jurors in the original case were improperly overruled; testimony from his second wife should not have been permitted; and most significantly, he had a constitutional right to engage in polygamy as it was part of his religious duty.<sup>261</sup>

Justice Waite distinguished between government control of beliefs and government control of actions. He concluded that “[l]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”<sup>262</sup> An example of this is, if one believes that human sacrifice is an integral part of worship, the government can validly restrict the religious practice. Justice Waite concluded that to permit illegal practices in the name of religion would be “[t]o make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself.”<sup>263</sup> Nevertheless, problems in prosecuting under the Morrill Act persisted; therefore, in 1882 Congress passed the Edmunds Act, making it significantly easier to prosecute polygamy as prosecutors did not need to prove actual marriage but only cohabitation, which

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<sup>259</sup> Morrill Act, ch. 126, § 1, 12 Stat. 501 (1862).

<sup>260</sup> Shayna M. Sigman, *Everything Lawyers Know About Polygamy Is Wrong*, 16 CORNELL J.L. PUB. POL’Y 101, 119 (2006).

<sup>261</sup> Reynolds, *supra* note 124 at 155.

<sup>262</sup> *Id.* at 166.

<sup>263</sup> *Id.* at 167.

the act prohibited.<sup>264</sup> Additionally, the act allowed prosecutors to strike jurors who practiced polygamy, as well as those who did not practice polygamy, but believed it acceptable.<sup>265</sup> Nearly 1,300 polygamists were prosecuted under various anti-polygamy statutes after the Edmunds Act.<sup>266</sup>

On October 6, 1890, the Church's then prophet, Wilford Woodruff, issued an official declaration stating that the Church would obey the laws of the federal government and cease the practice of polygamy. Woodruff explained to Church members that he had received a revelation from God and had been shown a vision in which the Church would be destroyed if the practice of polygamy were to continue. Most Church members followed the new commandment from Woodruff; others believed he was a fallen prophet who had succumbed to pressure from the United States. Shortly after the official renunciation of polygamy, Utah became a state in 1896. As a condition to statehood, Utah included in its constitution a provision that "polygamous or plural marriages are forever prohibited."<sup>267</sup>

## **V. Fundamentalism—The Break Off**

Those that refused to give up polygamy, believing it an eternal principle, were the predecessors of the FLDS Church. FLDS members claim that in 1886, four years before the Church's renunciation of polygamy, the then prophet and president of the Church, John Taylor received a very different revelation. According to FLDS historians, in Taylor's revelation the Lord declared that polygamy was an everlasting covenant, and that God would never revoke it. Lorin C. Woolley, who later became a FLDS leader, testified that he was outside Taylor's room during this vision when he saw a light appearing from beneath the door. Woolley claims to have heard three distinct voices coming from the room, which Taylor later told him was the Lord and the deceased prophet Joseph Smith delivering the revelation of eternal polygamy. FLDS members claim that the following morning Taylor placed five men under covenant to practice polygamy as long as they lived, and gave them power to ordain others to do the same. For some time those practicing polygamy stayed in Salt Lake City, alongside the Mormons who renounced plural marriage. However, as polygamy became less acceptable in mainstream Utah, many polygamists went into hiding.

Eventually Short Creek, Arizona (now known as Colorado City), became a strong hold for polygamists. FLDS members felt comfortable in this remote area surrounded by desert, over a hundred miles away from law enforcement and believed they could safely practice polygamy unbothered by the outside world.

## **VI. Government Intervention and FLDS Isolation**

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<sup>264</sup> Edmunds Act, ch. 47, § 3, 22 Stat. 30 (1882).

<sup>265</sup> *Id.* at § 5.

<sup>266</sup> Sigman, *supra* note 255, at 128.

<sup>267</sup> 39 UTAH CONST. art. III, § 1.

The FLDS's belief that law enforcement would tolerate their polygamist practices was mistaken; government officials have conducted a number of raids on FLDS compounds dramatically affecting the outside world's opinion of the Church. One of the most traumatic raids is known as the 'Short Creek Raid.' In the summer of 1953, over a hundred Arizona police officers and National Guardsmen descended on the FLDS compound in Short Creek. The reason given for the raid by Arizona Governor John Pyle was to stop a pending insurrection by the polygamists. Pyle accused FLDS members of being involved in the "foulest conspiracy you could possibly imagine" designed to produce white slaves.

The Governor even invited reporters to witness the raid with him. However, the attempt to demonize those practicing polygamy failed. Church members had been tipped off to the impending raid. As law enforcement entered the compound they found the community's adults congregated in a schoolhouse singing hymns, while their children played outside. Instead of reporting on the evils of polygamy, the media focused on the over-reaction of government officials. Regardless of the media reaction, the government removed over 400 children from their families at Short Creek.<sup>268</sup> It took more than two years for 150 of those children to be reunited with their families. The Short Creek Raid became a rallying cry for FLDS members; a manifestation of the secular world's desire to destroy God's chosen people.

Shortly after his father's (the previous prophet) death Jeffs married all but two of Rulon's twenty wives, increasing the number of his wives to approximately seventy, according to some ex-members. Jeffs claimed that this was necessary to ensure the preservation of his sacred bloodline; important to recall that Jeffs decreed that his actions were sanctioned by God. As the only person who possessed the authority to perform marriages, and assign wives, Jeffs often used this power to discipline members by reassigning their wives, children and homes to another man. This was made clear in 2004 when Jeffs exiled twenty male members from the community and assigned their wives to more worthy men.

Similar to his predecessors, Jeffs teaches that it is only through plural marriage that a man may enter heaven. To that extent, Jeffs has taught that any worthy male member should have at least three wives, and the more wives a man has, the closer he is to heaven. In 2004, the FLDS, especially the current prophet, Warren Jeffs, began facing trouble from the outside world once again. In 2004, several of Jeffs' nephews alleged that Jeffs and his brothers sodomized them in the late 1980s, leading to a lawsuit against them.<sup>269</sup> In 2005, Jeffs was charged with sexual assault on a minor and with conspiracy to commit sexual misconduct with a minor for arranging a marriage between a fourteen-year-old girl and her

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<sup>268</sup> See *Texas takes legal custody of 401 sect children*, CNN (Apr. 7, 2008), <http://web.archive.org/web/20080411050954/http://www.cnn.com/2008/CRIME/04/07/texas.anch/>;

<sup>269</sup> David Kelly & Gary Cohn, *Insider Accounts put Sect Leader on the Run*, SEATTLE TIMES, May 16, 2006, [http://seattletimes.nwsources.com/html/nationworld/2002996905\\_secttwo16.html](http://seattletimes.nwsources.com/html/nationworld/2002996905_secttwo16.html).

nineteen-year-old first cousin.<sup>270</sup>

In late 2005, Jeffs was placed on the FBI's most wanted list;<sup>271</sup> he was charged in Utah with rape as an accomplice and in Arizona with two counts of sexual conduct with a minor, one count of conspiracy to commit sexual conduct with a minor and unlawful flight to avoid prosecution.<sup>272</sup> While a fugitive, Jeffs nevertheless continued to perform marriages between underage girls and older men.<sup>273</sup> In August 2006, Jeffs was captured in Nevada during a traffic stop<sup>274</sup> and, in September of 2007, Jeffs was convicted in Utah for the accomplice to rape charge.<sup>275</sup> He was given a sentence of 10-years-to-life.<sup>276</sup> On July 27, 2010 the Utah Supreme Court, citing deficient jury instructions, reversed Jeff's convictions and ordered a new trial.<sup>277</sup>

The FLDS Church faced additional difficulties at a second compound, the Yearning for Zion Ranch, near Eldorado, Texas. On April 16, 2008, Texas state authorities entered the community after they had received calls<sup>278</sup> from an individual claiming to be an abused child from the ranch. Child Protective Services determined that the children living in the compound required protection from forced underage marriages. As a result,<sup>279</sup> 416 children were removed from the FLDS compound while over a hundred adult women chose to leave the ranch in order to accompany their children. The state determined that of fifty-three girls aged fourteen to seventeen thirty-one have children or are pregnant. On May 22, 2008 after a state court ruled that there was insufficient evidence to justify holding the children in custody they were returned to their families within ten days.<sup>280</sup> One year after the raid only one child remained in state custody, though twelve of the men from the group were indicted on a variety of sex charges, including assault and bigamy.<sup>281</sup> On August 9, 2011, Jeffs

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<sup>270</sup> Christine Hauser, *Man Near Top of Most-Wanted List is Captured*, Aug. 29, 2006, [http://www.nytimes.com/2006/08/29/us/30jeffscnd.html?\\_r=1&ref=us&oref=slogin](http://www.nytimes.com/2006/08/29/us/30jeffscnd.html?_r=1&ref=us&oref=slogin).

<sup>271</sup> *Have You Seen This Man? FBI Announces New Top Tenner*, available at <http://www.fbi.gov/page2/may06/jeffs050606.htm>.

<sup>272</sup> *Id.*

<sup>273</sup> Brooke Adams & Pamela Manson, *Polygamist Sect Leader Warren Jeffs Arrested in Las Vegas*, S.L. TRIBUNE, Sept. 30, 2007, [http://www.sltrib.com/polygamy/ci\\_4254653](http://www.sltrib.com/polygamy/ci_4254653).

<sup>274</sup> *Id.*

<sup>275</sup> John Dougherty & Kirk Johnson, *Sect Leader is Convicted as an Accomplice to Rape*, N.Y. TIMES, Sept. 26, 2007, [http://www.nytimes.com/2007/09/26/us/26jeffs.html?\\_r=1](http://www.nytimes.com/2007/09/26/us/26jeffs.html?_r=1).

<sup>276</sup> See Ben Winslow, *Jeffs is now an inmate at Utah State Prison*, DESERET NEWS, Nov. 22, 2007, <http://www.deseretnews.com/article/695229917/Jeffs-is-now-an-inmate-at-Utah-State-Prison.html>.

<sup>277</sup> See Dan Frosch, *Polygamist Convictions Overturned*, N.Y. TIMES, July 27, 2010, <http://www.nytimes.com/2010/07/28/us/28jeffs.html>.

<sup>278</sup> Subsequently, these calls were discovered to be "hoax" phone calls impersonating an abused child. Ryan Owens, *Polygamist Sect Marks First Anniversary of Texas Ranch Raid*, ABC NEWS (Apr. 3, 2009), <http://www.abcnews.go.com/TheLaw/Story?id=7252149&page=3>.

<sup>279</sup> Susan Duclos, *Polygamist Group, FLDS Children to be Placed in Foster Homes this Week*, DIGITAL JOURNAL (Apr. 20, 2008), <http://www.digitaljournal.com/article/253535>.

<sup>280</sup> Ismael Estrada, *Returning the Children, with Conditions*, AC360 (May 30, 2008), <http://ac360.blogs.cnn.com/2008/05/30/returning-the-children-with-conditions/>.

<sup>281</sup> Owens, *supra* note 221.

was convicted on two counts of sexual assault of a child and sentenced to life in prison.<sup>282</sup> During the sentencing phase his nephew testified to have been raped since he was 5 years old and his niece testified as to have been raped since she was 7 years old.<sup>283</sup>

## VII. Forced Marriage of Daughters

Adolescent girls are the best-known victims of polygamy in the FLDS community as they are forced to marry significantly older, married men. These girls lack a meaningful choice in deciding whether to get married; they have been taught the world outside their community is evil. Furthermore, avoiding the marriage by leaving is extraordinarily difficult as FLDS communities are physically isolated, making escape nearly impossible. By example: Jane Kingston was forced by her father, Daniel Kingston, to marry her uncle sixteen years her senior, and therefore became his fifteenth wife.<sup>284</sup> When Jane tried to escape the marriage, her father captured her and beat her until she was unconscious.<sup>285</sup> When she woke up from the beating, Jane walked seven miles to a gas station and called 9-1-1.<sup>286</sup> While Jane's uncle, David Ortell Kingston, was charged and convicted of incest and unlawful sexual conduct with a minor, he was not charged with bigamy.<sup>287</sup>

Although there is no doubt that many underage girls, such as Jane, are forced into marriage with much older men, prosecuting the crime is difficult because of significant evidentiary barriers. First, the key witnesses usually have no interest in aiding the prosecution as children are taught that authorities are not to be trusted and if they cooperate by testifying, they could be placed in foster care.<sup>288</sup> Girls have been taught that the outside world is evil; there is no one safe for them to turn to when they do not want to enter into a marriage. Furthermore, because of the remote physical location of these communities, the victim must go to extreme lengths to escape the abuse, as Jane did by walking seven miles to seek help after being beaten unconscious. In addition, typically only the first marriage of a polygamist is recorded with the state; thus, the state has no paper trail of the other marriages. Finally, as the FLDS community is located on both sides of the Utah- Arizona border, prosecutors have difficulty proving in which state the abuse occurred and, thus, are hard pressed to determine the

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<sup>282</sup> See Lindsay Whitehurst, *Warren Jeffs gets life in prison for sex with underage girls*, SALT LAKE TRIB., Aug. 10, 2011, <http://www.sltrib.com/sltrib/news/52354441-78/jeffs-sexual-child-jurors.html.csp>.

<sup>283</sup> See *Nephew, niece allege polygamist sect leader Warren Jeffs abused them*, CNN (Aug. 6, 2011), [http://articles.cnn.com/2011-08-06/justice/texas.polygamist.jeffs\\_1\\_warren-jeffs-alta-academy-polygamist-sect-leader?s=PM:CRIME](http://articles.cnn.com/2011-08-06/justice/texas.polygamist.jeffs_1_warren-jeffs-alta-academy-polygamist-sect-leader?s=PM:CRIME).

<sup>284</sup> Leti Volpp, *Blaming Culture for Bad Behavior*, 12 YALE J.L. & HUMAN. 89, 100 (2000).

<sup>285</sup> *Id.*

<sup>286</sup> Sigman, *supra* note 255, at 179.

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 180

appropriate jurisdiction for prosecution purposes.<sup>289</sup>

### VIII. The Lost Boys

Another group of children/individuals that have suffered from FLDS extremism are a group of male children known as the “Lost Boys.” Over 1,000 male children between the ages of thirteen and twenty-three have left the FLDS community, typically by being banished and becoming a “Lost Boy.”<sup>290</sup> Critics of the FLDS maintain that the boys, known as the “Lost Boys,” are kicked out of the community so that older, established men have less competition for the young wives.<sup>291</sup> The community tells the boys that they are being banished for not meeting the rigorous FLDS religious standards.<sup>292</sup> Once expelled, the boys are not allowed contact with their former community. The Church forbids parents from visiting their banished sons, and violating the rule can result in eviction from their Church-owned homes.<sup>293</sup> This means that the boys have no emotional and financial support from their former communities and they suddenly find themselves in the outside world, which they have been taught is “evil.” Furthermore, “most have no money, no real education and nowhere to live.”<sup>294</sup>

Not surprisingly, many of the boys turn to drugs and alcohol. Although there are state laws preventing child abandonment and neglect, Utah and Arizona authorities have yet to systematically enforce them. Additionally, authorities have not sought child support from FLDS members who abandon their sons.<sup>295</sup> Similar to the prosecution of sexual abuse, prosecution against parents for child abandonment has evidentiary challenges primarily because the Lost Boys are largely unwilling to testify against their parents.

According to former Utah Attorney General, Mark Shurtleff, “the kids don't want their parents prosecuted; they want us to get the number one bad guy—Warren Jeffs. He is chiefly responsible for kicking out these boys.”<sup>296</sup> However, in 2006 a group of six lost boys filed a landmark suit against Warren Jeffs and the FLDS for “unlawful activity, fraud, and breach of fiduciary duty, and civil conspiracy.”<sup>297</sup> The suit alleged that the boys were kicked out of the community so that it would be easier for the older men to marry the younger girls, because without the boys there would be less competition.<sup>298</sup> The suit was settled out of court; the ‘lost

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<sup>289</sup> Emily J. Duncan, *The Positive Effects of Legalizing Polygamy: “Love Is A Many Splendored Thing”*, 15 Duke J. Gender L. & Pol’y 315, 324 (2008).

<sup>290</sup> Borger, *supra* note 240; New Frontiers for Families, *The House Just off Bluff: Pilot Proposal*, <http://www.newfrontiersforfamilies.org/bluffhouse.asp> (last visited Jan. 8, 2013).

<sup>291</sup> Borger, *supra* note 240.

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> Dan Simon & Amanda Townsend, *Warren Jeffs “Lost Boys” Find Themselves in Strange World*, CNN (Sep. 7, 2007), <http://www.cnn.com/2007/US/09/07/lost.boys/index.html>.

<sup>295</sup> Sigman, *supra* note 255, at 184.

<sup>296</sup> Kelly, *supra* note 2.

<sup>297</sup> Sigman, *supra* note 255, at 182 (citing Complaint, *Ream v. Jeffs*, No. 040918237 (Utah Dist. Ct. Aug. 27, 2004)).

<sup>298</sup> *Id.*

boys' received \$250,000 for housing, education and other assistance to help boys who leave the FLDS community.<sup>299</sup>

In 2006, Utah Governor Jon Huntsman signed House Bill 30, also known as "The Lost Boys Law," which allows minors to petition to district court judges on their own behalf for emancipation.<sup>300</sup> The Lost Boys, and other homeless youth face numerous hurdles to survive because of the fact that they are minors. Everyday concerns, such as signing leases, and receiving health care are difficult for this population as legally they are minors and cannot represent themselves.<sup>301</sup> While the effects remain to be seen, the bill is undoubtedly represents an effort to facilitate the Lost Boys' integration into society.

## IX. Who Defines the Best Interest of the Child?

The May 15, 2009 decision of Brown County (Minnesota) District Judge John Rodenberg, that thirteen-year-old Daniel Hauser was "medically neglected"<sup>302</sup> by his parents, Colleen and Anthony Hauser, who refused to provide him with the appropriate medical treatment and was also in need of child who refused to provide him with the appropriate medical treatment and was also in need of child protection services, is but the latest manifestation of this issue.<sup>303</sup> The parents, who religiously believe in natural healing, cited their beliefs as the principle reason for refusing treatment.<sup>304</sup> Daniel, who's cancer has a 85-90% success rate when treated, was determined to have a "rudimentary understanding at best" of his condition and simply went along with his parents beliefs.<sup>305</sup> Rodenberg, in describing the state's interest, stated "the state's

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<sup>299</sup> Simon & Townsend, *supra* note 289.

<sup>300</sup> H.R. 30, 2006 Gen. Sess. (Utah 2006), *available at* <http://www.le.state.ut.us/%7E2006/bills/hbillenr/hb0030.htm>.

<sup>301</sup> For further discussion, see Brienne M. Billie, Note, *The "Lost Boys" of Polygamy: Is Emancipation the Answer?*, 12 J. GENDER RACE & JUST. 127, 138 (2008), and T. Christopher Wharton, Statute Note, *Deserted in Deseret: How Utah's Emancipation Statute is Saving Polygamist Runaways and Queer Homeless Youths*, 10 J.L. & FAM. STUD. 213, 220 (2007).

<sup>302</sup> Minnesota Criminal Code, MINN. STAT. ANN. § 609.378 (2010) specifies that a person is guilty of neglect or endangerment when:(a)(1) A parent, legal guardian, or caretaker who willfully deprives a child of necessary food, clothing, shelter, health care, or supervision appropriate to the child's age, when the parent, guardian, or caretaker is reasonably able to make the necessary provisions and the deprivation harms or is likely to substantially harm the child's physical, mental, or emotional health is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both. If the deprivation results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both. If a parent, guardian, or caretaker responsible for the child's care in good faith selects and depends upon spiritual means or prayer for treatment or care of disease or remedial care of the child, this treatment or care is "health care," for purposes of this clause.

<sup>303</sup> Amy Forliti, *Minnesota Judge Rules Teen Must See Cancer Doctor*, NEWVINE (May 15, 2009), [http://www.newsvine.com/\\_news/2009/05/15/2819712-minn-judge-rules-teen-must-see-cancer-doctor](http://www.newsvine.com/_news/2009/05/15/2819712-minn-judge-rules-teen-must-see-cancer-doctor).

<sup>304</sup> *Id.*

<sup>305</sup> *Id.*

interest in protecting the child overrides the constitutional right to freedom of religious expression and a parent's right to direct a child's upbringing."<sup>306</sup>

In *re Clark*, a three-year-old child suffered third degree burns over forty percent of his body. As the child's blood condition deteriorated his parents, Jehovah Witness', were asked to consent to blood transfusions if such became necessary to save his life. The parents refused. The doctor then petitioned a local court for permission to administer blood transfusions if such became medically necessary. The court granted the petition citing Ohio's Juvenile Code,<sup>i</sup> which provided for emergency medical and surgical care for children, as well as the courts' right under common law to act in behalf of the interests of the child. The child's condition gradually improved, and it appeared that a blood transfusion would not be necessary.

The parents then attempted to vacate the outstanding court authorization -- contending that Kenneth's was not an emergency situation. Judge Alexander rejected the argument and addressed the duty of the state—"The child is a citizen of the State. While he 'belongs' to his parents he belongs also to his State... When a religious doctrine espoused by the parents threatens to defeat or curtail such a right of their child, the State's duty to step in and preserve the child's right is immediately operative."<sup>307</sup> He stressed that the parents have an absolute right to believe that Holy Scripture forbids blood transfusions and to act in accordance with that belief, but that "this right of theirs ends where somebody else's right begins."<sup>308</sup>

However, in *Newmark v. Williams*, the court limited this right when state action had a low chance of actually benefiting the child. In that case the court grappled with the proposed treatment of a three-year-old suffering from Burkitt's Lymphoma when his Christian Scientist parents wanted to refuse medical intervention. The parents argued that removing the child from their home violated their First Amendment right to freedom of religion and that the Delaware abuse and neglect statutes exempted those who treat their children's illnesses "solely by spiritual means." The court ruled in favor of the parents because the state sought to administer, against the parents' wishes, an "extremely risky, toxic, and dangerously life threatening medical treatment offering less than a 40% chance for success."<sup>309</sup>

The essence of the parent-child relationship is the 'duty to care' obligation which the parent owes to the child. That duty, obligation and responsibility has been one of the core essences of the human condition since time immemorial:

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<sup>306</sup> Id.

<sup>307</sup> *In re Clark*, 185 N.E.2d 128, 132 (Ohio Com. Pl. 1962).

<sup>308</sup> Id.

<sup>309</sup> *Newmark v. Williams*, 588 A.2d 1108 (Del. 1991)



“But if any provide not for his own, and specially for those of his own house, he hath denied the faith, and is worse than an infidel.”

“And, ye fathers, provoke not your children to wrath: but bring them up in the nurture and admonition of the Lord.”

“But whoso shall offend one of these little ones [a child] which believe in me, it were better for him that a millstone were hanged about his neck, and that he were drowned in the depth of the sea.”

Herein lays a fundamental tension: while Scripture unequivocally articulates parental responsibility with respect to children, some religious extremists are endangering their children.<sup>310</sup> That endangerment violates both the criminal law and religious scripture.

Nevertheless, rather than adhering and respecting law, FLDS members who either marry their daughters to adult men or who themselves marry under-age children are violating both the law and scripture. They are doing so in accordance with the religious teachings of an individual claiming to articulate a particular interpretation of their faith. That interpretation however endangers their children, which both scripture and the law obligate them to protect. That said, there are “obscure laws in many states that let parents rely on prayer, rather than medicine, to heal sick children.”<sup>311</sup>

In *Employment Division v. Smith*,<sup>312</sup> the Supreme Court held that the state, consistent with the Free Exercise Clause, could “prohibit sacramental peyote use” thereby not granting religious actors an exemption with respect to the requirements of the law.<sup>313</sup> The concept that a parent’s religious beliefs do not justify denial of medical care to their children has been widely upheld in state

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<sup>310</sup> “Take heed that ye despise not one of these little ones...” *Matthew* 18:10 (King James); “And whosoever shall offend one of *these* little ones that believe in me, it is better for him that a millstone were hanged about his neck, and he were cast into the sea.” *Mark* 9:42 (King James); “Lo, children *are* an heritage of the Lord: *and* the fruit of the womb *is his* reward.” *Psalms* 127:3 (King James); “It were better for him that a millstone were hanged about his neck, and he cast into the sea, than that he should offend one of these little ones.” *Luke* 17:2 (King James); “And the King shall answer and say unto them, Verily I say unto you, Inasmuch as ye have done *it* unto one of the least of these my brethren, ye have done *it* unto me.” *Matthew* 25:40 (King James).

<sup>311</sup> Suzanne Sateline, *A Child’s Death and a Crisis for Faith*, WALL STREET JOURNAL, June 12, 2008, available at <http://www.rickcross.com/reference/cscience/cscience28.html>.

<sup>312</sup> *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872 (1990), *superseded by* Religious Freedom Restoration Act of 1993, P.L. 103-41, 107 Stat. 1488, 42 U.S.C. § 2000bb (Nov. 16, 1993).

<sup>313</sup> *Id.* at 872, 890.

courts.<sup>314</sup> While state courts have acted in the spirit of *Smith*, this action is not a truly meaningful test. Rather, the fundamental point of inquiry is whether prosecutors (local and federal) have been sufficiently aggressive in enforcing the law through criminal prosecutions. Available numbers suggest that the policy—historically—has been to largely turn a blind eye to the endangerment of children. That is, the failure has not been in the judiciary (*Smith* articulated a clear limit on the practice of religion), but rather the failure to protect the otherwise unprotected reflects a fundamental law enforcement and prosecutorial unwillingness to aggressively, consistently and uniformly bring the wrongdoer before the courts.

While the criminal law paradigm requires probable cause it is equally true that the state has a constitutional obligation and responsibility. In practical terms, the state is constitutionally required to infiltrate FLDS communities when the matter of child brides and lost boys is a matter of public knowledge. Protecting the endangered is a state responsibility and obligation. While it is constitutional for states to make laws that may slightly infringe on religion, taking children away from their parents because of religious beliefs is a tougher legal subject.

In *Wisconsin v. Yoder*, the Supreme Court “held that the First and Fourteenth Amendments prevent a state from compelling Amish parents to cause their children, [who have graduated from the eighth grade], to attend formal high school to age sixteen.”<sup>315</sup> Under *Yoder*, the “power of the parent . . . may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”<sup>316</sup> In *Santosky v. Kramer*, the Supreme Court held that under the Fourteenth Amendment’s Due Process Clause the state must support its allegations with “at least clear and convincing evidence” before terminating parental rights.<sup>317</sup>

There are at least two categories of private interests at stake in parental rights termination proceedings: the fundamental liberty interest of the parents in the care and custody of their children,<sup>318</sup> and the parents’ and children’s shared interest in preventing an “erroneous termination” of their natural relationship.<sup>319</sup> “Consequently, courts could consider both the parents’ and the children’s rights when determining the state’s burden of proof at the best interests stage.”<sup>320</sup> The lack of aggressiveness to enforce the law in protecting children has left girls and boys similarly unprotected. While the state has failed to protect child brides it has *also* failed to take action regarding the abandonment of the “lost boys.”

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<sup>314</sup> See Judith English Scheiderer, *When Children Die as a Result of Religious Practices*, 51 OHIO ST. L.J. 1429 (1990).

<sup>315</sup> *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972).

<sup>316</sup> *Id.* at 233-24.

<sup>317</sup> *Santosky II. v. Kramer*, 455 U.S. 745, 746 (1982).

<sup>318</sup> *Id.* at 753.

<sup>319</sup> *Id.* at 760.

<sup>320</sup> Brian C. Hill, *The State’s Burden of Proof at the Best Interests Stage of a Termination of Parental Rights*, 2004 U. CHI. LEGAL F. 557, 567 (2004).

However, in *comparison* to the sexual abuse suffered by girls living in the closed and isolated community it may be easier to prosecute those responsible for the neglect of boys who no longer live in that community as they have been, literally, forced to leave.

Jamie Heimlich, author of *Breaking Their Will: Shedding Light on Religious Child Maltreatment* explained that abuses often go unreported and that the state should take a proactive approach in reaching out to the children.

Children in religious authoritarian cultures greatly need the help that is offered by secular agencies, such as law enforcement and child protective services. But, for a host of reasons, adults living in those cultures are unlikely to reach out to those agencies. Many mistrust anything related to government. Some even believe such agencies work for the devil. Therefore, it is imperative for police, social workers, and government officials to reach out to faith communities that they suspect are abusing children to try to bridge what has been a very big gap of mistrust and miscommunication. I interviewed two state attorneys general who are doing just that, and they have seen improvement. One is Utah's Mark Shurtleff who decided that fundamentalist Mormon groups would no longer be prosecuted just for practicing polygamy, unless they stand accused of abusing children. Shurtleff has also offered these groups psychological counseling. One of the counselors told me that there have been reports of child abuse, whereas before, no one would have reported abuse. Also, Oregon's John Foote has tried to make inroads with a sect that was allowing children to get very sick and die because of members' zealous beliefs in faith healing. Foote told me how one member of the group, a father, even called Foote to get advice on what he should do if his children got sick. Of course, Foote told the man, who did not give his name, that he should call a doctor.<sup>321</sup>

## **X. Recommendations: Civil Society or Religious Society?**

Membership and participation in civil democratic society explicitly demands that citizens respect the rule of law as supreme. According to Rousseau, as citizens of a society we are all signatories to the social contract; in essence, we give up any truly *absolute* rights for the safety and comfort that government can provide. We agree to be subject to laws and restrictions imposed by a civil society including regulations on religion, regardless of the fact that we typically consider religious rights to be absolute.

That is not to minimize the importance, relevance or centrality of religion in the

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<sup>321</sup> Valerie Tarico, *Confronting Religion and Child Abuse: Interview with Interview with Janet Heimlich*, HUFFINGTON POST (May 10, 201, 6:48 PM), [http://www.huffingtonpost.com/valerie-tarico/religion-child-abuse\\_b\\_858996.html](http://www.huffingtonpost.com/valerie-tarico/religion-child-abuse_b_858996.html).

lives of untold millions. We simply must recognize that civil society is a society whose essence is civil law rather than religious law. Some people of faith—particularly those for whom religion is the essence of their temporal existence—may find this perspective objectionable. However, civil society cannot endure if religious law is found to be supreme to state law. Civil society owes an obligation to protect its otherwise unprotected; particularly children who are its most vulnerable members. Religious belief and conduct cannot be used as justification for placing children at risk; government, law enforcement and the general public cannot allow religion to hide behind a cloak of “religious immunity.” The focus of a religious extremist is single-minded dedication and devotion to serving his God.

Based on innumerable conversations with terrorists and members of the intelligence community alike, I have written elsewhere of the extraordinary hardships imposed on wanted terrorists. I have come to the conclusion that those hardships, when understood in the context terrorists serving their God, are both *explainable* to the terrorist and *tolerable* by the terrorist. While difficult, these hardships are not nearly as foreboding as the alternative, according to their worldview. For them it is better to incur physical discomfort than to incur the wrath of God. Where does that leave the secular State? Precisely because of the absolutism of the religious extremist, the state has no choice but to respond accordingly.

Perhaps the fundamental weakness of my argument is that I am suggesting that the State restrict the rights of citizens even at the cost of curtailing otherwise guaranteed rights. Perhaps society in response to the examples discussed above—in order to protect the unprotected—may have no choice but to consistently and aggressively monitor and prosecute religious extremists who endanger their children. The specific danger posed by religious extremists not only justifies but also demands that law enforcement and prosecutors re-articulate their approach to child endangerment when occurring in a religious paradigm. To suggest that the judiciary (state or federal) is acting in the spirit of *Smith* is, at best, only “half the battle” regarding child brides and lost boys. Both require government protection and intervention.

The traditional argument that prosecution is difficult as witnesses are hesitant to come forward can be addressed by an aggressive information (intelligence/source based) policy similar to concerted law enforcement efforts with respect to those involved in the manufacturing and supplying of illegal drugs.<sup>322</sup> The danger presented by religious extremists to their internal

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<sup>322</sup> “In an effort to achieve a ‘drug free society,’ the United States Government approaches its national drug problem through criminal sanctions for the possession, manufacture, sale, transport, and distribution of illegal drugs in the United States; the establishment of a complex law enforcement apparatus at both the federal and state levels with the purpose of reducing drug availability, increasing drug prices, and reducing drug use in America; and the development of drug use prevention and treatment programs that seek to stop drug use and heal drug users.” Margarita Mercado Echegaray, Note, *Drug Prohibition in America: Federal Drug Policy and its Consequences*, 75 REV. JUR. U.P.R. 1215, 1273 (2006).

community requires the immediate adoption of this aggressive policy. While there is an undeniable (and understandable) difficulty in convincing child brides and lost boys to testify against their parents and community (akin, perhaps, to children who are victims of sexual abuse committed by a parent or family member),<sup>323</sup> the state's obligation to protect the otherwise unprotected requires that intelligence gathering be aggressive. This is particularly the case when relevant state agencies cannot plead "ignorance" with respect to the specific endangerment to which FLDS children are subjected in their internal communities (compounds).

While religious extremism presents a significant threat to contemporary society, this does not mean that all religions or all people of religious faith present a threat. Far from it. It does, however, suggest that religious extremism needs to be analyzed, discussed and understood. It is not religion, but extreme religion as understood, articulated and practiced by extremists that draw our greatest concern and attention. While the distinction is critical, otherwise "guilt by association" and "round up the usual suspects" is an inevitable byproduct, the role of religion cannot be denied. Precisely because of that reality, the debate as to whether limits should be imposed on the practice of religion is legitimate.

If viewed on a spectrum or sliding scale, belief is the most private and intimate of the three aspects of religiosity and, therefore, the least subject to the imposition of limitations. Conversely, speech and conduct - if outside the intimacy of the home - are the most public manifestations of religion. However, with respect to speech and conduct, the home, as previously discussed, is not immune from the imposition of limitations. Crimes committed within the home in the name of religion<sup>324</sup> are punishable and justice must be meted out to the perpetrators. While clear distinctions are drawn between private and public religion, the home - the essence of private religion - is not immune from law enforcement, even if the motivation for the crime is religion.

Religion and violence have gone hand-in-hand for thousands of years. A casual perusal of religious texts of Christianity, Judaism and Islam makes this readily apparent. While the teachings of Jesus emphasized peacefulness and "love thy neighbor," not to mention "turn the other cheek," the pages of history and scriptures alike are filled with untold victims of Christianity. The Crusaders are the obvious examples of extraordinary violence in the name of Christianity; clearly, they are not the only guilty ones. The Old Testament is imbued with countless victims of violent battles.<sup>325</sup> The Koran, while stressing that Islam is the

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<sup>323</sup> According to the Supreme Court, child abuse is "one of the most difficult crimes to detect and prosecute, in large part because there are often no witnesses except the victim." *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987). Most often, the abuse is not reported because it takes place in the family setting and children do not understand what is happening, fear retribution if they report it, as well as other adult family members failing to report the abuse. Raymond C. O'Brien, *Clergy, Sex and the American Way*, 31 PEPP. L. REV. 363, 377 (2004).

<sup>324</sup> Honor killings are a prime example of religious-based crimes committed within the home.

<sup>325</sup> A classical source on this is: Paine, Thomas, *The Age of Reason*, 1794, in: Thomas Paine, *Collected Writings*, The Library of America, New York 1995, pp. 665-885. See also: Nelson-

religion of peace, exhorts its followers to be uncompromising in attacking those that deny Islam. While controversy rages as to whether jihad, or warfare on behalf of Islam, is defensive or offensive, the reality is that the Koran is very clear with respect to a fundamental message: kill the non-believer (external) and the hypocrite (internal).<sup>326</sup>

In the American context, a discussion regarding imposing potential limits on the freedom of speech was warranted in response to the terrible demagoguery of Senator Joseph McCarthy and the vicious anti-Semitism of Father Charles Coughlin. Did the terrible words - truly beyond the pale - of both McCarthy and Coughlin not endanger in a manner similar to danger potentially posed by a hate-spewing Christian cleric today? After all, both men articulated unbridled hatred, which clearly threatened otherwise innocent citizens who fell victim to the consequences of the views espoused by McCarthy and Coughlin.<sup>327</sup> While the Senate ultimately censured McCarthy, the damage had already been done – individuals were stigmatized and lives destroyed.<sup>328</sup> Did that not pose a danger to American society that justified First Amendment limitations?

My answer is unequivocally yes. However, the fact that the relevant authorities shied away from directly addressing McCarthy's and Coughlin's incitement does not justify nor warrant avoiding asking the questions this Article seeks to address. President Eisenhower failed a test of leadership by refusing to directly rebut McCarthy. However, that does not proscribe today's relevant law enforcement authorities or legislators from acting either proactively or reactively regarding contemporary dangers to society - even if those dangers are faith based.

In proposing that limits be imposed, it is essential to clearly and candidly address what I propose limiting. It is neither faith itself nor beliefs of particular faiths that I propose limiting: it is how extremism is articulated and practiced that must be limited. Limits must not be blindly imposed devoid of standards, criteria and review. Such an approach would reflect government action best described as arbitrary and capricious resulting in denial of due process before the law. The

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Pallmeyer, Jack, *Is Religion Killing Us? Violence in the Bible and the Quran*, Trinity Press International, Harrisburg 2003; Copan, Paul, *Is God a Moral Monster? Making Sense of the Old Testament God*, Baker Books, Grand Rapids 2011.

<sup>326</sup> See REUVEN FIRESTONE, *JIHAD: THE ORIGIN OF HOLY WAR IN ISLAM* 63 (Oxford Univ. Press 1999);

Harris, Lee, *The Suicide of Reason: Radical Islam's Threat to the West*, Basic Books, New York 2007;

<sup>327</sup> Coughlin was never charged, but after 1936, Coughlin began supporting an organization called the Christian Front, which claimed him as an inspiration. In January 1940, the Christian Front was shut down when the FBI discovered the group was arming itself and "planning to murder Jews, Communists, and a dozen Congressmen and eventually establish, in J. Edgar Hoover's words, "a dictatorship, similar to the Hitler dictatorship in Germany." Coughlin publicly stated, after the plot was discovered, that he still did not "disassociate himself from the movement," and though he was never linked directly to the plot, his reputation suffered a fatal decline.

<sup>328</sup> See ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* 133-34 (Princeton Univ. Press 1999).

requirement to impose limits subject to constitutional protections must not deter policymakers from limiting the rights of those who endanger society even if the basis for that endangerment is religion.

The Supreme Court's holding in *Reynolds v. United States*<sup>329</sup> that federal law prohibiting polygamy did not violate the Free Exercise Clause of a Mormon who claimed polygamy a fundamental tenet of his faith<sup>330</sup> is of enormous importance in this discussion. The same is true with respect to *In Employment Division, Department of Human Resources of Oregon v. Smith*<sup>331</sup> as the Supreme Court ruled that even if peyote were used as part of a religious ceremony and if the Oregon Supreme Court prohibited religious use of peyote, it was proper to deny unemployment benefits to those fired for using the drug.<sup>332</sup>

These cases are, in many ways, the constitutional basis for recommending that limits be imposed on how religion is practiced and what are the parameters of tolerable religious conduct. To that end, I propose religious belief be protected but that religiously inspired conduct, when harmful, not be protected. A proposal to proactively limit otherwise guaranteed protections must, necessarily, extend to speech that incites to violence. Freedom of speech advocates will argue that expanding *Brandenburg* results in an unjustified narrowing of tolerable and protected speech.

They are, of course, correct; such a recommendation violates one of the core values and principles of democracies. However, as this chapter makes clear protected speech directly contributes to harmful conduct. Obviously, not all protected speech directly contributes to harm; to argue that would be engaging in unconscionable exaggeration devoid of any basis in reality. Nevertheless, as history has repeatedly shown failure to limit speech that incites poses risks that society need not tolerate. The instinctual responses that free speech is a 'holy grail' (maybe 'the' holy grail) of civil democratic society are justified and understandable. However, given the clear danger posed by extremist speech exploring limits on free speech and conduct reflects government responsibility to larger society.

In suggesting that some religious based conduct be limited, the answers lie in the essence of modern day religion.<sup>333</sup> Whether religious extremism is a function of the manipulation of religion or an extremist understanding of sacred scripture is an important question. It is, however, not the critical question. While hundreds of millions practice their faith without imposing themselves on their fellow citizens and neighbors or endangering co-religionists others, in the name of

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<sup>329</sup> 98 U.S. 145 (1878).

<sup>330</sup> *Id.* at 166

<sup>331</sup> 485 U.S. 660 (1988).

<sup>332</sup> *Id.* at 672.

<sup>333</sup> In many cases modern day religion has become more and more extreme as evidenced in the ideology that accompanied the Iranian revolution, where leaders such as Khomeini believed that everyone (not just Muslims) required "guardianship" in the form of rule or supervision by the leading Islamic jurists. See HAMID DABASHI, *THEOLOGY OF DISCONTENT* 443 (Transaction Pub. 1993).

religion, commit egregious crimes. It is this category that is our primary concern and that warrants our greatest attention. Sadly, government willingness to address this issue is, at best, hesitant and perhaps better described, unfortunately, as facilitating conduct that directly contributes to harm.



## CHAPTER FIVE

### Contemporary social tensions

#### I. Introduction

Addressing contemporary social tensions in the context of this project requires focusing on a number of issues, particularly the economy, immigration and gender issues relevant to religion. The economic crisis that has struck both the US and Europe ('Eurozone') has raised profound questions regarding Europe's future.<sup>334</sup> These questions address not only the future of the European Union but also whether European nations will be able to honor their financial obligation in the context of social benefits and the welfare state. These are not trivial questions; they are essential to understanding the danger of extremism and the danger it poses a danger to society.

Hand in hand with the economic crisis is the question of immigration to Europe; the spotlight naturally focuses on immigration from North Africa and Turkey.<sup>335</sup> Discussions with a broad range of European academics, policy makers and security officials suggest that contemporary social tensions are particularly acute regarding immigration from North Africa. Those discussions highlight a powerful connection between the economic crisis and immigration; in many ways, the two are inexorably linked both in reality and perception.<sup>336</sup>

#### Negative View of Immigrants<sup>337</sup>

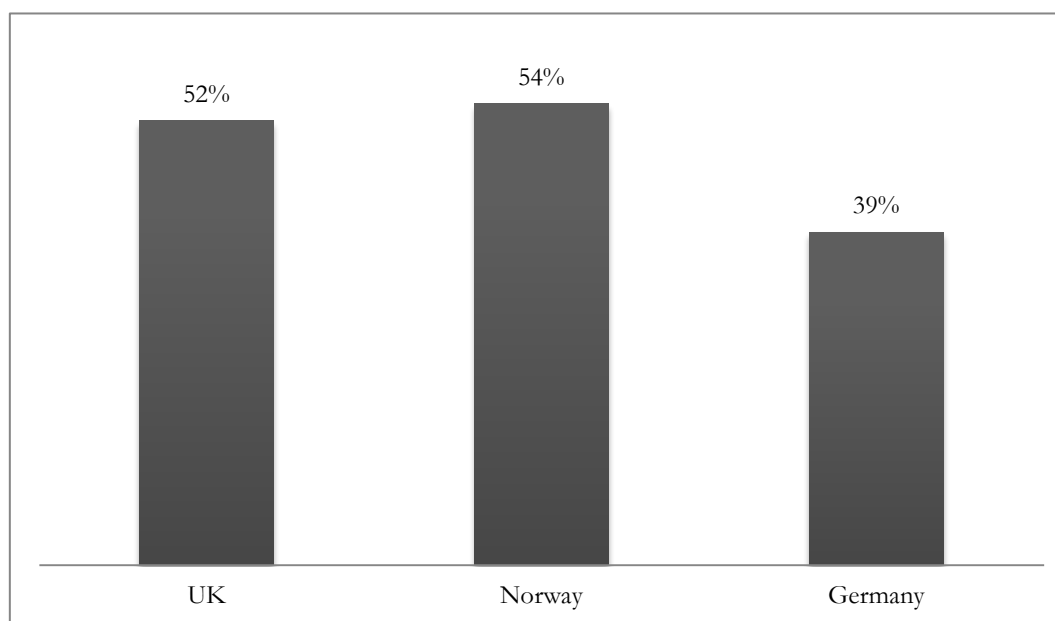
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<sup>334</sup> Tim Lister, The future of Europe: 3 scenarios, CNN (June 18, 2012, 11:23 AM), [http://www.cnn.com/2012/06/15/world/europe/europe-future/index.html?hpt=hp\\_c1](http://www.cnn.com/2012/06/15/world/europe/europe-future/index.html?hpt=hp_c1).

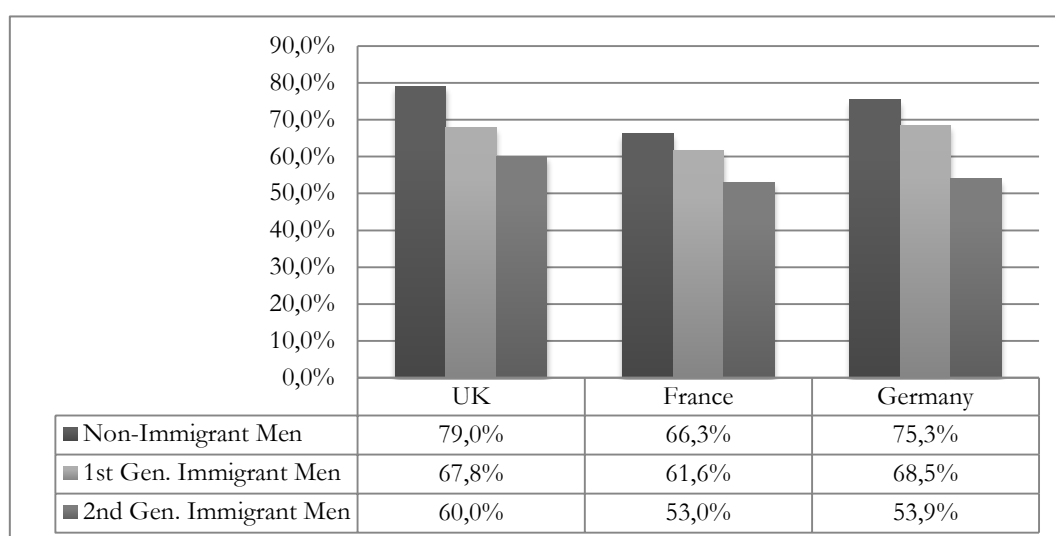
<sup>335</sup> For a thorough and objective analysis, please see *Muslims in Europe: Promoting Integration and Countering Extremism*, CONGRESSIONAL RESEARCH SERVICE (Sep. 7, 2011), <http://www.fas.org/sgp/crs/row/RL33166.pdf>, last viewed June 17, 2012

<sup>336</sup> See generally Soeren Kern, *Islam in Germany: "Germany Does Away with Itself"*, RIGHTSIDE NEWS, (June 16, 2012, 6:07 AM), <http://www.rightsidenews.com/2012061616432/world/geopolitics/islam-in-germany-qgermany-does-away-with-itselfq.html>; Jorn Madslien, *Norway's far right not a spent force*, BBCNEWS, <http://www.bbc.co.uk/news/world-europe-14260195> (last updated July 23, 2011); Robert Bridge, *Rise of right-wing extremism rattles Europe*, RT (July 25, 2011, 7:03 PM), <http://rt.com/politics/norway-extremism-russia-multiculturalism/>; Sylvia Poggioli, *Norway Questions Its Tolerance Of Extremism*, NPR (July 26, 2011), <http://www.npr.org/2011/07/26/138696308/norway-questions-its-tolerance-of-extremism>.

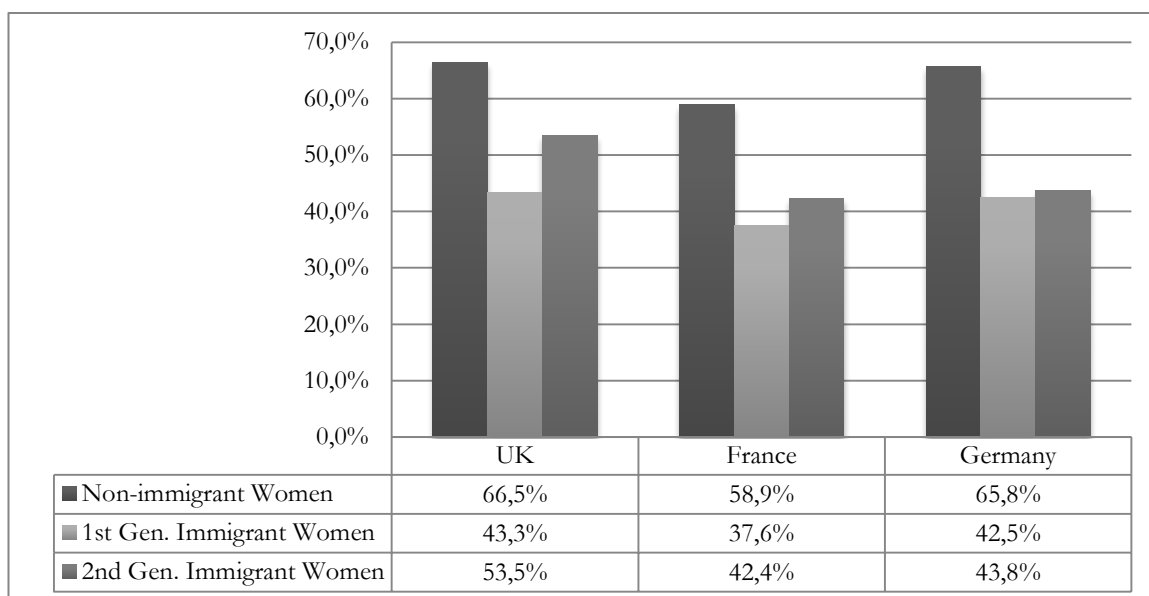
<sup>337</sup> *Surveys show UK antipathy towards immigration is growing*, WORKPERMIT (Sep. 19, 2012), <http://www.workpermit.com/news/2012-09-19/surveys-show-uk-antipathy-towards-immigration-is-growing>; *Anti-Immigration Sentiment Rises in 'Tolerant' Norway*, NORWAY NEWS (Oct. 7, 2011, 11:47 AM), <http://www.norwaynews.com/en/~view.php?72Wb554BNb4825s285Jnf844TN3883QW76ECp353Nb48>; see Transatlantic Trends Report 2011 available at [http://trends.gmfus.org/files/2011/12/TTI2011\\_Topline\\_final1.pdf](http://trends.gmfus.org/files/2011/12/TTI2011_Topline_final1.pdf).



## Employment Rates<sup>338</sup>



<sup>338</sup> Yann Algan, Christian Dustman, Albrecht Glitz, Alan Manning, *The Economic Situation of First and Second-Generation Immigrants in France, Germany and the United Kingdom*, 120–542 *The Econ. J.* F4-f30 (2010) available at <http://ideas.repec.org/a/ecj/econjl/v120y2010i542pf4-f30.html>.



However, the scope of this chapter extends beyond immigration and integration; at its core the chapter examines the very nature of society in an effort to provide a ‘snap-shot’ with respect to tensions between society and extremist groups and individuals. This is largely a descriptive chapter based on numerous interviews with both subject matter and country specific experts conducted in Holland, Norway, the UK and Israel. The interviews were conducted with a broad range of individuals including academics, politicians, members of the mainstream and alternative media, think tank ‘wonks’, law enforcement officials, convicted terrorists, national security officials, religious leaders and politicians.<sup>339</sup> Many experts graciously agreed to continue the dialogue via phone conversation or written correspondence; others shared their research, both published and in manuscript form. In aiming to create a ‘visual’ regarding each society the attempt is to understand significant domestic issues that define contemporary society.

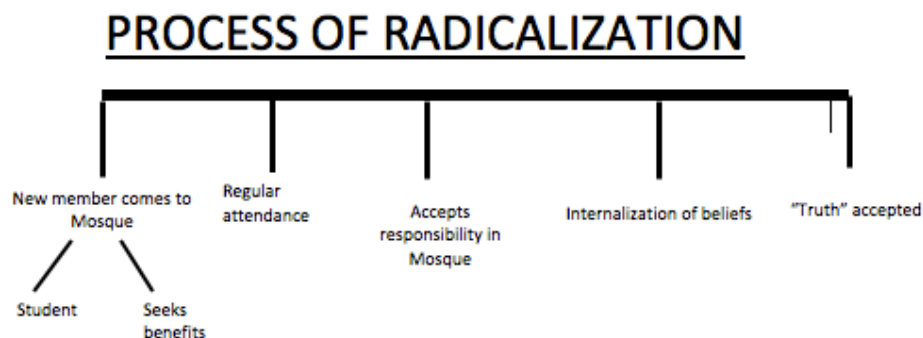
The four countries that are the particular focus of this chapter-----Holland, Norway, Israel and the UK---confront complicated intersections and forks in the road that require thoughtful resolution with one eye focused on today and the second on tomorrow. The complexity and tensions belies what Steven Pinker has suggested regarding the decline of violence.<sup>340</sup> Because of the insidious manner in which extremism poses dangers to society, analysis of its nature and impact requires an examination beyond empirical data. That is, while empirical data may reflect a decrease in violence, extremism’s impact on society extends beyond specific acts of violence, whether against individuals or groups.

<sup>339</sup> Notes of all conversations are in my records

<sup>340</sup> STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (Viking Adult, 2011).

By way of example: the demands by Israeli Orthodox Jews for gender discrimination on public transportation led the Israel Supreme Court, in the seminal case regarding separation on buses between the sexes, to ask whether “Have we gone back to the days of Rosa Parks”.<sup>341</sup> The harassment, humiliation and verbal abuse directed at women who either sat in the front of a bus or whose attire was arbitrarily deemed insufficiently modest are but examples of values predicated on extremist interpretation of religiosity. While numbers are undoubtedly important the long-term impact on individuals and society from extremism---whether religious or secular in orientation----must be both understood and addressed.

Essential to the discussion is recognition that extremism does not *inherently* endanger society; the question is in its manifestation and implementation. Thoughts alone do not pose a risk to society or specific individuals alone. However, when those thoughts are either ‘translated’ to action or are on the precipice of harm society must protect itself. Needless to say, much disagreement exists regarding the distance between the precipice and actual harm; defining that distance is essential in determining when society can impose limits on otherwise guaranteed rights and freedoms.



## II. Holland

Among several European commentators there is a great concern that Europe today is largely composed of ‘parallel societies’.<sup>342</sup> In raising the specter of ‘parallel societies’ the focus is, in the Netherlands, on first or second-generation immigrants to Holland from Morocco and Turkey. In the context of social tensions a critical question is one of allegiance and identity; according to a leading Dutch academic Moroccan youth identify with Islam whereas Turkish

<sup>341</sup> HCJ 746/07 Naomi Regan v. Ministry of Transportation, [http://elyon1.court.gov.il/files\\_eng/07/460/007/t38/07007460.t38.htm](http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.htm).

<sup>342</sup> See discussion in Chapter Three. One of the first authors who expressed concern about this was: Phillips, Melanie, *Londonistan: How Britain is Creating a Terror State Within*, Gibson Square, London 2006. She expressed similar ideas in: Phillips, Melanie, *The World Turned Upside Down: The Global Battle over God, Truth, and Power*, Encounter Books, New York and London 2010.

youth identify with Turkey.<sup>343</sup>

Jean Tille and Marieke Sloomman's research sheds light on the radicalization of Moslem youth in the Netherlands:

Muslims differ from the average resident of Amsterdam especially in the two core convictions. Muslims are three times more likely to consider their religion superior to others than the Christians in Amsterdam, and they are more likely than the average Amsterdammer to find the debate about Islam is conducted in a negative manner. These differences indicate a gap between many Muslims, especially Moroccans, and the average Amsterdammer in their religious beliefs (or at least in the manner these beliefs are formulated) and in their perception of the social discourse. Turkish Muslims agree with the average Amsterdammer in their perceptions of the debate about Islam although they are in general more orthodox than Moroccans. These differences seem relevant to us, because contrasts with the rest of society can lead to a mutual feeling of discord and of not being understood.<sup>344</sup>

This research is particularly relevant for it highlights both the reality and danger of alienation from mainstream society significantly facilitates the ability of extremists to 'prey' on disaffected youth contributing to their radicalization. In discussing immigration in the context of extremism the question is the degree of integration into larger society. That question, however, works 'both ways': to what extent does traditional Dutch society welcome immigrant values, mores and norms. Important with respect to this issue to reference the significant scholarship of Professor Paul Scheffer; Scheffer's book 'Immigrant Nations' is particularly insightful regarding a number of issues addressed in this chapter. Similar to Professor Minow's article regarding tolerating intolerance,<sup>345</sup> Professor Scheffer writes:

It's clear that in times of large-scale immigration tolerance is put to the test. Innumerable people have arrived in the Netherlands after growing up in unfree societies. Sometimes, conservative Muslims express beliefs that were commonplace some 40 years ago, but that doesn't make them any less disturbing in the here and now. This was clearly demonstrated by a case known to the Dutch as the el-Moumni affair. A Rotterdam imam at the An-Nasr mosque, who had been banned from preaching in Morocco because of his radical beliefs, caused a huge stir when he delivered a sermon in which he said of homosexuality, among

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<sup>343</sup> Private conversation, records in authors notes.

<sup>344</sup> Marieke Sloomman and Jean Tillie, *Processes of Radicalisation: Why some Amsterdam Muslims become radicals*, INST. FOR MIGRATION AND ETHNIC STUDIES. UNIV OF AMSTERDAM (Oct. 2006) available at <http://dare.uva.nl/document/337314>.

<sup>345</sup> See Chapter One.

other things: 'If this sickness spread, everyone will be infected and that could lead to us dying out'<sup>346</sup>

Furthermore, according to Scheffer:

The Dutch now find themselves with a new religious community in their midst, and this time history, language and the constitution can't be assumed to serve as ties that will mitigate division. In the past it was possible to find shared points of reference.....The extent to which the Dutch underestimate the command of a common tongue as one of the essential sources of mutuality available in their fragmented country is remarkable.....In the Netherlands today, the Dutch language cannot be taken for granted as a shared vehicle, given many immigrants' limited proficiency in it<sup>347</sup>

In quoting August Hans den Boef, Scheffer points out that "Integration via the mosque means integration within religious communities that are divided along national and regional lines and led by their conservative male segments, which largely consist of people from tribal cultures who have little education. In Dutch Muslim communities most children attend black schools, or Islamic schools that are an extension of the mosque."<sup>348</sup>

With respect to social tensions in the context of immigrant communities Scheffer writes:

A nation that enjoys freedom of religion can make room for Islam only on condition that the vast majority of Muslims accept their duty to defend that same freedom for people with whom they fundamentally disagree. This attitude is lacking in many mosques, where the principles and institutions of liberal democracy are questioned and in some cases rejected. Governments have looked away for a long time, not wanting to cause conflict.<sup>349</sup>

In this vein, a major study undertaken by Ineke Roex, Sjef van Stiphout and Jean Tillie is of particular importance. According to this study:

"Sensitivity to radicalism and extremism is higher among orthodox Dutch Muslims. Their tolerance towards a multi-religious society is lower, they think that Dutch women have too much freedom, they politically participate less in society, they identify less with The Netherlands and, most importantly, they think, more than other groups, that violence is a

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<sup>346</sup> PAUL SCHEFFER, IMMIGRANT NATIONS 121 (Polity 2011).

<sup>347</sup> *Id.* at 125.

<sup>348</sup> *Id.* at 127.

<sup>349</sup> *Id.* at 128.

legitimate means for religious goals.”<sup>350</sup>

In 1994 the European Court of Human Rights (Strasbourg) held:

“Freedom of thought, conscience and religion is one of the foundations of a ‘democratic society’ within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, skeptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”<sup>351</sup>

There is, then, a powerful tension between secular society and religious society; in examining contemporary social tensions the question is whether the two societies can co-exist under one umbrella. The question is posed not with respect to mainstream, moderate faith but in the context of an extremist articulation of faith in which civil law is secondary to religious law. In many ways the question goes to the nature of society; in the context of the extremist-moderate discussion the tension is to what extent should otherwise protected rights be honored by the state when they challenge, if not endanger, public order and offend group and personal sensitivities. The tension is significantly exacerbated in the context of immigration and alienation reinforced by an economic crisis that undermines society’s stability and structure.<sup>352</sup>

According to Tille and Slooman :

Feelings of deprivation are widespread among Muslims in the Netherlands. This feeling is fed by the current tone of debate. Although some feel victimised, there is a certain degree of actual socio-economic deprivation. For example, there has been an increase in the percentage of students from immigrant backgrounds who go on to higher education, from approximately a sixth in 1996 to around a quarter in 2002, but this is still far below the half of all students from a Dutch background who register for higher education. Secondary school drop-outs are also more common among young people with immigrant backgrounds. In Amsterdam, 6 percent of the native-born Dutch working population is unemployed, compared with 16 percent of the Turks and 28 percent of the Moroccans.

The situation of the Turks has improved since 1997, but that of

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<sup>350</sup> See Ineke Roex, Sijf van Stiphout and Jean Tillie, *Salafisme in Nederland*, INSTITUUT VOOR MIGRATIE-EN ETNISCHE STUDIES, 2010 at viii.

<sup>351</sup> *Kokkinakis v. Greece*, 260 Eur. Ct. H.R. ¶ 16 (1993) (cited in Doe on page 43).

<sup>352</sup> For discussion regarding Norway see *Committee on the Elimination of Racial Discrimination*, UN (Mar. 11, 2011), available at [http://reliefweb.int/sites/reliefweb.int/files/resources/FDF662F16DB156F385257853006165FB-Full\\_Report.pdf](http://reliefweb.int/sites/reliefweb.int/files/resources/FDF662F16DB156F385257853006165FB-Full_Report.pdf).

the Moroccans has deteriorated. Both the first and the second generation of immigrants are disappointed in the opportunities they have in the Netherlands....The first generation guest workers are mostly dissatisfied with their own housing situation and their financial position. They are also disappointed that their children do not have the social and economic opportunities they had hoped for. The younger generation, who see their future in the Netherlands, experiences stigmatisation and discrimination in their daily lives.

With respect to second-generation radicalization, Tillie and Sloodman note:

Due to the disappearance of the national-ethnic ties and the contact with Dutch society, many young people seek their own version of Islam, 'pure' and free from the 'superficial' Moroccan traditions of their parents. This way the children can take their own respectable place in the community. Parents are often labeled as ignorant by their own children. Some of these developments are approved of by parents because they wish to see that their children take religion seriously, but some find the young people are becoming too strict. These parents then begin to fear that their children are putting too much distance between themselves and Dutch society, limiting their social options and opportunities.<sup>353</sup>

On the issue of self-identification, Tillie and Sloodman comment:

In our conversations with the interview subjects, we learned that young people increasingly identify themselves with their religion. They call themselves 'Muslim' more often. This was noticed by Buijs, Demant and Hamdy. This trend towards identifying oneself as a Muslim is not only an individual self-identification, but also a result of labelling by others. In Dutch society, there is still a split between immigrants and the native-born Dutch – the terms 'allochtone' and 'autochtone', implying language skills and not ethnic background, are used frequently in the Dutch media and illustrate this division, increasingly formulated as Islamic versus non-Islamic. In so doing, a 'Muslim category' is created, especially by the media. Muslims are often spoken of as a group, in the Netherlands as well as internationally.<sup>354</sup>

Marginalization from mainstream society often leads to radicalization among young immigrants and natives alike. According to a European Commission's Expert Group on Radicalization:

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<sup>353</sup> *Id.* at 51.

<sup>354</sup> *Id.* at 54.



At the global level, polarising tendencies and radicalisation processes can be witnessed within many religious, ethnic and cultural population aggregates. Within this global mood that is also characterised by widespread feelings of inequity and injustice a very acute sense of marginalisation and humiliation exists, in particular within several Muslim communities worldwide as well as among immigrant communities with a Muslim background established in European countries.

The widespread feeling of humiliation and uncertainty basically rests upon a whole array of widely diverging specific local circumstances. As in the past, it offers fringe groups an opportunity to justify their recourse to terrorism.<sup>355</sup>

### III. Norway

Anders Breivik targeted the future generation of the Labor Party, young people at the vanguard of what he detests: a more multicultural, ethnically and religiously integrated Norway.<sup>356</sup>

“Following the horrific attacks that left 76 dead in Norway last week, many European leaders have been asking questions about the dangers of right-wing radicalization in the region. In recent years European Union member countries have seen growing support for right-wing populist groups but the attacks confessed to by Anders Behring Breivik took their anti-Islam, xenophobic ideology to an entirely new and deadly level.

In hopes of preventing similar events, this week both European Union interior ministers and the European law enforcement agency Europol pledged to review the dangers posed by far-right extremists within the 27 member states. The topic of radicalization has been tacked on to the agenda for the late September meeting of the Justice and Home Affairs Council, to which non-EU member Norway has now also been invited. Meanwhile, an EU anti-radicalization network already set in motion last year is set to take up its work earlier in the same month.

In a blog entry announcing the new measures on Monday, European Commissioner for Home Affairs Cecilia Malmström referred to Breivik's 1,500-

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<sup>355</sup> *Radicalisation Processes Leading to Acts of Terrorism*, EUR. COMM., May 15, 2008, available at [http://www.rikcoolsaet.be/files/art\\_ip\\_wz/Expert%20Group%20Report%20Violent%20Radicalisation%20FINAL.pdf](http://www.rikcoolsaet.be/files/art_ip_wz/Expert%20Group%20Report%20Violent%20Radicalisation%20FINAL.pdf).

<sup>356</sup> Eric Westervelt, *Norway 'Still Shattered' As Extremist Goes On Trial*, NPR (Apr. 15, 2012, 6:02 AM), <http://www.npr.org/2012/04/15/150661728/norway-still-shattered-as-extremist-goes-on-trial>.

page online manifesto<sup>357</sup> saying that while it was clearly written by a disturbed individual, some of his sentiments were not uncommon to contemporary European political discourse. "I have many times expressed my concern over xenophobic parties who build their unfortunately quite successful rhetoric on negative opinions on Islam and other so-called threats against society," she wrote. 'This creates a very negative environment, and sadly there are too few leaders today who stand up for diversity and for the importance of having open, democratic and tolerant societies where everybody is welcome.'<sup>358</sup>

In June 2012 I spent the better part of a week in Norway; during the course of the week I met with a wide range of Norwegian academics, thought leaders, law enforcement/national security officials and politicians.<sup>359</sup> Some of those I met with testified at Breivik's trial; others had followed it to varying degrees of intensity and interest. One individual was acquainted with a survivor of the attack and had mutual friends with one victim. I repeatedly emphasized that if not for Breivik, research relevant to this project would not have taken me to Norway. In the aftermath of July 22, 2011 my interlocutors fully agreed with my rationale.

They did so with a heavy heart both because of the horrific results of Breivik's attack and deep concern regarding a profound undermining of traditional Norwegian mores and norms. The initial finding that Breivik was insane was unanimously rejected; consensus was repeatedly articulated that Norwegian society must acknowledge homegrown extremism exists in its midst. A common refrain was were Breivik not an ethnic Norwegian<sup>360</sup> the question of his sanity would not have been raised either by the Court or Prosecutor. In other words, internalizing that a right-wing ethnic Norwegian extremist murdered 77 fellow ethnic Norwegians poses significant challenges for Norwegian society.

On the other hand, hyperbole must be avoided; Breivik evidentially acted alone and his actions have not led others to commit to similar acts.<sup>361</sup> Unlike terrorist organizations such as al-Qaeda, Hamas, IRA and the Tamil Tigers Breivik is a lone wolf, closer to Timothy McVeigh<sup>362</sup> and the Unabomber<sup>363</sup> than to Osama bin

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<sup>357</sup> See Breivik's Manifesto available at <http://www.breiviksmanifesto.com/> (last visited Jan 11, 2013).

<sup>358</sup> EU Declares Fight Against Right-Wing Extremism, SPIEGEL (July 27, 2011), <http://www.spiegel.de/international/europe/after-norway-eu-declares-fight-against-right-wing-extremism-a-776985.html>; For a thoughtful discussion regarding the dangers of unlimited free speech see Sindre Bangstad, *Whatever Happened To Norway's Incitement Laws?*, INST. OF RACE RELATIONS, (Oct. 20, 2011), <http://www.irr.org.uk/news/whatever-happened-to-norways-incitement-laws/>.

<sup>359</sup> Notes of all conversations in my records

<sup>360</sup> Ethnic Norwegians here means "native."

<sup>361</sup> These lines are accurate to June 6, 2013

<sup>362</sup> See generally Ted Ottley, *Timothy McVeigh & Terry Nichols: Oklahoma Bombing*, TRUTV, [http://www.trutv.com/library/crime/serial\\_killers/notorious/mcveigh/dawning\\_1.html](http://www.trutv.com/library/crime/serial_killers/notorious/mcveigh/dawning_1.html) (last visited Jan. 13 2012).

Laden. Breivik's manifesto, largely a 'cut and paste' of innumerable articles, blogs, commentary and writings of others claims Norwegian leaders have surrendered to 'cultural Marxism' thereby endangering contemporary Norway. A careful reading of the manifesto and discussions with Norwegian thought leaders indicates that 'cultural Marxism' is, in essence, an euphemism for 'multiculturalism' that favors and benefits immigrants, particularly Moslems. In other words, Breivik accuses Norway's leaders of capitulating to Islam harkening back to Churchill's warnings regarding the dangers of appeasement. From Breivik's perspective, "cultural Marxism" reflects a direct harm to contemporary Norwegian society and culture.

Breivik references the Norwegian government during the Second World War established by the Nazi's in the wake of Germany's occupation of Norway. In other words, according to Breivik, contemporary Norwegian leadership is the modern day Quisling; the reference is to Vidkun Quisling who collaborated with the Nazi's by serving in a puppet government.<sup>364</sup> In other words, according to the manifesto, modern day Norwegian leadership much like Quisling is collaborating with an external force. Quisling collaborated with Nazi Germany while modern day Norwegian leaders are collaborating with Islam. In that vein, the Nazi occupation threatened Norway, while occupation by Islam endangers modern Norway. The fault, according to Breivik, lies with Norwegian leadership rather than with the immigrants themselves who are the beneficiaries of the former's policies. It is for that reason that Breivik directed his attack at present and future Norwegian leadership. Re-articulated: fault, according to Breivik, lies with national leaders rather than with those who benefit from misbegotten policy; the latter are beneficiaries, the former are legitimate targets.

On Friday July 22, 2011 a car bomb detonated in downtown Oslo blowing out windows in the Prime Minister's office and damaging the oil and finance ministries. As a result of this attack, 8 people were killed and 290 wounded. According to multiple sources the late hour (3:27 pm) of the attack minimized the loss of life. After detonation of the bomb Breivik drove to Utoeya Island, the site of a Labor Party youth camp. Traveling by ferry, dressed in police uniform and heavily armed Breivik immediately opened fire upon arrival on the island. Logistical difficulties encountered by Norwegian law enforcement officials enabled Breivik to conduct his attack largely undisturbed for over an hour. When police arrived Breivik immediately surrendered; his casualties numbered 69 killed, 33 wounded.<sup>365</sup> Over the course of three hours Breivik's two attacks resulted in 77 deaths and over 300 wounded.

As quickly became apparent, Breivik's attacks were neither spontaneous nor

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<sup>363</sup> See generally Ted Ottley, *Ted Kaczynski: The Unabomber*, TRUTV, [http://www.trutv.com/library/crime/terrorists\\_spies/terrorists/kaczynski/1.html](http://www.trutv.com/library/crime/terrorists_spies/terrorists/kaczynski/1.html) (last visited Jan. 11, 2013).

<sup>364</sup> Vidkun Quisling, Britannica available at <http://www.britannica.com/EBchecked/topic/487555/Vidkun-Quisling>.

<sup>365</sup> For a timeline of the attacks see Timeline: How Norway's terror attacks unfolded, BBCNews, <http://www.bbc.co.uk/news/world-europe-14260297>, (last updated Apr. 17, 2012).

impulsive. Both the manifesto and his actions on July 22 reflect careful planning, significant attention to detail and rigorous self-discipline that enabled gathering materials necessary for both attacks. Breivik's statements at his trial before the Oslo District Court confirmed the intensity and depth of planning, the motivation for the attack, identification of the victims as traitors and complete lack of remorse.<sup>366</sup> In addition, Breivik had planned on capturing and beheading former Norwegian Prime Minister Gro Harlem Brundtland who was also on the island; however, technical difficulties forced him to abandon this idea.<sup>367</sup> Conversations with Norwegian security officials confirmed that Breivik 'flew under the radar' of the intelligence community and was, therefore, able to prepare, unabated, over the course of a number of years.<sup>368</sup>

Breivik's claim to belong to a secret organization modeled on the medieval Christian military order the Knights Templar has not been substantiated. Similarly, evidence supporting his claims to have links with far right British groups has not been presented. Conversations with Norwegian subject matter experts, including those who testified before the Oslo District Court confirmed Breivik's self-assessment that he was motivated by extreme right-wing ideology that, in the context of a civil war, seeks to protect Norway from multiculturalism, traitors and Moslems. In his statements before the Court, Breivik assumed responsibility for his actions; therefore, the sole question is whether Breivik was sane on July 22, 2011.

An initial psychiatric evaluation determined that he was insane, suffering from paranoid schizophrenia and therefore not responsible for his actions. Subsequent psychiatrist evaluations indicated Breivik is not psychotic and must be held accountable for his actions.<sup>369</sup> The prosecution, in its closing statement, asked the Court to find Breivik insane; Breivik requested the Court find him sane but acquit on the grounds that he was protecting Norway from those who support and facilitate Islamic immigration.<sup>370</sup> The question of Breivik's sanity is of paramount importance: if found insane then his actions can be dismissed as those of a 'psychotic', whereas if the Court finds him sane Norwegian society is confronted with powerful and troubling questions regarding its make-up and character. A public opinion poll found 74% of the public believes Breivik mentally competent to be sentenced to prison.<sup>371</sup>

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<sup>366</sup> *Anders Breivik details Norway massacre plans, cite Al-Qaeda inspiration*, WASHINGTON POST (Apr. 20, 2012), <http://www.washingtonpost.com/world/exclude/anders-breivik-details-norway-massacre-plans-cites-al-qaeda-inspiration/2012/04/20/>;

<sup>367</sup> Karen Kissane, *Breivik reveals chilling plan to behead PM*, SMH (Apr. 20, 2012), <http://www.smh.com.au/world/breivik-reveals-chilling-plan-to-behead-pm-20120419-1xaib.html>.

<sup>368</sup> Private conversations; notes in author's records.

<sup>369</sup> *Prosecutors in Norway call for Breivik insanity verdict*, BBCNEWS <http://www.bbc.co.uk/news/world-europe-18530670> (last updated June 21, 2012).

<sup>370</sup> Balazs Koranyi, *Prosecutors want mass killer Breivik ruled insane*, REUTERS (June 21, 2012), <http://www.reuters.com/article/2012/06/21/us-breivik-trial-idUSBRE85K0TT20120621>.

<sup>371</sup> Julia Gronnevet and Karl Ritter, *Norway prosecutors assert Breivik insane*, YAHOO (June, 21, 2012), <http://news.yahoo.com/norway-prosecutors-assert-breivik-insane-184515198.html>.

The question of Breivik's sanity goes far beyond Breivik himself; it cuts to the core of homegrown right wing extremists 'living in our midst'. The overwhelming majority of individuals whom I met responded candidly when queried about their initial reaction to the news reports regarding the bombing (not the island attack): "I was stunned al-Qaeda had come to Norway" was the standard response.<sup>372</sup> However, when hearing reports regarding the second (island) attack my interlocutors articulated gradual awareness that the attacker must be an ethnic Norwegian. Their belief was predicated on an assumption that al-Qaeda would not deliberately attack a gathering of the Labor Party youth organization convening on Utoeya Island for their annual meeting. The initial reaction is similar to one expressed by many, including recognized experts, in the immediate aftermath of the Oklahoma City bombing.<sup>373</sup>

The difference between the two attacks is not insignificant; that difference contributed to the distinct responses. The first attack---a car bomb---is similar to innumerable acts of terrorism committed by terrorist organizations worldwide, over decades. It is for that reason that many expressed the sentiment "al-Qaeda in Norway". However, the second attack required information pertaining to the specific event and its location; committing the attack on the island was conditioned on information regarding logistics ----in particular ferry crossings--- that strongly suggested an act committed by an ethnic Norwegian.

Regarding Breivik, the commentary below by a Norwegian academic concisely summarizes the legal, moral, political, and cultural dilemma facing contemporary Norwegian society:

The case raises a profound moral-philosophical question for Norwegian society: Are we prepared in a thoroughly secularized society to accept and face up to the existence of evil in our midst, or must evil perpetrated by white ethnic Norwegians always be rendered as an articulation of mental illness? There is a precedent with regard to this in Norwegian courts: When non-white Norwegians kill their partners or wives, it is always rendered through the lens of 'culture' or 'religion'; when white Norwegians do the same it is always cast by the Courts and public as expressions of mental illness.<sup>374</sup>

This was not the first time right-wing extremists have committed violent acts in Norway:

On January 26 2001, fifteen-year-old Benjamin Labarang Hermansen was brutally stabbed to death in the eastern suburb of

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<sup>372</sup> Notes in author's records; also see Oyvind Strommen, *Violent "Counter-Jihadism"*, FOREIGN AFFAIRS (July 27, 2011), <http://www.foreignaffairs.com/articles/67999/oyvind-strommen/violent-counter-jihadism>.

<sup>373</sup> See generally John F. Sugg, *Steven Emerson's Crusade*, FAIR (Jan 1, 1999), <http://fair.org/extra-online-articles/steven-emersons-crusade/>.

<sup>374</sup> Excerpt from email sent to author; full text in author's records.

Holmlia in Oslo by three young neo- Nazis. Hermansen had been born to a Norwegian mother and a Ghanaian father. Joe Erling Jahr (20), Ole Nicolai Kvisler (22) and Veronica Andreassen (18) were eventually charged with the murder. Jahr and Kvisler were sentenced to 18 and 17 years in prison, whereas Kvisler's girlfriend Andreassen was sentenced to 3 years in prison as an accomplice to the murder. The three had set out from a council flat in the nearby eastern suburb of Bøler armed with knives on the day of the murder, intending to 'to attack immigrants.'<sup>375</sup>

The background for Hermansen's murder:

On 19 August 2000, a group known as the Boot Boys organized a march in commemoration of the Nazi leader Rudolf Hess. Some 38 people, wearing "semi-military" uniforms, some with their faces covered participated. One of the central Boot Boys figures made a speech, in which he stated:

We are gathered here to honor our great hero, Rudolf Hess, for his brave attempt to save Germany and Europe from Bolshevism and Jewry during the Second World War. While we stand here, over 15,000 Communists and Jew-lovers are gathered at Youngstorget in a demonstration against freedom of speech and the white race. Every day immigrants rob, rape and kill Norwegians, every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts. We were prohibited from marching in Oslo three times, whilst the Communists did not even need to ask. Is this freedom of speech? Is this democracy? Our dear Führer Adolf Hitler and Rudolf Hess sat in prison for wh...at they believed in, we shall not depart from their principles and heroic efforts, on the contrary we shall follow in their footsteps and fight for what we believe in, namely a Norway built on National Socialism (...)" The Nazi salute was made and "Sieg Heil" shouted.<sup>376</sup>

Boots Boy leader Terje Sjøli was convicted on charges of racism and anti-Semitism; on appeal, the conviction was over-turned by the Supreme Court. In

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<sup>375</sup> See generally Sindre Bangstad, After Anders Breivik's conviction, *Norway must confront Islamophobia*, GUARDIAN (Aug. 28, 2012), <http://www.guardian.co.uk/commentisfree/belief/2012/aug/28/anders-breivik-norway-islamophobia-muslims>; see also Newo-Nazis held for Oslo 'racist' murder, BBCNEWS (Jan 29, 2001), <http://news.bbc.co.uk/2/hi/europe/1142780.stm>, Steve James, *Mass protests against racist murder in Norway*, WWSWS (Feb. 11, 2001), <http://www.wsws.org/articles/2001/feb2001/norw-f13.shtml>.

<sup>376</sup> See Committee Elimination of Racial Discrimination available at <http://www.unhchr.ch/tbs/doc.nsf/0/b0f01303db356e96c125714c004eb10f?Opendocument> (last visited Jan 11, 2013).

2004 this decision was appealed to the UN Committee on the Elimination of Racial Discrimination that issued an unusually strong opinion against the Norwegian Supreme Court.<sup>377</sup> In their appeal the petitioners---the Jewish community of Oslo and the Norwegian Antiracist Center---contended they are victims of violations by the State party of articles 4 and 6 of the Convention.<sup>378</sup>

The thrust of their petition is that they were “not afforded protection against the dissemination of ideas of racial discrimination and hatred, as well as incitement to such acts, during the march of 19 August 2000; and that they were not afforded a remedy against this conduct, as required by the Convention”.<sup>379</sup> The Committee’s final recommendation in its opinion is that “the State party take measures to ensure that statements such as those made by Mr. Sjolie in the course of his speech are not protected by the right to freedom of speech under Norwegian law.”<sup>380</sup>

However, the Boot Boys was not the first extreme right-wing xenophobic anti-immigration group in Norway<sup>381</sup> for the White Election Alliance party was established in 1993. Important to recall that previous anti-immigrant resistance movements were largely dominated by World War II resistance heroes. From an ideological-philosophical perspective, Breivik represents a contemporary resistance movement best described as the new Crusaders fighting the third attempt by Islam to conquer Europe with assistance of internal and external collaborators. While the electorate resoundingly rejected the White Election Alliance party its campaign attention drew to the ‘immigrant question’ and particularly the role, place and legitimacy of immigrants in Norwegian society.

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<sup>377</sup> See chapter 8 for additional discussion regarding this issue; *Id.*

<sup>378</sup> Articles 4 reads: States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, inter alia:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination;

Article 6 reads: States Parties shall assure to everyone within their jurisdiction effective protection and remedies, through the competent national tribunals and other State institutions, against any acts of racial discrimination which violate his human rights and fundamental freedoms contrary to this Convention, as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination.

<sup>379</sup> Discrimination, *supra* note 406.

<sup>380</sup> *Id.*

<sup>381</sup> For a discussion of this issue see <http://www.tau.ac.il/Anti-Semitism/asw98-9/norway.htm>, last viewed July 4, 2012.



The Alliance was a legitimate political party, fully engaged in the political process in direct contrast to the Boot Boys who were “more of a hooligan group than a political movement.”<sup>382</sup> White Election Alliance leader, Jack Erik Kjuus, who advocated the forced sterilization of adopted children and foreigner’s married to Norwegians was convicted in 1997 of racism; the Norwegian Supreme Court upheld his conviction.<sup>383</sup>

The White Election Alliance originated as a joint list for the 1993 general election for two registered political parties, both lead by Jack Erik Kjuus. One of the participants were *Hjelp fremmedkulturelle hjem* [Help the aliens go home], a party originally formed in 1973 under the name *Ensliges parti* [The singles' party]. The other party, *Stopp innvandringen* [Stop immigration] was registered by Jack Erik Kjuus in 1988.

"Stop Immigration" was originally the heading of an advertisement put in the newspaper *Aftenposten* by Jack Erik Kjuus, then posing as leader of a *Tverrpolitisk velgerforbund* [Association of electors across the political spectrum]. The Association called for a referendum on a proposition recommending a total halt to granting refugees asylum. A complaint was filed against Kjuus and *Aftenposten* by the Antiracist Centre (ARC) for violation of the Penal Code Article 135a, known as the "racism article". The prosecution decided to drop the case. Chief Superintendent Anne Marie Aslakrud at the Oslo Police Department wrote in her recommendation to the Prosecution that the advertisement "ikke er rettet mot asylsøkerne, men (...) er en kritikk mot norsk innvandringspolitikk." [is not directed at the refugees, but (...) is a criticism against Norwegian immigration policies] The ARC complained to the Director General of Public Prosecutions, who found no reason to reverse the decision.

Following a campaign with immigration issues as a central topic, Stop Immigration was the choice of fewer than 9 000 voters in the 1989 elections. In relative numbers, this means 0,3 percent of the electorate, the best result for any of Kjuus' parties in general elections ever. In the local elections of 1991, Frank Hove was elected to the City Council of Drammen. Re-elected in 1995, he is the only representative of Stop Immigration with some measure of political success. In the general elections of 1993, the support for Stop Immigration was down to fewer than 2000 votes and in 1997 fewer than 500.

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<sup>382</sup> E-mail received from Norwegian subject matter expert who requested anonymity, in author's records.

<sup>383</sup> See Youth, Racist Violence and Anti-racist Responses in the Nordic Countries *available at* <http://www.nuorisotutkimusseura.fi/julkaisu/virtanen/3/4.html> (last visited Jan 13, 2013).



The Alliance participated in the general election in the counties of Akershus, Oslo and Buskerud, and received a total of 463 votes. The Fatherland Party ran in all counties, and achieved fewer than 4 000 votes altogether.<sup>384</sup>

### A. Gaining Perspective-Responses

During the course of my visit to Oslo I met with a senior security official<sup>385</sup>; over two hours we discussed a wide range of security related issues focusing on Breivik, right-wing extremism and immigration to Norway. The official was candid with respect to the intelligence community's failure to recognize Breivik as a threat; the expression used was 'Breivik flew under the radar'. While I expressed surprise at certain aspects of the operational response to the island attack the official noted that circumstances notwithstanding----the island is 38 km/24 miles from Oslo, road conditions were less than ideal, only one police helicopter was available, initial responders were focused on the Oslo bombing and the first boat available to police nearly sunk---the police response was in accordance with procedures and guidelines.

While not underestimating the extraordinary impact of and human tragedy resulting from Breivik's attack the official was unhesitating in stating that Islamic extremism poses the most pressing threat facing Norway today.<sup>386</sup> In doing so the official noted the vulnerability of both larger society and moderate Moslems to Moslem extremists who use Sharia to hinder integration by encouraging radicalization. The official noted that at public high school prayer meetings extremist Islamic views are articulated; in that vein the official expressed concern regarding the possible creation of a parallel society if state authorities and laws are not perceived as legitimate.<sup>387</sup> Regarding parallel society the official emphasized the existence of insular communities in Oslo and reality of public schools with Norwegian citizens<sup>388</sup> but not ethnic Norwegians teachers.<sup>389</sup>

In identifying Islamic extremism as posing the most significant danger to Norwegian society the official was not gainsaying the obvious threat posed by right wing extremist ethnic Norwegians; Breivik's acts and their results are undeniable with respect to their impact and harm. However in distinguishing between the two categories the official emphasized that Breivik was a classic 'lone wolf' with no organization, either in Norway or the UK, supporting,

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336 Eric Lundebj, Free speech and political exclusion, PhD Thesis, University of Oslo (2000) available at <http://www.lundebj.info/EL%20Free%20Speech%20Dissertation.pdf>.

<sup>385</sup> Name and position in author's records.

<sup>386</sup> In earlier conversations I asked Dutch and Israeli security officials what single attack causes them 'to lose sleep at night; the former responded that an attack on MP Wilders, the latter responded an attack on an ELAL (Israel national airlines) plane.

<sup>387</sup> See chapter 3,

<sup>388</sup> Reference is to children of immigrants

<sup>389</sup> For further discussion regarding schools in Europe today, see Scheffer, *supra* note 368; ethnic Norwegians refers to those who have been in Norway for generations and came from Germany, Sweden and Denmark.

facilitating or abetting him.<sup>390</sup> This in contrast to Islamic terrorism that in the overwhelming majority of instances is committed by terrorist organizations, whether international or domestic in orientation.<sup>391</sup> A caveat is required: while identifying the threat posed by Islamic extremism---as compared to right wing extremism---the security official emphasized that, presently, the number of Moslem extremists in Norway is limited.

In differentiating between the two categories, the official suggested that right wing extremists are, broadly speaking, marginalized individuals with a weak ideology<sup>392</sup> whereas Islamic extremist terrorism is the result either of incitement by Imams or self-radicalization by the actor. In many ways, Breivik's actions are akin to the latter for he largely self-radicalized though his ideology was influenced by a number of individuals, in particular the blogger Fjordman.<sup>393</sup> While Breivik represents a new form, perhaps latest incarnation is better term, of right-wing xenophobia in Norway the security official does not believe Breivik's actions will motivate others to follow in his footsteps. The evaluation represents an important perspective in assessing future "lone wolf" threats.

This assessment is arguably surprising given that Breivik was able to plan and execute his attack unencumbered by the security and intelligence community. Perhaps, the two threats---Islamic extremism and right wing extremism---are more connected than initially apparent. Breivik claims Europe is under attack from two distinct forces---Moslem immigrants and capitulating traitor governments -----therefore justifying his actions. There is an irony, if not intellectual inconsistency "at play" here: the intelligence community identifies extremist members of *that* immigrant community as *the* threat while Norway's deadliest attack was conducted by an ethnic Norwegian against other ethnic Norwegians.

To better understand the tensions and threats confronting Norwegian society it is necessary to examine three core issues: limits of free speech, the extent of integration and the role of immigrants in Norwegian society.<sup>394</sup> While free speech will be discussed in chapter 6, we turn our attention to integration and immigration. Immigration to Norway can be divided into two distinct categories: cultural immigrants from Sweden and Denmark and job seekers from Pakistan, Turkey and Morocco. A large portion of immigrants from the later is able to gain

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<sup>390</sup> Breivik has claimed both to belong to a secret organization modeled on the medieval Christian military order the Knights Templar and that he was in contact with like minded individuals in the UK; neither claim has been substantiated.

<sup>391</sup> AMOS GUIORA, GLOBAL PERSPECTIVES ON COUNTERTERRORISM (Wolter Kluwer 2007).

<sup>392</sup> A careful reading of Breivik's manifesto suggests the label of 'weak ideology' is not applicable in his case.

<sup>393</sup> Fjordman is the pseudonym of Peder Are Nøstvold Jensen is a Norwegian far-right anti-Islamic blogger; Jensen blogs extensively on the blog, Gates of Vienna, <http://gatesofvienna.blogspot.co.il/>, last viewed July 5, 2012.

<sup>394</sup> For an informative discussion regarding integration in Europe see Rinus Penninx, Dimitrina Spencer and Nicholas Van Hear, *Migration and Integration in Europe: The State of Research*, UNIV. OF OXFORD (2008) available at <http://www.norface.org/files/migration-COMPAS-report.pdf>.

entrance into Norway via Family Reunification. Family reunification means that a family member abroad is reunited with one or more members of his or her family already living in Norway. Residence permits in connection with family reunification are granted primarily to spouses or children under 18 years of age. In order for a person abroad to be entitled to family reunification, that person must be a close relative of the person in Norway with whom reunification is being sought. In special cases, cohabitant, parent and other close relatives may be granted residence permits or work permits in Norway on the grounds of family reunification. Please note that the definition of the term close relatives in Norway often comprises fewer people than is the case in certain other countries,

As a general rule, the person who is granted family reunification must be guaranteed sufficient economic support. If the conditions for family reunification are satisfied, work permits are usually granted to persons who are over 18 years of age, regardless of whether or not they have received any job offers. A work permit granted on the grounds of family reunification usually gives the holder general access to work, i.e. it is not limited to a specific job or place of work. Work permits are also granted to applicants between 15 and 18 years of age, if consent has been given by their parents or other persons with parental responsibility for them. With respect to recent immigrants from Poland and the former Yugoslavia their categorization is unclear. Subject matter experts suggest 'cultural immigrants' a more appropriate term though many of these immigrants are job seekers similar to immigrants from non-European countries.<sup>395</sup> Breivik's reference to immigrants, important to recall, is limited to Moslems; the Third Crusade is in direct response to his conviction that Moslems are seeking to conquer Europe.

The U.N. Committee on the Elimination of Racial Discrimination on February 22, 2011 heard the Norwegian delegation as follow up to the nineteenth and twentieth periodic reports of Norway regarding implementation of the provisions of the International Convention on the Elimination of all Forms of Racial Discrimination:

In preliminary concluding observations, Régis de Gouttes, the Committee Expert who served as country Rapporteur for the report of Norway, referred to issues of national legislation and the position that the Committee would like allotted to its recommendations in Norwegian domestic law. He also mentioned policies dealing with refugees, asylum seekers and migrants in Norway and expressed his concerns about the requirement of learning the Norwegian language, detention of unidentified individuals, access to jobs, medical care, education, interpretation

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<sup>395</sup> Important to note that non Norwegian Europeans (from Denmark and Sweden) are similarly job seekers (as an anecdote, a waiter from Denmark explained that economics and employment opportunities brought him to Norway).

services...<sup>396</sup>

In response the Norwegian delegate, Tora Aasland, Minister of Education and Research and Acting Minister of Children, Equality and Social Inclusion focused on the following issues:

The delegation leader said that Norwegian society was seen as homogenous despite the fact that immigrants and their children made up 11 per cent of the population. There were five national minorities living in Norway with people with backgrounds and roots from more than two hundred different countries and independent regions. This diversity was not only seen as a strength, it also contributed to Norway's economic growth and cultural enrichment. This was also a challenge to the government as the society was not immune to prejudice and xenophobia with people victims of stigmatization and discrimination. She stressed that integration policies were based on the fundamental values of Norway and included freedom of opinion and expression, gender equality, equal treatment and the right to marriage and choice of spouse.<sup>397</sup>

In the committee's final preliminary comments the following prescient warning was sounded:

The Rapporteur asked about instances of xenophobia and racist ideas by political leaders and media which might lead to racial violence and how the State could combat this. Mr. de Gouttes also talked about the discrimination experienced by minority groups. These were issues which would or should be included in the committee's final report.<sup>398</sup>

#### **IV. Israel Today**

Israel is at a crossroads on a number of critical issues; particularly important for our purposes are two separate issues: the relationship between the State and Orthodox Jews and the future of Jewish settlements in the West Bank. The first issue is purely domestic in nature while the second has clear domestic and

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<sup>396</sup> See Committee on the Elimination of Racial Discrimination considers report of Norway, UNOG (Feb. 22, 2011), [http://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear\\_en%29/1CEB5B55C2F5DB19C125783F004D000E?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear_en%29/1CEB5B55C2F5DB19C125783F004D000E?OpenDocument).

<sup>397</sup> *Id.*

<sup>398</sup> See the 19<sup>th</sup> and 20<sup>th</sup> Reports found here [http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/437/39/PDF/G1043739.pdf?OpenElementhttp://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear\\_en%29/1CEB5B55C2F5DB19C125783F004D000E?OpenDocument](http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/437/39/PDF/G1043739.pdf?OpenElementhttp://www.unog.ch/80256EDD006B9C2E/%28httpNewsByYear_en%29/1CEB5B55C2F5DB19C125783F004D000E?OpenDocument) (last visited Jan. 11, 2013).

international ramifications and implications.<sup>399</sup> The two issues are at the core of the contemporary Israeli debate. Regarding the Orthodox community the question is whether, broadly speaking, secular and religious-nationalist<sup>400</sup> Israelis will continue to bear the financial and military burden from which the Orthodox are, largely, excused. Regarding settlements the question is directly related to resolution of the Israeli-Palestinian conflict and whether an independent Palestinian state will be established in the West Bank.

The essence of extremism of Israel is directly related to both issues: increasingly strident voices in the Orthodox community are demanding separation between the sexes not based on religious text and are actively engaged in rejecting calls for an equal burden.<sup>401</sup> As discussed below, the term 'state within a state' is particularly appropriate in describing the relationship between Orthodox Jews and Israeli society; extremism is inherent to the debate in the context of how this troubling paradigm is understood and manifested by certain voices in the Orthodox community. With respect to the religious nationalist community the questions regarding settlements, the Israel-Palestinian peace process and the West Bank are neither ephemeral, nor abstract. Quite the opposite: the future of

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<sup>399</sup> The overwhelming majority of the international community's criticism of Israel is focused on Israel's occupation of the West Bank and Gaza Strip (result of the 1967 Six-Day War) and the Jewish settlements built in both areas subsequent to the war. While Israel unilaterally disengaged from Gaza in 2004, the Palestinian Authority assumed power in Palestinian cities in the West Bank (the PA does not exercise control or power over Jewish settlements in the West Bank) and Hamas controls the Gaza Strip (resulting from elections) the international community focus on the West Bank is largely restricted to these two issues. While discussion regarding the legality/illegality of Jewish settlements in the West Bank is beyond the scope of this book its relevance to both the domestic political debate in Israel and Israel's standing---if not growing isolation---in the world today is beyond dispute. The following is but an example: in 2012 Prime Minister Netanyahu, at the urging of settlement leaders, appointed a committee comprised of legal scholars to examine the status of the West Bank. This committee, chaired by former Supreme Court Justice Edmund Levy, was convened largely with the intent (of those who advocated its convening) to counter the Sasson Report (written by Talia Sasson, a former senior Ministry of Justice official); the Sasson Report (the Report was commissioned by then Prime Minister Sharon) concluded that state funds had been diverted to building West Bank settlements and outposts that violated Israeli Law. The Prime Minister's Office acknowledged that Netanyahu received the Report two weeks after Justice Levy presented the Prime Minister with the Report (June, 2012); the reason for the delay was grave concern regarding how the international community would react to the Report which concluded that Israel was not an occupier in the West Bank and that the settlements are legal. International attention and condemnation were immediate; see Isabel Kershner, *Validate Settlements, Israeli Panel Suggests*, N.Y. TIMES, July 9, 2012, [http://www.nytimes.com/2012/07/10/world/middleeast/israeli-panel-says-west-bank-presence-is-not-occupation-and-recommends-approval-of-jewish-settlements.html?\\_r=2&emc=tnt&tntemail1=y](http://www.nytimes.com/2012/07/10/world/middleeast/israeli-panel-says-west-bank-presence-is-not-occupation-and-recommends-approval-of-jewish-settlements.html?_r=2&emc=tnt&tntemail1=y); *Wrong Time for New Settlements*, N.Y. TIMES, July 10, 2012, <http://www.nytimes.com/2012/07/11/opinion/wrong-time-for-new-settlements-in-the-west-bank.html?ref=opinion>.

<sup>400</sup> I use the term 'religious nationalist' rather than 'nationalist religious' reflecting direct translation of the political party that historically represented this sector: Meflaga Da'tit Leumit (Religious Nationalist Party).

<sup>401</sup> This is a direct translation of the term used by protestors demanding draft of all Haredim to the IDF; perhaps a more accurate translation is 'shared burden' between the Haredim and the rest of Israeli society. It is an open question to what extent the demand for 'equal burden' includes Israeli Arabs who are not drafted to the IDF.

the West Bank and of Jewish settlements<sup>402</sup> raises profound religious, existential and philosophical concerns and questions for religious nationalist Jews.<sup>403</sup> As repeatedly demonstrated, extremists in the religious nationalist camp are strident in voice and violent in action. Israeli authorities have confronted religious nationalist violence for over thirty years: murderous acts of the Jewish Underground<sup>404</sup>, the assassination of Prime Minister Rabin<sup>405</sup>, attacks against both Palestinian's living in the West Bank and IDF soldiers stationed in the West Bank.

While Rabin was the target of unmitigated, venomous incitement articulated by rabbis and right wing politicians<sup>406</sup> religious nationalist extremists have engaged in violent action for decades. In large part the state has turned a blind eye; in many ways, Rabin paid the ultimate price for a reality whereby one sector of the population perceives itself as beholden to the Almighty rather than to state law. Tragically, Israeli governments----right and left alike----have failed to directly address this deliberate delegitimization. In the context of examining religious nationalist Jewish extremism, the questions are whether an assassination of a Prime Minister who orders the dismantling of Jewish settlements be deemed legitimate by rabbis, would IDF soldiers dismantling settlement be attacked and would Islamic holy sites be attacked.<sup>407</sup>

History has shown that secular and religious extremists in Israel attack both Jewish<sup>408</sup> and Palestinian<sup>409</sup> targets. It is for that reason that warnings issued by

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<sup>402</sup> Whether built with permission (referred to legal) or without authorization (referred to as illegal settlements)

<sup>403</sup> Needless to say, the issue similarly raises many questions for secular Jews opposed to the continued building of settlements in the West Bank and/or who favor a two state solution to the conflict.

<sup>404</sup> Early-mid 1980's.

<sup>405</sup> November 4, 1995.

<sup>406</sup> In August, 1995 at a right wing demonstration a 'coffin' marked Rabin was carried; walking in front of the coffin was then Member of Parliament (today Prime Minister) Benjamin Netanyahu. At a mass rally in Jerusalem (October, 1995) a photograph of Rabin was photo-shopped so that he was wearing a kaffiya (traditional Arabic headwear) and an SS uniform; on the balcony looking down at the demonstrators carrying these placards stood MP Moshe Katsav (subsequently President of the State of Israel), Ariel Sharon (subsequently Prime Minister), Benjamin Netanyahu (subsequently Prime Minister) and Tzahi Hanegbi (subsequently Justice Minister); Alan Sipress, *Leah Rabin Says Netanyahu Reverses Gains Israel Faces Renewed Isolation And Peace Is On Hold, She Told The World Affairs Council. Arafat Drew Her Praise*, PHILLY (May 22, 1997), [http://articles.philly.com/1997-05-22/news/25561645\\_1\\_tel-aviv-peace-rally-leah-rabin-prime-minister-benjamin-netanyahu](http://articles.philly.com/1997-05-22/news/25561645_1_tel-aviv-peace-rally-leah-rabin-prime-minister-benjamin-netanyahu); Hendrik Hertzberg, *Words and Deeds*, NEW YORKER, Jan. 24, 2011, [http://www.newyorker.com/talk/comment/2011/01/24/110124taco\\_talk\\_hertzberg](http://www.newyorker.com/talk/comment/2011/01/24/110124taco_talk_hertzberg).

<sup>407</sup> The Jewish Underground planned on blowing up the Dome of the Rock; according to experts such an action would have directly resulted in a regional war, if not more than that.

<sup>408</sup> For example, in February, 1983 during a Peace Now demonstration urging Prime Minister Begin to adopt the findings of the Kahane Commission regarding Sabra and Shatila Emil Grunzweig was murdered by a grenade thrown by Yona Avrushi, a right wing activist; see Emil Grunzweig Peace Now, <http://peacenow.org.il/eng/content/emil-grunzweig>, (last visited Jan. 11, 2013).

<sup>409</sup> Ori Nir, *Short History of Israeli Right Wing Terrorism*, PEACE NOW (Nov. 13, 2009, 1:55 PM), [http://peacenow.org/entries/short\\_history\\_of\\_israeli\\_right\\_wing\\_terrorism#.T\\_80a3AVxN0](http://peacenow.org/entries/short_history_of_israeli_right_wing_terrorism#.T_80a3AVxN0).

rabbis and settler leaders regarding violence that may ensue in the face of possible withdrawal from the West Bank are treated with the utmost seriousness by the Israeli security and intelligence community.<sup>410</sup> The actions of religious nationalist Jews are, obviously, important with respect to the domestic debate regarding the future of West Bank settlements. However, in direct contrast to the extremist actions of the Orthodox community events in the West Bank are newsworthy internationally resulting in extensive media coverage, reports by NGO's and statements by foreign leaders.

Orthodox Jews, as discussed below largely do not serve in the Israel Defense Forces and are the beneficiaries of an extraordinary political arrangement whereby the majority of orthodox adult males do not work in direct contrast to religious nationalist Jews who serve in the IDF and directly contribute to the Israeli economy akin to secular Jews. In the main, Orthodox Jews vote for Orthodox political parties whereas religious –nationalist Jews vote for right wing political parties committed to continued building of settlements in the West Bank.<sup>411</sup> Focusing on specific issues will facilitate understanding Israeli society and the tensions between different population groups and the resulting dangers posed to society and state alike. The issues that will draw our attention are West Bank settlements, the 'equal burden' with respect to employment and military service, and gender discrimination in Orthodox Jewry.

In a crux, religious nationalist Jews want the continued building of settlements in the West Bank and extremists view any attempt to return the land to Palestinians as an act of treason; this view is predicated on the belief that the West Bank is God given to the Jewish people as stated in the Old Testament. Extremist rabbis issue proclamations, give sermons and write books that incite; targets of the incitement include Prime Minister Rabin assassinated by Yigal Amir who acting on rabbinical incitement concluded that assassinating Rabin would seriously impede the Oslo Peace Process between Israel and Palestinians. In addition to incitement against Rabin, rabbis have pushed the limits of free speech with respect to incitement against homosexuals, Israeli-Arabs and Palestinians.

As discussed in chapter 6 the limits of free speech in Israel are broadly perceived enabling speech that would be subject to prosecution in other countries. Regarding extremist religious nationalist Jews, the intelligence community's assessment is that the government decision to return part/s of the West Bank to the Palestinians, whether unilaterally or in the context of a peace agreement, would be met with violence directed against IDF soldiers, Palestinians and Israel

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<sup>410</sup> *Jewish terrorism threat grows in West Bank*, UPI (Dec, 21, 2011), [http://www.upi.com/Top\\_News/Special/2011/12/21/Jewish-terrorism-threat-grows-in-West-Bank/UPI-83091324497138/](http://www.upi.com/Top_News/Special/2011/12/21/Jewish-terrorism-threat-grows-in-West-Bank/UPI-83091324497138/).

<sup>411</sup> Explain myriad political parties.



political leaders responsible for policy.<sup>412</sup>

The policy implemented by West Bank settlers is referred to as 'price tag'<sup>413</sup>; Ori Nir, Spokesperson of Americans for Peace Now and former Washington bureau chief of Israel's Haaretz daily describes it in the following manner:

"Price Tag," also known as "Arvut Hadadit" (Mutual Responsibility), is a set of violent tactics employed by national-religious Israeli settlers in the West Bank to deter Israeli law enforcement authorities from removing illegally-built structures from West Bank settlements. The tactics employed include attacks on Palestinians and their property, as well as attacks on Israeli military and police officers. These tactics are designed to obstruct and deter law enforcement inside settlements, but their ultimate goal is to deter Israeli leaders from implementing a possible future Israeli-Palestinian peace agreement that entails removing Israeli settlements from the West Bank.<sup>414</sup>

In broad strokes, Prime Minister Netanyahu's Likud led coalition is perceived as pro-settlement movement. However, settler leaders have voiced criticism of the government's decision to implement Supreme Court decisions regarding the dismantling of illegal Jewish settlements. In addition, acts of settler violence against Palestinian's are not an infrequent occurrence; settlers responsible for acts including damage to Palestinian property and attacks against Palestinians are, largely, not prosecuted.<sup>415</sup> This in direct contrast with respect to Palestinian terrorist attacks against Israelis; the intelligence community, IDF and law enforcement agencies conduct robust investigation, interrogation and prosecution of suspected Palestinians.<sup>416</sup>

Religious Nationalists are not involved in gender-based issues including male-female segregation on public transportation or segregation between genders on sidewalks in orthodox neighborhoods, discussed below.

Judaism is divided into two distinct categories: Ashkenazi Jews whose

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<sup>412</sup> In that context, Carmi Gilon the former Head, Israel Security Agency (1994-1996) stated that a Prime Minister who decides to return the West Bank (in whole or in part) would be assassinated; Gilon, who resigned in the aftermath of the Rabin assassination (1995) made his comments in the documentary 'Gatekeepers'. See The Gatekeepers, JFF, <http://www.jff.org.il/?CategoryID=745&ArticleID=1340> (last visited Jan. 11, 2013).

<sup>413</sup> For a compilation of 'price tag' related attacks on Palestinian targets see [http://peacenow.org/entries/price\\_tag\\_timeline#.T\\_8hNXAVwdU](http://peacenow.org/entries/price_tag_timeline#.T_8hNXAVwdU), last viewed July 12, 2012; for a report regarding 'price tag' applied in Israel (in addition to the West Bank) see [http://peacenow.org/entries/price\\_tag\\_terrorism\\_crosses\\_the\\_green\\_line#.T\\_8ivXAVxN0](http://peacenow.org/entries/price_tag_terrorism_crosses_the_green_line#.T_8ivXAVxN0), last viewed July 12, 2012.

<sup>414</sup> Ori Nir, *Price Tag*, 44 CASE W. RES. J. INT'L L. 277, (2012).

<sup>415</sup> See Saed Bannoura, *Israel Fails To Prosecute Soldiers, Settlers, who Attack Palestinians*, UNHRC (Sep. 25, 2012), <http://www.imemc.org/article/64290>.

<sup>416</sup> Eyal Gross, *Security for israeli settlers, not for Palestinians*, HAARETZ, May 28, 2012, <http://www.haaretz.com/opinion/security-for-israeli-settlers-not-for-palestinians-1.433069>.



background is European and Sephardic Jews who come from North Africa and the Middle East. Hassidic Jewry was established in Eastern Europe; the Ashkenaz Orthodox community is divided into different communities, the largest are Lita'im and Hasidim of which the largest are Gur, Viznitz and Belz. The original religious political parties in Israel were Mizrahi and Hapoel Mizrahi, which joined forces in the 1950's and formed the National Religious Party. In the early 1980's Rabbi Shach, the head of the Lita'im, broke away from Gur and its political party, Agudat Yisrael, and created two new political parties: SHAS a Sephardic orthodox party and Degel HaTorah an Ashkenazi orthodox party. These distinct communities have different beliefs and varying degrees of orthodoxy making significant efforts to ensure the supremacy of their particular rabbi and community.

Over the past decades the Orthodox population in Israel has significantly grown; by way of example in 1977 there were 6 Orthodox members of the Knesset (Parliament) whereas in 2012 there are 16 Orthodox Members of Parliament. Commensurate with an increase in political power is an increasing stridency and extremism that affects both the State and society.

The expression 'state within a state'<sup>417</sup> is used to describe the relationship between Orthodox Jews and the nation state. Simply put: the term suggests that orthodox Jews<sup>418</sup> do not contribute to Israeli society on two distinct fronts as the majority of males do not work and the overwhelming majority do not serve in the IDF.<sup>419</sup> The overwhelming majority of orthodox Jews live in self-enclosed communities, often times in poverty or near-poverty, in Israeli cities including Jerusalem, Modi'in Illit, Bnei Brak and Bet Shemesh.<sup>420</sup>

As a result of political arrangements of mutual convenience Israeli government, both Likud<sup>421</sup> and Labor<sup>422</sup>, have institutionalized and facilitated an infrastructure whereby adult Orthodox males study religious text rather than contribute to

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<sup>417</sup> When I used this expression in conversation with a former Minister in a previous Israeli government he rejected the term suggesting that Orthodox Jews are more engaged in the State than commonly believed.

<sup>418</sup> To be distinguished from religious-national Jews.

<sup>419</sup> Israel is unique in that military service is compulsory for both males and females. It is the only country in the world that maintains obligatory military service for women. This continues the tradition of female fighters during Israel's War of Independence. Males serve for three years and females for just less than two years. Israel also has one of the highest recruitment rates in the world - some 80% of those who receive summons serve. Those who are exempt from service include most minority groups, those who are not physically or psychologically fit, married women or women with children, religious males who are studying in an accredited Jewish Law institution and religious females who choose to pursue 'national service' - community work.

<sup>420</sup> NACHMAN BEN-YEHUDA, *THEOCRATIC DEMOCRACY: THE SOCIAL CONSTRUCTION OF RELIGIOUS AND SECULAR EXTREMISM* (Oxford Univ. Press 2010).

<sup>421</sup> Right-wing Israeli political party. It was founded in September 1973 to challenge the Israel Labour Party, which had governed the country since its independence in 1948, and first came to power in 1977.

<sup>422</sup> Israeli social-democratic political party founded in January 1968 in the union of three socialist-labour parties. It and its major component, Mapai, dominated Israel's government from the country's independence in 1948 until 1977, when the rival Likud coalition first came to power.

larger society. Important to note, as suggested by an Israeli subject matter expert, that the world views of Orthodox Jews and the rest of Israeli society are strikingly distinct; the phrase “we do not live in the State of Israel but rather in the Land of Israel” concisely summarizes the relationship between Orthodox Jewry and the rest of society.<sup>423</sup>

For the Orthodox Jew, the individual has no control over his destiny, as all decisions are God’s. To that extent, Orthodox Jews are not burdened by the complicated dilemmas that confront Israeli society for they do not participate in the larger national debate; the primary focus of Orthodox Jews with respect to the political process is ensuring continued government financial support of institutions that facilitate their ‘way of life’.

What has significantly contributed to a system whereby one sector in the Jewish population has a higher birth rate and whose contribution to the work force is significantly less than the rest of society is a two-tiered social benefit system. In 1977 then Prime Minister Begin implemented significant welfare payments for large families<sup>424</sup>; this legislation directly contributed to a Haredi birth rate significantly higher than that of secular and religious nationalist Jews. In addition, the Haredi birth rate was higher than that of the non-Jewish population.<sup>425</sup> In addition to benefit payments for families, non-working males whose way of life dictates that they study religious text rather than working receive monthly allowances from the government.<sup>426</sup> Orthodox Jews comprise 10% of the Israeli population<sup>427</sup> with a birth rate of 6.5<sup>428</sup> as compared to 2.7 for secular Israelis<sup>429</sup> and 4.5 for Israeli Arabs<sup>430</sup> and an employment rate significantly below that of secular<sup>431</sup>, Arab-Israelis<sup>432</sup> and national-religious Jews<sup>433</sup>

Political considerations led Prime Minister Ben Gurion in 1948 to agree that

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<sup>423</sup> Private conversation; notes in author’s records.

<sup>424</sup> See what is known as the “Large Families Law.”

<sup>425</sup> Israeli-Arabs comprise approximately 20% of the Israeli population. See *Latest Population Statistics for Israel*, JEWISH VIRTUAL LIB. (Sep. 2012), [http://www.jewishvirtuallibrary.org/jsource/Society\\_&\\_Culture/newpop.html](http://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/newpop.html).

<sup>426</sup> See generally Yair Ettinger, *Israel to defend special welfare payments to yeshiva students before High Court*, HAARETZ (Nov. 13, 2012, 3:49 AM), <http://www.haaretz.com/news/national/israel-to-defend-special-welfare-payments-to-yeshiva-students-before-high-court.premium-1.477280>.

<sup>427</sup> See generally Aaron Heller, *Israeli Draft Pits Secular Jews vs. Ultra-Orthodox*, HUFFINGTON POST (July 7, 2012, 3:09 PM), [http://www.huffingtonpost.com/2012/07/07/israeli-draft-pits-secular-orthodox-jews\\_n\\_1655909.html](http://www.huffingtonpost.com/2012/07/07/israeli-draft-pits-secular-orthodox-jews_n_1655909.html).

<sup>428</sup> Hleihel, A. 2011. Fertility among Jewish and Muslim Women in Israel, by Level of Religiosity, 1979-2009. Working Paper Series, No. 60, Jerusalem: Israel Central Bureau of Statistics (in Hebrew).

<sup>429</sup> See facts and figures from TAUB CENTER FOR SOCIAL POLICY STUDIES IN ISRAEL (2009) available at <http://taubcenter.org.il/>.

<sup>430</sup> *Id.*

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> *Id.*

Orthodox Jews receive deferments<sup>434</sup>; when that decision was made, much criticized today, there were 600 male draft age Orthodox Jews (out of a population of 600,000) whereas today there are 63,000 (Jewish population of almost 6 million)<sup>435</sup>. In order to create a mechanism whereby Orthodox Jews would be drafted into the IDF then Prime Minister Ehud Barak (2001) convened the Tal Commission<sup>436</sup>; the commission's suggestion that Orthodox males receive a deferment until the age of 22 at which point they could decide whether to serve or learn<sup>437</sup> was adopted into law (2002). However, the government subsequently admitted that the Law did not satisfactorily resolve the question of induction of Orthodox Jews though proponents cited the establishment of a religious brigade within the IDF<sup>438</sup> as an indicator of successful implementation.

Nevertheless, the Israel Supreme Court struck down the law; the President (akin to Chief Justice) of the Court, Dorit Beinisch wrote, ""The law, which has already been found in violation of the right to equality as part of the right to dignity, does not meet the proportionality standard and is therefore unconstitutional""<sup>439</sup>. The Court gave the government until August 1, 2012 to resolve the issue; failure to do so would result in automatic induction of all Orthodox Jews, a measure Orthodox rabbis and political parties deeply resist and oppose.

#### **A. Orthodox Jewry and Women**

Orthodox Jewry in Israel is, according to experts<sup>440</sup>, more extreme than in the past; while a number of issues reflect the increasing extremism two examples will be highlighted: separation of men and women on public transportation and on sidewalks in religious neighborhoods. Important to note that religious texts do not justify either measure; rather both are the result of Orthodox groups articulating extremist positions predicated on community and political considerations. Both measures have direct impact on the status of women in the religious community; both reflect sexual discrimination based on extremist interpretation of religious text that directly affects the rights and status of Orthodox women.

The Israeli Supreme Court held it was illegal to force women to sit in the back of public buses; nevertheless, the effort reflects a hardening of interpretation regarding gender and the status of women. While Orthodox Jewry, like other faiths, emphasizes modesty there is a sharp distinction between clothing

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<sup>434</sup> Ofer Aderet, *Battle over Haredi draft is decades old*, HAARETZ, Nov. 7, 2012, <http://www.haaretz.com/news/national/battle-over-haredi-draft-is-decades-old.premium-1.450291>.

<sup>435</sup> Israeli Arabs are not drafted to the IDF but may volunteer to serve; according to a news report (July 8, 2012; Gali-Tzahal Radio) 2,400 Israeli Arabs volunteer (2012) as compared to 240 in 2006.

<sup>436</sup> Justice Zvi Tal sat on the Israeli Supreme Court.

<sup>437</sup> Orthodox Jews study religious text in yeshivot .

<sup>438</sup> Nahal Haredi.

<sup>439</sup> Aviad Glickman, *High Court rules against extending Tal Law*, YNET (Feb. 22, 2012, 12:53 AM), <http://www.ynetnews.com/articles/0,7340,L-4193034,00.html>.

<sup>440</sup> Notes, names, emails and records of interviews with subject matter experts in author's files.

guidelines and measures that clearly discriminate against women. Measures directed at women are reflected in what has been described as a 'new religion unrelated to traditional Judaism'<sup>441</sup>: it is a religion where 'kosher is not kosher enough'<sup>442</sup>, conversions to Judaism can be cancelled, traditional female modesty is insufficient and separation of men and women is demanded with the exception of within the privacy of the home.'<sup>443</sup> With respect to increasing extremism one commentator observed that the process reflects concern, if not fear, from the increasing liberalism of the 'outside' world. In particular, the perception amongst Orthodox Jews that secular Israelis are seeking to penetrate the closed community---in part through the Internet---and to create a barrier between the Orthodox and their faith.

In the context of this enhanced concern regarding external penetration strident extremism gains legitimacy. The 'guiding hand' of a leading rabbinical authority responsible for the increasing extremism is, apparently, not to be found. Rather, the enhanced extremism is the result of 'local initiative' that increasingly sets the tone in the Orthodox communities. One of the realities of enhanced extremism in a closed community is the inevitable 'competition' with respect to articulating and implementing increasingly extreme measures. The move to separate women from men on public transportation, for instance, was not the result of a decision by a leading rabbi rather it was, literally, a grassroots movement that 'snowballed' and took on a life of its own.

According to the Israel Research Action Center Annual Report (2011):

In last year's report, (2010, ANG) we noted that almost all the demands for segregation are manifested in an effort to push women to the back, physically and figuratively. This underlines the origins of such demands in patriarchal approaches that seek to perpetuate a gender-based hierarchy. Last year, most of the demands for segregation involved situations where men occupied the front section of public space, while women were relegated to the rear. In this report, however, there are also many instances in which women are completely excluded from public space, or an entirely separate space is created for them, silencing their voice. The trend to silence women's public voice attracted considerable public attention, particularly in such contexts as the deliberate exclusion of women from public billboards in Jerusalem, and incidents when religious soldiers refused to participate in army events that included singing by women performers.<sup>444</sup>

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<sup>441</sup> Private conversation, notes in authors records.

<sup>442</sup> In an increasing number of restaurants in Jerusalem, a 'kosher certificate is no longer sufficient; rabbinical authorities are demanding 'Glatt' kosher which is both more expensive and requires greater dietary supervision.

<sup>443</sup> Private conversation, notes in authors records.

<sup>444</sup> Available at <http://www.irac.org.il/UserFiles/File/%2005.pdf> (in Hebrew).

In its ruling on the segregation of women and men on buses, the Israel Supreme Court sitting as the High Court of Justice held that coerced segregation is illegal:

The Petition filed at the beginning of 2007, concerns bus lines.....in which men and women were customarily separated. This is how the Petitioners described the prevailing reality:

“For approximately nine years, the public transportation companies.....have been operating bus lines which are called “*mehadrin* lines” [literally: “meticulous,” for orthodox or ultra-orthodox Jews who meticulously observe the religious laws]. On these lines... women are required to board by the rear door and to sit in the back of the bus, whereas men board by the front door and sit in the front seats. In addition, the women passengers are required to dress modestly (...). Women who do not resign themselves to these coercive arrangements and attempt to oppose them (.....)are humiliated and suffer severe verbal harassment, are made to leave the bus and are even threatened with physical violence.”

The Petitioners argued that these arrangements violate the principle of equality, the constitutional right to dignity, and freedom of religion and conscience – and that they are employed with no authority under the law. In effect, after four years of litigation (reviewed below), no one today can dispute that the coercive, dictated reality described above is illegal.<sup>445</sup>

In the words of Justice Rubenstein:

To clarify the situation for anyone to whom the above statement is not clear, *we will state: a public transportation operator – like any other entity under the law – is not entitled to tell, ask or instruct women where they should sit on a bus merely because they are women, or what they should wear, and they are entitled to sit anywhere they wish.* (emphasis in the original, ANG) Naturally, the same applies to men; however, for reasons that are not hard to understand, all the complaints refer to an insulting attitude toward women. When I go back and read the lines that were just emphasized above, I am amazed that it should have been necessary to write them in Israel in 2010. Have we gone back to the days of Rosa Parks, the African-American woman who, in refusing to give up her bus seat for a white passenger in 1955, helped to end racial segregation on buses in Alabama, United

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<sup>445</sup> HCJ 746/07 Naomi Ragen v. Ministry of Transportation, [http://elyon1.court.gov.il/files\\_eng/07/460/007/t38/07007460.t38.htm](http://elyon1.court.gov.il/files_eng/07/460/007/t38/07007460.t38.htm).

States, in 1955)?<sup>446</sup>

Is it really even necessary to state that it is forbidden to *coerce or order* (emphasis in the original, ANG) a woman to sit in the back rows on the bus...? Is it really necessary to state that men who *harass* (emphasis in the original, ANG) a woman who sits outside the intended area... thereby commit a forbidden act and are liable to criminal prosecution? Does not any rational person, whether secular, religious, or Haredi, understand this without explanation?<sup>447</sup>

The description below best illustrates both the reality and impact of gender segregation based on religious extremism:

“Must it really be said that an **attack** (emphasis in the original, ANG) by men on a woman who deviated from the designated female seating area (as described in some of the affidavits that were filed) is prohibited, and is likely to lead to an action in criminal court? Is this not understood and self-evident to every decent person – secular, religious or ultra-Orthodox? In one of the affidavits that were appended to the Petition, the following description (with reference to 2004) appears:

The bus was completely empty of passengers. I chose to sit on a single seat at the front of the bus. When the bus began to fill up, several ultra-Orthodox men suddenly came up to me and insistently demanded that I get up from my seat and move to the back of the bus. I was utterly horrified. I answered that I did not see rules anywhere with regard to such an arrangement on the bus...

I was subjected to an incessant attack of verbal insults and physical threats; a large ultra-Orthodox man leaned over me and berated me quite loudly throughout the entire trip. Through all that time, the driver did not intervene... I felt as if I had been subjected to ‘psychological stoning’, although I had not done anything wrong (affidavit by Petitioner 1).

Woe to the ears that hear this! And where is human dignity, “which supersedes [even] a Torah (Biblical) prohibition” (Babylonian Talmud, Brakhot, 19b). Can anyone say that this event was reasonable? In another affidavit, which refers to 2006, a National Servicewoman describes how, when traveling very late at night (the bus left Jerusalem for Ofakim after 11:00 p.m.), she did not object to separating from her [male] traveling companion and

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<sup>446</sup> *Id.*

<sup>447</sup> *Id.*

sitting in the back rows. Nonetheless:

From where I was sitting in the back, I noticed one of the passengers speaking to the driver, and after that, an uproar began next to the driver... *I understood that, as a woman, I was forbidden to approach the front of the bus myself.* (emphasis in the original, ANG) I called my partner, who was sitting in the front of the bus, on my mobile phone... My partner explained to me that passengers had spoken to the driver about how I was dressed. I should add that I was wearing a long-sleeved shirt and a skirt which came to just above the knees.

The uproar did not quiet down, and the driver turned to my partner *and demanded that we get off the bus in the middle of the road, in the dead of night* (emphasis in the original, ANG), ‘to avoid problems,’ in his words. Only after my partner passed me a long shirt, with which I was forced to cover my legs, did the uproar quiet down... The driver answered that this was Egged’s declared policy and that no one may board the ‘*mehadrin* lines’ in immodest attire (affidavit by Petitioner 2; emphases added – E.R.).

Even if we ignore the very fact of the gender separation, to which the female passenger was “resigned,” can we resign ourselves, in Israel in 2010, to the sentence “I understood that, as a woman, I was forbidden to approach the front of the bus myself”? Or to a driver who wants – Heaven help us – to make passengers get off the bus in the middle of the road, in the dead of night, because he claims that the girl’s attire does not comply with Egged’s modesty rules? I would not like to think that money – the wish to profit by operating the lines in question – would mean everything; the sages have already said “The Lord said, ‘The cry of Sodom and Gomorrah is great’ – on account of the maiden” (Sanhedrin 109b). Another affidavit stated that even the Petitioner’s proposal to cover her bare shoulders with additional clothing was not accepted by the passengers and the driver, and she *was not allowed to board the bus* (affidavit by Petitioner 5; emphasis in the original, ANG). Again: what about human dignity?”<sup>448</sup>

With respect to the increasing extremism in the Orthodox community Justice Rubenstein wrote:

It should also be noted that the phenomenon of “*mehadrin* lines” has not always existed... buses was mixed, even in places where the population was largely ultra-Orthodox, such as Jerusalem and Bnei Brak. This is, therefore, a recent phenomenon...It is possible – as has been proposed in various articles – that this is part of a

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<sup>448</sup> *Id.*

process of radicalization in ultra-Orthodox society.<sup>449</sup>

As reported in the Israel Action Research Institute annual report, segregation is not limited to public transportation; the report highlights gender segregation at funerals, government offices, health clinics and sidewalks. As Justice Rubenstein noted these examples highlight a process best described as radicalization in the Orthodox community; the radicalization, which is devoid of a 'guiding hand', has the practical import of discriminating against women in the name of religion. The lack of a 'guiding hand', however, does not diminish from the significance of the measures; in the name of religious extremism the community to which they belong actively discriminates against women. What is particularly troubling is the willingness of state officials to abide with extremism based gender discrimination. The following example of how a one community<sup>450</sup> in Israel celebrated the Jewish holiday of Simhat Torah is instructive:

During the Simchat Torah celebrations in Mevasseret Zion at the end of the festival of Sukkot in 2011, which were sponsored by the local council, those present were asked to separate into two groups, one for men and one for women. Dozens of local residents left the event in protest.<sup>451</sup>

With respect to segregated sidewalks:

Ahead of the festival of Sukkot in 2011, posters were displayed around Jerusalem urging women not to enter Mea She'arim Street during the water libation celebrations, which form part of the festival. The announcement asked women to use alternative routes (such as Shvtei Israel Street) in order to reach their homes, "and thereby help avoid mingling." Reports on this subject in Haaretz and on the Kikar Hashabbat website noted that the Toldot Aharon Hassidic sect was spending a large amount of money in order to hire stewards who would be stationed on the streets in order to enforce the segregation and in order to install partitions.

Jerusalem city councilor Rachel Azaria petitioned the Supreme Court against the imposition of segregation in the area around Toldot Aharon Yeshiva. Responding to the petition, the justices noted with displeasure that the previous ruling of the Supreme Court regarding segregated sidewalks had not been enforced. The justices noted the trend toward increasingly extreme patterns of gender segregation, and determined that this injures the residents of the neighborhood and constitutes the injurious domination of

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<sup>449</sup> *Id.*

<sup>450</sup> In the name of full disclosure I reside in the referenced community, Mevasseret Zion; while my family did not attend the event, there is little doubt we would have, along with others, walked out.

<sup>451</sup> *Supra* note 477 at 38.



the residents by a minority in the neighborhood.<sup>452</sup>

## V. United Kingdom

In undertaking an examination of extremism in the UK the initial question is whether the focus will be on 'The Troubles' in Northern Ireland or analysis of more current tensions. A number of conversations led to the decision to focus on the latter and leave the former to others. To that end, a week visit to London focused on Islamic extremism and right wing extremism. Meetings and interviews I conducted focused on both; discussions highlighted differences and similarities alike. Subject matter experts included academics, journalists, politicians, senior law enforcement and security officials, extremists, policy experts focusing on both forms of extremism and practicing attorneys.

A previous visit to London<sup>453</sup> had been disconcerting; as I noted in 'Freedom from Religion':

I ended the trip with the troubling impression that British lawmakers were deliberately ignoring a serious problem confronting not only their own country, but democracies around the globe.....For one reason or another, the British government is not willing to acknowledge the reality of religious extremism in its country, and is often willing to go to great lengths to paint the problem in a different light....Some of the individuals I spoke to went even further, claiming that the true danger to the United Kingdom was not the threat posed by religious extremists, but the potential harm to British society that were to result were the government to emphasize the Islamic nature of religious terrorism.<sup>454</sup>

My trip coincided with intensive pre-Olympic planning by UK authorities; while I was in London the stunning incompetence of the private UK security company, G4S, hired to provide security during the Olympics was the subject of heated discussion in Parliament.<sup>455</sup> In addition, the suicide bombing in Burgas, Bulgaria (July 18, 2012) highlighted the vulnerability of tourist buses and; in the aftermath of the attack "MI5 and New Scotland Yard are reportedly thought to have raised their threat assessment in light of the terrorist attack in Bulgaria on Wednesday that killed 5 Israelis, the bus driver and a suicide bomber. In addition, the Sunday Times reports, the Israeli government has dispatched agents from the Shin Bet and Mossad to protect its 38-strong delegation."<sup>456</sup> Perhaps reflecting a

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<sup>452</sup> *Id.* at 35.

<sup>453</sup> December, 2009 when researching 'Freedom from Religion'.

<sup>454</sup> GUIORA, *supra* note 9, at 2-3.

<sup>455</sup> Richard Allen Greene, *Olympics security failure is 'humiliating shambles,' boss concedes*, CNN (July 17, 2012), <http://edition.cnn.com/2012/07/17/sport/olympics-security/index.html>.

<sup>456</sup> *Report: Israel fears Iranian terror attack at London Olympics*, HAARETZ (July 22, 2012, 8:31 AM), <http://www.haaretz.com/news/diplomacy-defense/report-israel-fears-iranian-terror-attack-at-london-2012-olympics-1.452699>.

confluence of the two events, particularly security concerns relevant to the Olympics, conversations with subject matter experts suggested somber and sober recognition of the threats posed by extremists.

An earlier assessment by Scotland Yard Deputy Assistant Commissioner that “Islamic and terrorist are two words that do not go together”<sup>457</sup> was replaced by analysis reflecting concern regarding home-grown terrorism, particularly acts committed by Islamic extremists. In addition, concern was articulated regarding the English Defense League particularly with respect to an attack similar to Breivik’s. In that vein, security officials and policy experts were largely unanimous in their assessment that the most pressing danger was posed by a ‘lone wolf’, particularly an Islamic extremist. In discussing the threat posed by ‘lone wolves’ unanimity was voiced regarding their intent but questions were raised regarding their capability.<sup>458</sup>

With respect to dangers posed by lone wolves, security officials were candid in their assessment that significant deficiencies exist with respect to intelligence monitoring, gathering and surveillance. Subject matter experts, security officials and policy analysts alike, were unanimous in dismissing dangers posed by external threats. Meetings with subject matter experts in London focused on two distinct threats: Islamic extremism and extreme right wing extremism. While my pre-determined emphasis was on extreme right wing extremism senior security officials with whom I met were clear that the gravest threat facing the UK today is Islamic extremism.

That is, while concern was expressed regarding extreme right wing movements<sup>459</sup> the threat posed by such groups does not reach the level of Islamic extremism. British subject matter experts stressed that UK Moslem extremists are primarily interested in advancing a three part agenda: an Islamic world government, establishing Sharia in non Moslem majority countries (such as the UK) and imposing sanctions against Western armed forces in the Middle East. With respect to ERW, subject matter experts emphasized two points in particular: a powerful combination of xenophobic nationalism and support for the welfare state but not for immigrants.

In 1999 a young white man called David Copeland set off 3 nail bombs in the heart of London's black community (Brixton), Bangladeshi community (Brick Lane), and gay community (Soho) during one week, in which he killed three people and wounded 165 others. He was a former member of the British National Party and had then 'migrated' to a more extreme neo-Nazi organization which was an offshoot of a group calling itself Combat 18 (the 1 and 8

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<sup>457</sup> GUIORA, *supra* note 9 at 2.

<sup>458</sup> For material on Lone Wolves see <http://www.lonewolfproject.org.uk/resources/LW-complete-final.pdf>, last visited August 12, 2012. Violent actions/terrorism: see LONE WOLF report that lays out in documented fashion violent acts committed by far right extremists AND raises important question whether LONE WOLVES really are lone wolves.

<sup>459</sup> All the groups.

representing the numerical position of 'A' and 'H' for Adolf Hitler). But with fewer guns around, our incidents are not quite so common or severe usually as the US or other countries.<sup>460</sup>

However, the law enforcement and security community are allocating significant resources and energies to minimize the threat posed by both groups with the understanding that ERW groups have not committed acts of terrorism on the scale of Islamic extremists. Security officials and other subject matter experts repeatedly commented those responsible for terrorist acts in the UK, other than 'the Troubles' in Northern Ireland, were committed either by British citizens or those residing in the UK. While the importance of external influence was recognized 'outsiders' did not commit the acts themselves. Subject matter experts, security officials and policy analysts alike, were unanimous in dismissing dangers posed by external threats.

### **A. Right Wing Extremism**

The English Defense League (EDL) is a working class, blue-collar group largely comprised of adult white males opposed to immigration fearful of losing their jobs in the broader context of an economic downturn. Much like ERW groups elsewhere in Europe they largely articulate three guiding principles: Europe is under attack (from immigrants); the need to 'reclaim our streets' (from immigrants) and the obligation to 'protect our values'. With deep roots in the football hooliganism that previously plagued the UK the EDL has engaged in violent behavior, particularly against Islamic women and at demonstrations.

The roots of the football hooligan culture are essential to the extreme right wing; perhaps it is most accurate to suggest that ERW culture mirrors that of football hooliganism. However, the relationship is complicated: while EDL songs are super-imposed on football songs (all teams have their own songs) the EDL unites fans from opposing teams who are otherwise deeply opposed to each other. That is, fans from opposing teams rally around the same political movement (EDL) because of their mutual deep opposition to immigration. However, distinct from the traditional football culture the EDL (unlike the BNP) has minority members as both Sikhs and Jews belong thereby manifesting the 'common enemy theory' (Moslems).

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<sup>460</sup> He joined the far-right British National Party in May 1997, at the age of 21. He acted as a steward at a BNP meeting, in the course of which he came into contact with the BNP leadership and was photographed standing next to John Tyndall, then leader. It was during this period that Copeland read *The Turner Diaries*, and first learned how to make bombs using fireworks with alarm clocks as timers, after downloading a so-called terrorists' handbook from the Web. He left the BNP in 1998, regarding it as not hardline enough because it was not willing to engage in paramilitary action, and joined the smaller National Socialist Movement, becoming its regional leader for Hampshire just weeks before the start of his bombing campaign. It was around this time that he visited his family doctor and was prescribed anti-depressants after telling the doctor he felt he was losing his mind.

In addition to the EDL there are 22 groups identified as xenophobic in the UK; to that end, concern was raised regarding 'outlet' for anger should the EDL cease to function given the centrality of its position amongst those who espouse extreme right wing positions.<sup>461</sup> Heightening the concern with respect to RWE is the worsening economic crisis in Europe; as history unemployment and its financial, family and social repercussions significantly enhance the dangers that emanate from targeting the 'other'.

The EDL was largely created in response to a march organized by the extremist Islamic group "Ahle Sunnah al Jamah – a splinter group from the banned extremist group al-Muhajiroun"<sup>462</sup> that demonstrated against British soldiers returning from Afghanistan at a homecoming parade in Luton.<sup>463</sup> In the aftermath of the Luton parade the group promised further marches against British soldiers returning from Afghanistan.

Unlike the British National Party (BNP) the EDL is not a political party rather it identifies itself as a movement that expresses working class anger; furthermore, the EDL seeks to distinguish itself from the BNP that is perceived as racist, anti-Semitic and fascist with clear Nazi undertones. While the BNP does not enjoy electoral success in British parliamentary elections<sup>464</sup> the British right has performed well in European Parliament elections.<sup>465</sup> The EDL does not have an ideologue akin to Peder Are Nøstvold Jensen who writes under the penname "Fjordman" and was widely quoted and cited in Breivik's manifesto.<sup>466</sup> Perhaps for that reason, the EDL is perceived as 'negative' as it is not focused on building but rather restricts its activities to espousing English values and solidarity predicated on opposition to immigration.<sup>467</sup> To that end, the EDL advocates both limits on immigration and imposing language requirements as a condition for receiving citizenship.

The sentiment that "England has been taken from me without my consent" is a powerful slogan for the ERW; it is a refrain I heard in Holland and Norway

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<sup>461</sup> As an example: UKIP (UK Independent party) exemplifies the splinter trend in extremist far right parties;

<sup>462</sup> Matthew Taylor, Jenny Percival and Vikram Dodd, *Muslim group pledges more protests against UK soldiers*, GUARDIAN (Mar. 11, 2009, 1:26 PM), <http://www.guardian.co.uk/uk/2009/mar/11/muslim-group-anti-war-protests>.

<sup>463</sup> Micheal Holden, *Anti-Islamist protest group to form a Freedom Party in Britain*, REUTERS (Mar. 24, 2012), <http://blogs.reuters.com/faithworld/2012/03/24/anti-islamist-protest-group-to-form-a-freedom-party-in-britain/>. Luton is of particular importance and concern: it is a divided city between Moslems and white working class and the possibility of further violence has been raised in the context of a tinderbox effect.

<sup>464</sup> For a UK Parliament Party breakdown see <http://www.londonelects.org.uk/im-voter/results-and-past-elections/results-2012>.

<sup>465</sup> With respect to poor election in UK elections it was suggested that the cause is powerful anti racist movements/trends in UK and because of a poor TV appearance by the party's the leader (Griffin)

<sup>466</sup> Breivik, *supra* note 386.

<sup>467</sup> As was repeatedly reinforced in conversations in Norway, Holland and UK the phrase 'anti-immigrant' is code for 'anti-Islam' as those opposed to immigration are, consistently, focused on Moslem immigrants whether from Turkey, Morocco or Pakistan.

expressing, in essence, dismay at and opposition to immigrants. In emphasizing the centrality of British values the ERW accentuates the dangers posed by the 'other' whose power is enhanced by people in position of power who are facilitating the taking of England. In that vein, working class antipathy for former UK Prime Minister Tony Blair was repeatedly mentioned as illustrative in understanding the resentment towards a public leader identified with multiculturalism.<sup>468</sup>

Distinctions are important; the EDL is not inherently opposed to ethnicity but is opposed to symbols of Islam, in particular the hijab and niqab. In opposing---perhaps resenting---over expressions of Islamic identity the EDL demands to know whether individuals are Moslems or Brits.<sup>469</sup> In asking this question the subtext is a 'loyalty check' for the concern is with overt expressions of religiosity, particularly Islam. There is, of course, an additional implied subtext: immigrants, in the guise of extremism, are detrimental to society even though their mere thoughts may not lead to terrorism. However, a public opinion poll indicated that British Moslems are the most patriotic British citizens as 81% feel British first and Moslem second; this in comparison to France where 46% of French Moslem who feel French first and Moslem second.<sup>470</sup>

## **B. The Islamic Community**

According to subject matter experts whose research focuses on the Islamic community<sup>471</sup>, Islamic extremists conduct their recruiting efforts away from the mainstream Islamic community. Unlike in the past, Imams are not the focal point either of recruitment or radicalization. Imams are not engaged in recruitment extremists and only a small minority is considered extremists; in conducting recruiting efforts outside the traditional Mosque structure extremists focus on the grass-roots level outside the traditional community. Regarding imams, the working assumption amongst experts is that Western educated imams will emphasize tolerance with respect to Western culture and values unlike those educated outside the UK.

Not dissimilar to recruiting efforts in other countries, recruiters focus their efforts on the following:

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<sup>468</sup> With respect to multiculturalism a comment repeatedly mentioned was that the British government wasted resources without knowing the context of specific groups.

<sup>469</sup> DARREN MULLOY, *AMERICAN EXTREMISM: HISTORY, POLITICS AND THE MILITIA MOVEMENT* (Routledge 2004).

States that membership is typically of the lower educated.

<sup>470</sup> Johnathan Paris, *Europe and Its Muslims*, *FOREIGN AFFAIRS* (Feb. 2007),

<http://www.foreignaffairs.com/articles/62281/jonathan-paris/europe-and-its-muslims>.

<sup>471</sup> Conversations on this issue were conducted with law enforcement officials, politicians and policy experts, including members of the Moslem community; all notes in author's records.

- 1) Individuals already involved in low-level street crime;
- 2) Individuals whose home-life is perceived dysfunctional;
- 3) Individuals with an understanding that religion provides redemption who are susceptible to conviction that violence is legitimate;
- 4) Individuals not previously involved in violence who are recruited to an 'idea' rather than to 'action'; unlike the three categories above this category focuses on individuals, particularly those exploring their identity, attracted to an idea;
- 5) Two 'convenient' recruiting tools are the Rushdie affair<sup>1</sup> and the Srebrenica massacre
- 6) Important to note that the first three categories target individuals identified as having low self esteem and therefore perceived as vulnerable, searching for a sense of identity, attracted to martyrdom; in all four categories above economic circumstances are deemed by subject matter experts as irrelevant to the recruiting

Young radicalized Moslems do not view their parents Islam as legitimate primarily because it is rooted in Pakistani culture and therefore 'contaminated' by the very culture they left. In that vein, the second and third generation challenge their parents through enhanced faith, with particular emphasis on the hijab<sup>472</sup> and niqab<sup>473</sup>; for the younger generation the niqab is viewed as manifesting extreme rejection of western society. In that context, parents are perceived as having an ethnic, rather than religious, identity; the niqab is perceived as reflecting an extreme act of devotion that distinguishes the generations.

Subject matter experts repeatedly emphasized that recruiters, in focusing on action, engage in little instruction regarding faith-based issues (in contrast to the fourth category above) stressing 'rote learning' which is not predicated on textual reasoning or analysis. In numerous conversations, the terrorist attack on July 7, 2005 was mentioned as a significant 'wake-up' call for the British Moslem community. The coordinated attack targeting civilians using London's public transport system killed 52 individuals and wounded over 700.<sup>474</sup>

The challenge confronting UK law enforcement officials similar to that faced by counterparts elsewhere is determining when does extremism become a risk; re-

<sup>472</sup> *Hijab* in Arabic means "to cover" and is generally translated as "veil." Commonly worn today by Muslim women, the veil is a hair covering or scarf that covers the head, but *hijab* also refers to modest dress and seclusion — the system of separating women from men. See Michelle MacNeill, *The Practice of Veiling*, 101 (Jun. 5, 2009), <http://suite101.com/article/the-practice-of-veiling-a123005>.

<sup>473</sup> Supporters of banning the full face cover emphasize it is a public safety measure, citing that criminals and Islamic terrorists have taken advantage of wearing the burqa to conceal their identities. Ban all face-covering masks in public places, including burqas. In 1975, a number of European towns banned the wearing of ski masks and motorcycle helmets in public, specifically because they covered the face, and so posed a security and crime risk. The same logic applies to the burqa. So, the ban on the burqa and niqab should be considered part of a broader ban on all face-covering masks in public, particularly in and around crowded areas and in public transportation. The Niqab is the face veil worn by Islamic women.

<sup>474</sup> See *Report of the Official Account of the Bombings in London 7th July 2005*, HOUSE OF COMMONS, available at <http://www.fas.org/irp/world/uk/7-july-report.pdf> (last visited Jan. 12, 2013).

articulated: when does extremism in thought merge into extremism in action. To coin a phrase, determining when extremism violence replaces non-violent radicalism is the challenge confronting law enforcement officials. That challenge is relevant to both ERW and Moslem extremists; while the two groups have distinct motivations similarities are inevitable and reflect the commonality of extremists, regardless of their circumstances and conditions.

The discussion that follows regarding free speech and what, if any, limits should be imposed is, in many ways, the essence of this project. To fully understand, much less appreciate, the power and danger of incitement it is necessary to understand the fertile ground that beckons religious and secular extremists speakers. The discussion in the pages above was intended to highlight that reality; whether extremists are motivated by secular or a religious cause, the power of the speaker, in both paradigms, is extraordinary. Whether it is sufficiently powerful to warrant imposing limits is an “open” question; however, it is one that cannot be merely shrugged off as “inconvenient” because it is source of “discomfort”. Re-articulated: the power of speech is well documented and much discussed; the question is whether liberal society sufficiently and consistently understands the dangers it poses. It is to that question that we turn our attention.

## CHAPTER SIX

### What limits should be imposed on free speech?

#### I. Israel

Approaching how to present this chapter to the reader weighed heavily on my mind at three different times: when developing the project proposal, when conducting in-country research and when researching the specific topic of free speech. A word of background is essential to understanding the approach I ultimately chose: my introduction to the extraordinary tension between free speech and incitement was as an Israeli citizen, watching, deeply concerned, as the religious and political right -wing engaged in vitriolic incitement against Prime Minister Rabin.<sup>475</sup> It is for that reason, then, that I have chosen to begin this chapter with a practical discussion regarding the tension between free speech and the price paid for that right. In doing so, I hope to ---starkly---present the reader with the realities of the free speech dilemma; the discussion, with respect to Israel, is not abstract for a terrible price was paid for tolerating incitement and intolerance. That is, both mainstream society and state agents ---acting in accordance with the law but failing to either robustly enforce existing law or legislate laws in response to ‘clear and present threats’----respected the rights of those openly, constantly and loudly inciting against Prime Minister Rabin calling him “traitor” and “murderer”.

The inciters were, primarily, right wing rabbis deeply opposed to the Oslo Peace Process; their incitement was hate filled, vitriolic and vocal. It was unrelenting and extremely discomforting; it, clearly, was a clarion call for someone to do something. Ultimately, Yigal Amir did something: he assassinated Rabin at the conclusion of an enormous gathering in Tel Aviv in support of Rabin and the peace process.<sup>476</sup> Irony of ironies, the final song at the gathering attended by hundreds of thousands of Israelis was “Song for Peace.”<sup>477</sup> The rabbis were inciting with a keen understanding of their audience: right-wing religious nationalists deeply opposed to Rabin and his policies. The incitement against Rabin represents the danger posed when a perfect confluence exists between speaker and audience; the speaker (rabbis) knew his audience (right-wing religious nationalists) extremely well and the audience (Amir) knew what the speakers expected of him. While the rabbis directly incited, politicians emboldened the vitriol against Rabin by participating in hate-filled demonstrations and rallies. While those demonstrations and rallies were not

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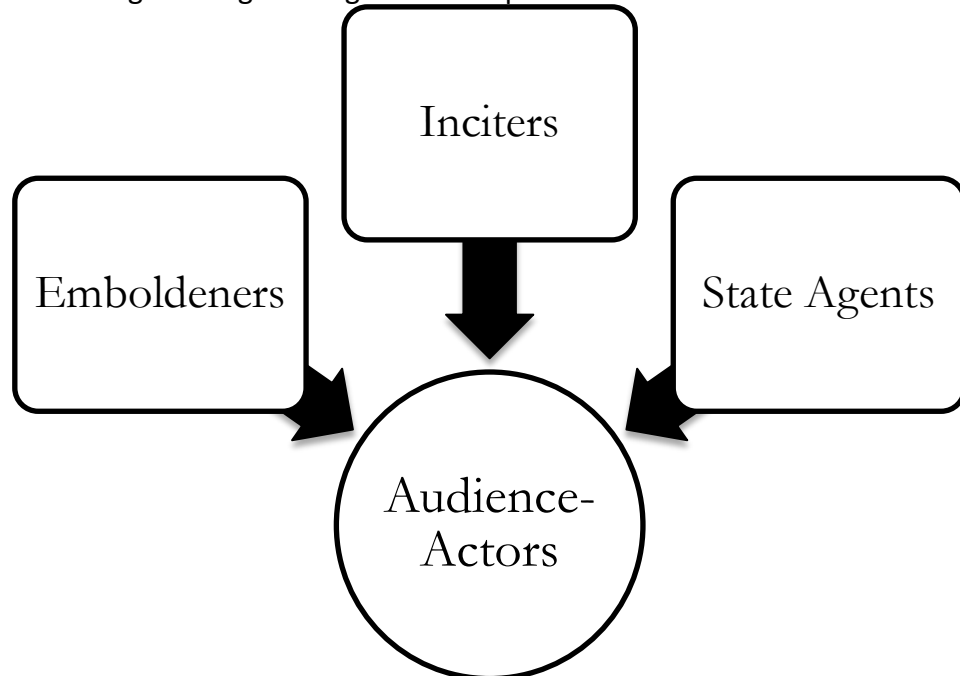
<sup>475</sup> The incitement against Rabin was directly related to his decision to engage the Palestinian’s in a peace process (the Oslo Peace Accords) intended to result in the establishment of a Palestinian state and removal of Israeli settlements from the Gaza Strip and the West Bank.

<sup>476</sup> Jerrold Kessel, *Israeli peace son symbolizes a movement*, CNN (Nov. 13, 1995, 7:05 AM), <http://www.cnn.com/WORLD/9511/rabin/11-14/index.html>.

<sup>477</sup> Lyrics can be views at <http://www.hebrewsongs.com/song-shirlashalom.htm>, (last visited Jan 11, 2013).



illegal they, undoubtedly, directly contributed to the pre-assassination hate-filled environment. The participation by leading members of the opposition party (Likud) was in full accordance with the law. Nevertheless, the presence of highly respected politicians emboldened speakers and audience alike by lending the incitement credibility and legitimacy. In the free speech-incitement dilemma the importance of legitimizing unmitigated hate speech cannot be minimized.<sup>478</sup>



The Rabin assassination, then, represents a paradigm consisting of four actors: inciters (rabbis); audience-actors; emboldeners (politicians) and state agents (charged with legislating and enforcing legislation).

Could the assassination have occurred without the embodiment of politicians and their presence at rallies and demonstrations? The answer is, in all probability, positive; nevertheless, by visibly participating the politicians legitimized the rabbinical incitement. While not a crime in accordance with the Israeli penal code it raises profound questions regarding bearing moral responsibility for the assassination.

There are particular pictures forever embedded in my memory: then Member of Parliament (today Prime Minister) Netanyahu leading a coffin bearing the sign “Yitzhak Rabin—the Murderer of Zionism”<sup>479</sup>; Members of Parliament Hanegbi, Katsav, Netanyahu and Sharon standing on the balcony in Jerusalem's Zion Square on a Saturday night, looking at placards bearing a likeness of Rabin

<sup>478</sup> Rabin's wife, Leah, refused to shake then Member of Parliament Netanyahu's hand at the funeral. See Naomi Segal, *Leah Rabin dad at 72*, JTA (Nov. 13, 2000), <http://www.jta.org/news/article/2000/11/13/6368/LeahRabindeadat7>.

<sup>479</sup> *Leah Rabin Awarded Anwar Sadat Peace Achievement Award*, NAGALIL, <http://www.hagalil.com/israel/GuShalom/maamarim/leasadat.htm> (last visited Jan. 12, 2013).

dressed in an SS uniform wearing a keffiyeh;<sup>480</sup> and hate-filled bumper stickers and slogans all but calling for violence against Rabin.

Like many Israelis, I will never forget where my family was when we heard the initial breaking news on TV that Rabin had been shot. Rabin's assassination was a transformational moment for Israelis not only individually but also as a society. The assassination dramatically affected the course of Israel's history. In conjunction with the horror associated with the assassination was deep concern at the failure of law enforcement, the state attorney and the judiciary to—in any way—satisfactorily protect Rabin either from the inciters or from his assassin, and subsequently to vigorously prosecute the rabbis who directly contributed to the assassination.

Distinctions are important: to that end, distinguishing between actions of the four politicians listed above and the rabbis who incited against Rabin is important.<sup>481</sup> That distinction is not intended to minimize the actions of the politicians but rather to distinguish between political discourse and words that directly contributed to Rabin's assassination. For two years prior to the assassination, extreme right-wing rabbis issued a variety of proclamations regarding Rabin. Rabbi Shmuel Dvir, a teacher at the Har Etzion Yeshiva, told his students that it was "definitely permissible to kill Rabin under the provision of *din rodef*."<sup>482</sup> *Din rodef* is the duty of a Jew to kill a Jew who imperils the life or property of another Jew.<sup>483</sup> Dvir even boasted to one of his students, "If Rabin comes to visit Gush Etzion, I myself will climb on a roof and shoot him with a rifle."<sup>484</sup>

The International Rabbinical Coalition for Israel, an organization of Orthodox rabbis, declared Rabin a *rodef*, a Jew who deserved to be killed because he imperiled the life or property of another Jew.<sup>485</sup> The ultra-Orthodox weekly paper, *Hashavna*, published a symposium issue addressing not only whether Rabin should be executed, but also the most appropriate method to carry out the killing.<sup>486</sup> These are but a few of the examples of the extremist religious speech that directly encouraged violence against Rabin. In the run-up to Rabin's assassination, *pulsa denura* was issued against him—a call to kill the prime

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<sup>480</sup> Traditional Arab headdress worn by men.

<sup>481</sup> See Allan C. Brownfeld review of *Murder in the Name of God: Where Religious Extremism Can Lead* by Michael Karpin and Ina Friedman, [http://www.acjna.org/acjna/articles\\_detail.aspx?id=117](http://www.acjna.org/acjna/articles_detail.aspx?id=117) last visited Jan. 10, 2013).

<sup>482</sup> Allan C. Brownfeld, *Israel: A Sharply Divided Society on the Brink of a Cultural Civil War*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, (July/August 1999), available at [www.wrmea.com/backissues/0799/9907086.html](http://www.wrmea.com/backissues/0799/9907086.html).

<sup>483</sup> Allan C. Brownfeld, *Growth of Religious Extremism in Israel Threatens the Peace Process*, WASHINGTON REPORT ON MIDDLE EAST AFFAIRS, (August/September 2000), available at [http://www.washington-report.org/archives/Aug\\_Sept\\_2000/0010072.html](http://www.washington-report.org/archives/Aug_Sept_2000/0010072.html).

<sup>484</sup> *Id.*

<sup>485</sup> Brownfeld, *supra* note 524.

<sup>486</sup> HASHAVNA (THE WEEKLY), November 3, 1995.

minister because of his decision to pursue the Oslo peace process.<sup>487</sup> The *pulsa denura*, translated as “lashes of fire,” has long been a tradition of Kabbalah, a sect within Judaism. On the eve of Yom Kippur, in 1995, rabbis gathered on the sidewalk in front of Rabin’s home after midnight to recite the ancient execration of *pulsa denura*. These 10 rabbis were disciples of the late Rabbi Meir Kahane. Avigdor Eskin,<sup>488</sup> the group’s leader, intoned, “I deliver to you, angel of wrath and ire, Yitzhak, the son of Rosa Rabin, that you may smother him and the specter of him, and cast him into bed, and dry up his wealth, and plague his thoughts, and scatter his mind that he may steadily diminish until he reaches his death.”<sup>489</sup> As Eskin chanted, the other rabbis joined in, saying, “Put to death the cursed Yitzhak, son of Rosa Rabin, as quickly as possible because of his hatred for the Chosen People.”<sup>490</sup> The ceremony came to an end with Eskin shouting, “May you be damned, damned, damned!”<sup>491</sup>

The hatred in the streets culminating in the assassination on November 5, 1995, then, serves as powerful background and introduction to free speech and incitement. While critical of Rabin on occasion, his assassination has served, for me, as the powerful reminder of the ‘power of the word’; Rabin’s murder dramatically manifests that ‘words kill’.

## II. Background Information

Given the above, the question is how to best address the question of free speech and incitement. I have chosen the following path: a brief recounting of the dramatic events of September 2012 in the Middle East in the aftermath (not necessarily in response) of the video “Innocence of Muslims” and the cartoon depiction of the Prophet Mohammed in the French magazine, Charlie Hebdo; analysis of the writings of Thomas Hobbes, John Locke, Voltaire, John Stuart Mill, Ronald Dworkin, John Rawls and Jeremy Waldron; an in-depth discussion of the history of free speech in the US; a brief discussion of free speech in the UK, Holland and Norway.

Much of the discussion regarding free speech-hate speech and what limits, if any, should be placed depend on the relationship between the speaker and the audience. While there is nothing particularly original in highlighting this relationship the profound impact of social media and its extraordinary ability to

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<sup>487</sup> The former President (Chief Justice) of the Israeli Supreme Court, Aharon Barak was also threatened with threatened with a *pulsa denura*; a police investigation determined that the threatening phone calls came from a yeshiva in the Haredi neighborhood, in Jerusalem, Mea She’arim; see NACHMAN BEN-YEHUDA, THEOCRATIC DEMOCRACY: THE SOCIAL CONSTRUCTION OF RELIGIOUS AND SECULAR EXTREMISM 78 (Oxford Univ. Press 2010).

<sup>488</sup> Eskin was subsequently convicted for violating Israel’s terrorist law for organizing the *pulsa denura* ceremony. See *A Curse Is Ruled Terrorism*, N.Y. TIMES, July 21, 1997, <http://www.nytimes.com/1997/07/21/world/a-curse-is-ruled-terrorism.html>.

<sup>489</sup> MICHAEL KARPIN AND INA FRIEDMAN, MURDER IN THE NAME OF GOD: THE PLOT TO KILL YITZHAK RABIN 90-91 (Metropolitan Books 1998).

<sup>490</sup> *Id.*

<sup>491</sup> Zion Zohar, *Pulsa De-Nura: The Innovation of Modern Magic and Ritual*, 27 MODERN JUDAISM 1, 72 (2007).

disseminate speech at, literally, the sound of speed. The traditional speech paradigm of major TV networks, newspaper dailies and mainstream radio gave way to cable TV which was largely replaced by the internet, blogs, twitter, Facebook. As repeatedly demonstrated the power of you-tube significantly surpasses the impact of traditional media.

Accordingly, in analyzing the limits of free speech it is essential to appreciate a fundamental shift in the manner in which speech is expressed and received. The events of the Arab Spring<sup>492</sup> demonstrated the ability of social media to impact, if not facilitate, political developments of historic proportions. Decision makers, clearly caught flat-footed, were remarkably disengaged from the challenges posed by this new reality. It is as if the New World had arrived under their noses, much to their total surprise.

This extraordinary shift in how speech is disseminated is essential to the discussion in the coming pages. While the full implications and ramifications are not sufficiently understood as it is, literally, a “work in progress”. Nevertheless, it represents the future and must be understood in that vein. With respect to extremism and the dangers it poses to larger society there is little doubt that social media is essential to extremists; it significantly enhances both the reach of their message and the speed with which target audiences (whether existing or future) receive the message. As has been repeatedly evident, extremists understand this new reality; the question is whether the learning curve of decision makers will reflect dexterity or clumsiness. With that, we turn our attention to the question of free speech and whether and when it should be limited when exercised by extremists.

The discussion in chapter four focused on extremism, religious and secular, in the surveyed countries; chapter five emphasized the importance of educational and employment opportunities in an effort to minimize extremism. The discussion is predicated on the assumption that extremism can, at best, be minimized; to suggest that it can be eradicated (‘wiped out’) is far-fetched and, largely, devoid of practicality. Emphasizing educational and employment opportunities assumes that an individual with a ‘stake’ in society will be vested in the larger community and therefore less willing to engage in harmful conduct. Important to recall that extremism, as defined in this book, results in conduct that harms members of internal communities and the larger community alike. While chapter five focused on creating opportunities that counter extremism this chapter focuses on limiting the rights of those who foster, develop and facilitate extremism.

Building off the lengthy discussion in chapter four, the discussion in this chapter focuses on how to limit the rights of those whose conduct---particularly speech---directly contributes to extremism. Focusing on the inciter of extremism is not

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<sup>492</sup> For a general history and background on the Arab Spring see *Arab Spring: A Research & Study Guide*, CORNELL UNIV. available at <http://guides.library.cornell.edu/content.php?pid=259276&sid=2159754> (last visited Jan 11, 2013).

intended to excuse the actor; it is, however, intended to highlight the power of speech and the repercussions of speech that falls on 'willing ears' resulting in harmful conduct.

### III. September 2012

Free speech is an inherently complex topic whose intensity is, literally, breathtaking. Intensity both in the abstract given the legal and philosophical nature of the discussion and in the practical given violent responses, world wide, to perceived insults to faith based on videos and cartoons. The events in the Middle East (September, 2012) in, perhaps, response to the video movie "Innocence of Muslims"<sup>493</sup> highlighted the tensions relevant to hate speech and free speech.<sup>494</sup> The caveats are deliberate as it is unclear to what extent the video actually precipitated the demonstrations or whether the events reflected a coordinated terrorist attack. It is an open question whether those demonstrating actually viewed the video or were responding to calls by extremist inciters seizing an opportunity for political and other purposes.<sup>495</sup> As a result of the riots at least 30 people were killed.<sup>496</sup>

Shortly after the video came to public attention the French satire magazine, Charlie Hebdo, published cartoons mocking the Prophet Mohammed. In anticipation of violent responses, the French government ordered the closing of French embassies and schools.<sup>497</sup> Ironically, the same week that the cartoon was published Salman Rushdie's autobiography, Joseph Anton, was published.<sup>498</sup> Rushdie, is, after all the classic victim of the hate speech-free speech debate; while there was no fatal attack on Rushdie (like there was in the case of Van Gogh and on Rushdie's Japanese translator) the fatwa issued by the Ayatollah Khomeini drove Rushdie to living in hiding for decades. As is the case with rioters in the Middle East ostensibly reacting to "Innocence of Muslims" it is highly unlikely that Khomeini read "The Satanic Verses" before condemning Rushdie to death. Nevertheless, what is important---for our purposes---is the combustible confluence between hate speech, free speech and incitement. Enormously

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<sup>493</sup> Sam Bacile, *Innocence of Muslims*, YOUTUBE (Sep. 16, 2012), <http://www.youtube.com/watch?v=6ySE-yYeIE>.

<sup>494</sup> For discussion regarding the video see Kent Greenfield, *Is the Anti-Muhammad Film Constitutionally Unprotected 'Fighting Words'?*, HUFFINGTON POST (Sep. 18, 2012), ([http://www.huffingtonpost.com/kent-greenfield/is-the-antimuhammad-film-b-1891345.html?utm\\_hp\\_ref=politics](http://www.huffingtonpost.com/kent-greenfield/is-the-antimuhammad-film-b-1891345.html?utm_hp_ref=politics)).

<sup>495</sup> Bounty placed on vide producer by Pakistani Minister of Railroads. *See Pakistan condemns bounty offer on film-maker*, ALJAZEERA (Sep. 23, 2012), <http://www.aljazeera.com/news/africa/2012/09/201292216919289217.html>.

<sup>496</sup> *French cartoons fuel Prophet film tensions*, DAILY STAR (Sep. 20, 2012, 1:42 AM), <http://www.dailystar.com.lb/News/Middle-East/2012/Sep-20/188633-french-cartoons-fuel-prophet-film-tensions.ashx#axzz270UPOWfT>.

<sup>497</sup> Kim Willsher, *Paris Magazine's Muhammad cartoons prompt fears for French embassies*, GUARDIAN (Sep. 19, 2012, 6:21 AM), <http://www.guardian.co.uk/world/2012/sep/19/paris-magazine-muhammad-cartoons-french>.

<sup>498</sup> *Becoming 'Anton,' Or, How Rushdie Survived A Fatwa*, NPR (Sep. 18, 2012, 3:35 AM), <http://www.npr.org/2012/09/18/161172489/becoming-anton-or-how-rushdie-survived-a-fatwa>.

complicating an already volatile convergence are two additional factors: parties opportunistically seeking to take advantage, in accordance with their respective agenda, of the film/cartoon/book and the “quick to condemn” tone adopted by policy-makers whose instinct, not necessarily based on viewing/reading, is to articulate an over-protectiveness of Islam.<sup>499</sup>

The initial description of the film by Hilary Clinton: “disgusting and reprehensible”<sup>500</sup> represents classic over-reaction in the context of the ‘over-protectiveness’ paradigm. The film, amateurish at best, depicts the Prophet Mohammed in an unflattering light but the distance between that and “reprehensible” is broad and dangerous. After all, the principles of free speech suggest that the film, like innumerable other artistic ventures<sup>501</sup>, reflect a broad range of opinions, some of them certainly causing “discomfort”, if not “anger”. However, to describe the video as “reprehensible” casts the video and its maker<sup>502</sup> in a vulnerable light with respect to those seeking to maximize, for their purposes, the repercussions of the video. In other words, Secretary of State fell into the not uncommon trap of articulating excessive mollification.<sup>503</sup> Clinton, undoubtedly unintentionally provided “food for the fodder”; it is for that reason that responses to inflammatory speech must be weighed carefully in the context of how particular audiences will interpret ‘mollifying speech’.<sup>504</sup>

#### IV. Free Speech—from the Perspective of Philosophers

In analyzing the harm in hate speech Professor Jeremy Waldron makes the following cogent observation:

Hate speech undermines this public good, or it makes the task of sustaining it much more difficult than it would otherwise be. It does this not only by intimating discrimination and violence, but

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<sup>499</sup> For a different approach see, [http://www.gulf-times.com/site/topics/article.asp?cu\\_no=2&item\\_no=532459&version=1&template\\_id=39&parent\\_id=21](http://www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=532459&version=1&template_id=39&parent_id=21) last viewed September 21, 2012.

<sup>500</sup> Brett LoGiurato, *HILLARY CLINTON: Anti-Muslim Film Is ‘Disgusting And Reprehensible’*, BUS. INSIDER (Sep. 13, 2012, 11:07 AM), <http://www.businessinsider.com/hillary-clinton-innocence-of-muslims-disgusting-2012-9>.

<sup>501</sup> With respect to the video, the word “artistic” is used generously, at best.

<sup>502</sup> Creator of the video was Nakoula Basseley Nakoula is an Egyptian-born U.S. resident. He is a Coptic Christian with past criminal conviction and a history of using aliases.

<sup>503</sup> For an example, see Brian Williams NBC News reporting on the French cartoon but noting that out of respect the cartoon will not be shown, video can be seen here <http://video.msnbc.msn.com/nightly-news/49095025#49095025>. Needless to say, one wonders whether Mr. Williams appreciates his use of the word “respect” given the total lack of respect for free speech principles exhibited by the demonstrators. see Matthew Weaver, Haroon Siddique and Tom McCarthy, *Protests over anti-Islam film and Muhammad cartoons-as it happened*, GUARDIAN (Sep. 21 2012, 4:13 PM), <http://www.guardian.co.uk/world/middle-east-live/2012/sep/21/tension-anti-islam-film-muhammad-cartoons>. It is, obviously, an open question whether they saw the cartoon while attacking Western facilities.

<sup>504</sup> For an example see, <http://www.rightsidenews.com/2012092317088/editorial/rsn-pick-of-the-day/muslim-multiculturalism-and-western-post-nationalism.html> last viewed September 23, 2012

by reawakening living nightmares of what this society was like—or what other societies have been like----in the past.<sup>505</sup>

In advocating for restrictions on hate speech Waldron writes:

.....I want to develop an affirmative characterization of hate speech laws that shows them in a favorable light---a characterization that makes good and interesting sense of the evils that might be averted by such laws and the values and principles that might plausibly motivate them.”<sup>506</sup>

Waldron is right to highlight both the need to engage in conversation regarding limiting speech and its inherent difficult and controversy. However, given the power of speech the discussion is essential; the adage ‘words kill’ is not an ephemeral concept devoid of content and history. Quite the opposite; examples of the harm caused by words are bountiful and tragic. The harm is not only to specific individuals targeted by extremists or individuals who belong to particular ethnic and religious communities but to larger society which tolerates hate speech in the name of free speech. However, as I argued in “Freedom from Religion” religious extremist speech that potentially results in harm must not be granted immunity in the name of free speech. That is, free speech must not be understood to be a holy grail unencumbered by limits, principles of accountability and restrictions imposed by legislators and the courts.

To suggest otherwise is to create, intentionally or unintentionally, a society ‘at risk’ with respect to incitement. There is, needless to say, great danger in staking out this position for it raises the specter of government regulation of free speech subject to the vagaries of legislators, courts and law enforcement. That concern is legitimate and with merit; many commentators advocate a ‘marketplace of the ideas’ approach rather than a ‘heavy-handed’ regulation based approach. Without doubt, the marketplace of ideas is compelling for it minimizes government intervention regarding speech while maximizing what Justice Holmes called “the free trade in ideas.”<sup>507</sup>

John Stuart Mill in “On Liberty”<sup>508</sup> advanced a powerful argument favoring a ‘marketplace of ideas’ paradigm regarding free speech. Mill’s argument is predicated on the principle that limits on the power government can exercise over the individual are essential; according to Mill, the state can exercise power the individual only to prevent harm to others. According to Mill the “appropriate region of human liberty comprises.....the inward domain of consciousness; demanding liberty of conscience.....liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects”<sup>509</sup> Mill highlights the two risks

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<sup>505</sup> The Harm in Hate Speech, Jeremy Waldron, Harvard University Press, 2012, pg. 4

<sup>506</sup> JEREMY WALDRON, THE HARM IN HATE SPEECH 15 (Harvard Univ. Press 2012).

<sup>507</sup> *Id.* at 25.

<sup>508</sup> JOHN STUART MILL, ON LIBERTY (Penguin Classics 1982).

<sup>509</sup> *Id.* at 25.



in limiting speech: for the state to suggest the falsity of particular speech implies state infallibility and that the risk in limiting opinion limits others from hearing a particular opinion. In that context, Mill's argument suggests the danger of government excess with respect to restricting both the right to express an opinion and the right to hear an opinion. In that spirit, Mill's notes the danger of narrowing the diversity of opinions and, accordingly, highlights the advantages of the diversity of opinions. There are, according to Mill four principle advantages to freedom of opinion: "if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true; though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; even if the received opinion be not only true, but the whole truth; the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct."<sup>510</sup>

Mill advocates expression of unencumbered free speech conditioned on fair discussion and that the opinion is expressed in temperate manner rather than unmeasured vituperation.<sup>511</sup> To that end, according to Mills human beings must be free to form and express their opinions without reserve but "opinions lose their immunity when circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act".<sup>512</sup> In other words, the limit on liberty that Mill is willing to countenance depends on whether there is a nuisance to others: "The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people".<sup>513</sup>

In that vein, Voltaire's letter, *On the Liberty of the Press and of Theatres*, to a First Commissioner (20 June 1733) is particularly insightful regarding harms emanating from government censorship.

As you have it in your power, sir, to do some service to letters, I implore you not to clip the wings of our writers so closely, nor to turn into barn-door fowls those who, allowed a start, might become eagles; reasonable liberty permits the mind to soar--slavery makes it creep.<sup>514</sup>

In *Leviathan*, Thomas Hobbes mentioned four categories of abuses of speech:

First, when men register their thoughts wrong. ....Secondly, when they use words metaphorically; that is, in other sense than that they are ordained for; and thereby deceiving others. Thirdly, when by words they declare that to be their will; which is not. Fourthly, when they use them to grieve one another.....it is but an abuse of Speech, to grieve him with the tongue, unless it be one who wee

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<sup>510</sup> *Id.* at 89.

<sup>511</sup> *Id.* at 92.

<sup>512</sup> *Id.* at 94.

<sup>513</sup> *Id.*

<sup>514</sup> *On the Liberty of the Press and of Theatres, to a First Commissioner*, WHITMAN UNIV., <http://www.whitman.edu/VSA/letters/20.6.1733.html> (last visited Jan 10, 2013).



are obliged to govern; and then it is not to grieve, but to correct and amend.<sup>515</sup>

Our concern is with Hobbes' fourth category; in particular speech, whether predicated on religion or secular extremism, that incites to harmful conduct.

While this chapter highlights the danger emanating from speech it is worth noting the distinction between religious and secular violence as noted by Hector Avalos:

Unlike many non-religious sources of conflict, religious conflict relies solely on resources whose scarcity is wholly manufactured by, or reliant on, unverifiable premises. When the truth or falsity of opposing propositions cannot be verified, then violence becomes a common resort in adjudicating disputes. That is the differentia that makes religious violence even more tragic than nonreligious violence.<sup>516</sup>

Whether Avalos' interpretation regarding the primacy of religious violence accurately reflects the reality of religious and secular violence is a matter of discussion and controversy. As this book proposes both religious and secular extremism pose significant danger to society; it is in that context that the proposal to limit free speech is offered. In an important article, "The Rise of Settler Terrorism"<sup>517</sup> Daniel Byman and Dr. Natan Sachs correctly argue: ".....to slow the tide of radicalism, Israeli leaders must denounce extremists and shun their representatives, placing particular pressure on religious leaders who incite violence."<sup>518</sup> Byman and Sach's analysis regarding rabbis who incite violence is applicable to secular extremists who incite violence; to distinguish between the two categories potentially minimizes the danger posed by both groups. In that vein, limiting the free speech of extremists who incite, whether predicated in religious or non-religious context, is essential to protecting society and members (external and internal communities) potentially at risk from extremist speech. With respect to the free speech discussion the focus is on limiting the impact of extremists who incite; Waldron's concise categories are particularly helpful:

.....opponents of hate speech legislation go out of their way to denigrate the terms in which claims about harm are phrased.....they proceed on the basis that the harm is most likely nonexistent or overblown; and that in any case it is appropriate to denigrate claims of harm in terms that would be quite fatal if they were applied to the vague and airy considerations with which, on the other side of the balance, the principle of free speech is

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<sup>515</sup> THOMAS HOBBS, *LEVIATHAN* 20-21 (Seven Treasures Pub. 2009).

<sup>516</sup> HECTOR AVALOS, *FIGHTING WORDS: THE ORIGINS OF RELIGIOUS VIOLENCE* 18 (Prometheus Books, 2005).

<sup>517</sup> Daniel Byman and Natan Sachs, *The Rise of Settler Terrorism*, *Foreign Affairs*, September/October 2012.

<sup>518</sup> *Id.* at 75.

defended.<sup>519</sup>

That said, Waldron correctly cautions regarding limits on free speech:

Defenders of hate speech regulation need to face up honestly to the moral costs of their proposals....The restrictions I have been talking about have a direct bearing on freedom to publish, sometimes on freedom of the press, very likely on freedom of the Internet.<sup>520</sup>

It is, then, a complicated cost-benefit analysis that drives this discussion. It is, as Waldron intimates, dangerous and requires honest assessment of the ramifications and price of limiting free speech. In the ideal, the tone and tenor of public debate---whether religious or secular----would not require imposing limits on free speech. However, as the discussion in this book highlights the harm posed by extremist incitement warrants government regulation and restriction. The burden, needless to say, is in careful line-drawing that avoids over-regulation while providing sufficient protection to distinct 'at risk' members of society. Line drawing is essential for it enables creation of a paradigm that facilitates answering whose speech is to be protected. Whose speech do we protect: Salman Rushdie's or those who issued the fatwa in response to publication of the *Satanic Verses*; Kurt Westergaard<sup>521</sup> or those who incited to riots resulting in numerous deaths?

The answer, from the perspective of Western civil society, is clear: the free speech of Rushdie and Westergaard must be protected and the speech of those who incite to violence in response to their ideas must be restricted. That is the essence of Dean Minow's tolerance/intolerance thesis and the basis for John Locke's 'A Letter Concerning Toleration': "The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light."<sup>522</sup>

The speech we are protecting is that of voices engaged in public debate and discussion; the speech that must be subject to regulation and restriction incites extremists to violence whether against specific voices or against particular ethnic, religious and gender groups. The difficulty is two-fold: recognition that speech need be limited and then determining where the line best be drawn. It is, then, a two-step process requiring a linear progression; devoid of step one, there is no step two. Step one poses a double risk: acknowledge that speech need be limited beyond existing parameters raises profound concerns; ignore the threat

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<sup>519</sup> Waldron, *supra* note 549 at 147-148.

<sup>520</sup> *Id.* at 148-149.

<sup>521</sup> Westergaard is the Danish cartoonist who created the controversial cartoon of the Prophet Mohammed depicted with a bomb in his turban; Westergaard hid in his home (along with his granddaughter) when an axe and knife wielding assailant attacked his home.

<sup>522</sup> John Locke, *A Letter Concerning Toleration*, CONSTITUTION.ORG, <http://www.constitution.org/il/tolerati.htm> (last visited Jan 10, 2013).

posed by extremists imposes unnecessary risks on innocent individuals, whether belonging to specific group or members of society at large, in harms way. Advocating free speech beyond present parameters is not, naturally, risk free; however, the risk in not placing limits is similarly risky, if not riskier (the over-use of the word “risk” is deliberate). The requisite line drawing poses significant legal, political, cultural and practical obstacles; however, as proposed below in the Brandenburg<sup>523</sup> discussion limits can be both articulated and implemented.

In that context, Ronald Dworkin’s comments on the First Amendment are particularly important:

The First Amendment, like many of the Constitution’s most important provisions, is drafted in the abstract language of political morality: it guarantees a “right” of free speech but does not specify the dimensions of that right—whether it includes a right of cigarette manufacturers to advertise their product on television, for instance, or a right of a Ku Klux Klan chapter publicly to insult and defame blacks or Jews, or a right of foreign governments to broadcast political advice in American elections. Decisions on these and a hundred other issues require interpretation and if any justice’s interpretation is not to be arbitrary or purely partisan, it must be guided by principle—by some theory of why speech deserves exemption from government regulation in principle. Otherwise the Constitution’s language becomes only a meaningless mantra to be incanted whenever a judge wants for any reason to protect some form of communication.<sup>524</sup>

While Dworkin’s analysis is correct it does not fully address the question of when can free speech be limited. In noting, correctly, that “freedom of political speech is an essential condition of an effective democracy” left unsaid is the fate of political speech when it nears or crosses the line of incitement. Much like John Stuart Mill (discussed below) and Justice Oliver Wendell Holmes, Dworkin emphasizes the importance of the ‘marketplace of ideas’. While, obviously, the ‘marketplace of ideas’ is an argument widely accepted in the free speech discussion I share Waldron’s concern regarding how and when limits are placed on free speech. That is, the effort to protect society from extremism and extremists----whether religious or secular----cannot rely on the ‘marketplace’ to sufficiently discriminate and distinguish between speech and incitement.

The danger, naturally, is that government will engage in a paradigm of excessive limiting of free speech in an effort to minimize the reach and impact of ‘problematic’ speakers. That is, of course, a natural and justified concern; nevertheless, that concern must not deter us from inquiring whether individuals and society are sufficiently protected from speakers whose speech dangerously

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<sup>523</sup> Brandenburg, *supra* note 54.

<sup>524</sup> Ronald Dworkin, *The Decision That Threatens Democracy*, N.Y BOOKS (May 13, 2010),

morphs into incitement. In that vein, I suggest Dworkin's assessment, while reflective of case law and widely held opinions, does not satisfactorily protect potential victims of hate speech and incitement.

## V. Free Speech in the United States

***Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.***

— *The First Amendment to the U.S. Constitution*

The First Amendment protects the freedom of speech, press, religion, assembly and petition; it is the great protector of individual rights clearly articulating limits of government power. Despite uniform support for the amorphous term “free speech,” Americans vigorously dispute both what it actually means and what it is intended to protect.<sup>525</sup> For example, 73% of Americans say the First Amendment does not go too far in protecting free speech,<sup>526</sup> yet 31% say musicians should NOT be allowed to sing songs with lyrics that others might find offensive, while 35% would support an amendment banning.<sup>527</sup>

Freedom of speech is much revered as a clear symbol of American democracy; nevertheless as the historical survey below indicates it has had clear ‘ups and downs’. US Presidents, the Congress and Courts have struggled to define the boundaries of free speech; arguably, nowhere is this struggle more evident than during wartime. While the liberal, democratic ethos advocates maximum rights of and for the individual, dangers posed by extremism requires re-examining that premise. Membership and participation in civil democratic society explicitly demand the citizen understand and respect that the rule of law is supreme. If we follow the logic of Rousseau, as citizens we are all signatories to the grand social contract.<sup>528</sup> In essence, we have given up any truly absolute rights for the safety and comfort that a government and village can provide to the individual and family; simply stated in creating society we have agreed to be subject to laws and regulations.

Beginning with the Sedition Act of 1798 continuing to present day tensions and conflicts successive presidents have struggled to balance civil liberties with national security; line drawing with respect to free speech has been the subject of robust debate.

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<sup>525</sup> First Amendment Center, *State of the First Amendment 2009* (2009) available at <http://s111617.gridserver.com/madison/wp-content/uploads/2011/03/SOFA2009.analysis.tables.pdf>.

<sup>526</sup> *Id.* at 2.

<sup>527</sup> *Id.* at 6.

<sup>528</sup> Bertram, *supra* note 35 at 74-75.

## A. Sedition Act of 1798

Shortly after the First Amendment was ratified, Congress enacted the Sedition Act (1798)<sup>529</sup> restricting freedom of speech in response to the possible outbreak of war between the US and France.<sup>530</sup> Acting out of concern that sympathizers to France would 'stir up trouble' Congress passed the Sedition Act imposing criminal penalties for saying or publishing anything "false, scandalous, or malicious" against the federal government, Congress or the president.<sup>531</sup> Twenty-five American citizens were arrested under the Act,<sup>532</sup> including a Congressman who was imprisoned for calling President Adams a man who had "a continual grasp for power."<sup>533</sup> The Act was particularly controversial; Virginia threatened to secede over this issue.<sup>534</sup>

In one of his first official acts as President, Thomas Jefferson, a bitter political opponent of President Adams and the Sedition Act, pardoned all those convicted under this law.<sup>535</sup> The Act was never challenged before the Supreme Court; forty years later, however, Congress repaid all of the fines exacted under the Sedition Act, with interest, to the legal representatives of those who had been convicted.<sup>536</sup> The congressional committee report declared that the Sedition Act had been passed under a "mistaken exercise" of power and was "null and void."<sup>537</sup> In 1964, the Supreme Court echoed this sentiment, stating "although the Sedition Act was never tested in this Court, the attack upon its validity has carried the day in the court of history."<sup>538</sup>

## B. Civil War – The Arrest of Clement Vallandigham

Upon taking office, President Lincoln was faced with a difficult choice between the lesser of two evils: permit dissenting voices to exercise their rights and risk losing states like Maryland or suppress dissent in an effort to hold the nation together.

Despite being a strong advocate for civil liberties, President Lincoln was greatly concerned with maintaining the fragile Union. In an effort to suppress pro-secessionist groups in border states like Maryland, Lincoln took several measures, including declaring martial law, suspending the writ of *habeas corpus* and arresting individuals suspected of disloyalty in those areas. Lincoln explained that harsh measures were necessary in the early days of the rebellion

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<sup>529</sup> Sedition Act of 1798, ch. 74, 1 Stat. 596.

<sup>530</sup> Constitutional Rights Foundation, *A Clear and Present Danger*, <http://www.crf-usa.org/america-responds-to-terrorism/a-clear-and-present-danger.html> (last visited Jan. 11, 2013).

<sup>531</sup> *Id.*

<sup>532</sup> *Id.*

<sup>533</sup> *Id.*

<sup>534</sup> *Id.*

<sup>535</sup> GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME*, 73 (W. W. Norton & Co. 2004).

<sup>536</sup> *Id.*

<sup>537</sup> *Id.*

<sup>538</sup> *Id.*

because “every department of the Government [had been] paralyzed by treason.”<sup>539</sup> He analogized that a limb must sometimes be amputated to save a life, but that a life must never be given to save a limb.<sup>540</sup>

In March 1863, Lincoln appointed General Ambrose Burnside the Union commander of the Department of Ohio, a state where substantial protests regarding the war had been held. After discovering that newspapers in Ohio were openly critical of the President and the war efforts, Burnside issued General Order no. 38, which announced (among other things) that “the habit of declaring sympathies for the enemy will not be allowed in this Department.”<sup>541</sup> Burnside, without Lincoln’s knowledge, established himself as the ultimate arbiter of such charges.<sup>542</sup>

In May 1863, Burnside arrested an outspoken critic of the war, Clement Vallandigham. Vallandigham was charged and convicted by a military commission, holding that his speeches “could but induce in his hearers a distrust of their own government and sympathy for those in arms against it.”<sup>543</sup> Vallandigham argued, to no avail, that his speeches were merely an appeal to the people to change public policy by lawful means.

Vallandigham immediately petitioned for a writ of *habeas corpus* in federal court. In response to his petition, Judge Humphrey Leavitt applied a balancing test between Vallandigham’s civil liberty interest and the government’s national security interest; as discussed below, this test continues to be applied today. Judge Leavitt held that General Burnside had acted reasonably given the circumstances, reasoning that during wartime, self-preservation was “paramount law,” even rising above the Constitution. Leavitt concluded it is not the judiciary’s place to overrule the Commander in Chief during wartime as a sufficient check on the President’s power already existed in Congress’ impeachment power.<sup>544</sup>

In response to pleas for the release of Vallandigham, Lincoln justified the arrest with the following statement:

It is asserted...that Mr. Vallandigham was...seized and tried “for no other reason than world addressed to a public meeting, in criticism of the... Administration, and in condemnation of the Military orders of the General.” Now, if there be no mistake about this; if this assertion is the truth and the whole truth; if there was no other reason for the arrest, then I concede that the arrest was

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<sup>539</sup> Executive Order no. 1, Relating to Political Prisoners, Feb. 14, 1862, in 2:2 *The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies* 222 (Government Printing Office 1902).

<sup>540</sup> See SHELBY FOOTE, *THE CIVIL WAR: A NARRATIVE* 630 (Random House 1963).

<sup>541</sup> STONE, *supra* note 10, at 96.

<sup>542</sup> *Id.* at 97.

<sup>543</sup> STONE, *supra* note 10, at 101.

<sup>544</sup> *Ex Parte Vallandigham*, 28 F Cases 874, 921-24 (Cir. Ct. Ohio 1863)..

wrong...

But the arrest, as I understand, was made for a very different reason...his arrest was made because he was laboring with some effect, to prevent the raising of troops; to encourage desertions from the army; and to leave the Rebellion without an adequate military force to suppress it...<sup>545</sup>

The case raised the question that is as relevant today as it was then: in times of war, should some civil liberties, otherwise protected under the Constitution, be suspended.

### C. WWI – the Espionage Act of 1917

The Espionage Act of 1917 was the first legislation since the Sedition Act (1798) to limit free speech; Passed on June 15, 1917, shortly after the U.S. entered World War I and against the backdrop of fear and uncertainty, it represents a low point for free speech in American history.

The Wilson Administration was deeply concerned about the effect that disloyalty would have on the war effort. To that end, President Wilson asked Congress to give him authority with respect to individuals that might undermine national unity. The President wanted, among other things, the power of censorship of the media, but Congress refused.<sup>546</sup> According to the legislation the following acts were subject to criminal prosecution:

To convey information with intent to interfere with the operation or success of the armed forces of the United States or to promote the success of its enemies.

To cause or attempt to cause insubordination, disloyalty, mutiny, refusal of duty, in the military or naval forces of the United States, or to willfully obstruct the recruiting or enlistment service of the United States.<sup>547</sup>

The Act also gave the Postmaster General authority to refuse to mail or to impound publications that he determined to be in violation of its prohibitions.<sup>548</sup>

In *Schenck v. United States*<sup>549</sup> the Supreme Court considered the constitutionality of the Espionage Act. Charles Schenck, the Secretary of the Socialist Party of America distributed leaflets that advocated opposition to the draft; Schenck was indicted and subsequently convicted for conspiracy to violate the Espionage Act

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<sup>545</sup> Letter from Abraham Lincoln to Erastus Corning and Others, June 12, 1863, in STONE, *supra* note 10, at 110-111.

<sup>546</sup> STONE, *supra* note 10, at 147-49.

<sup>547</sup> Espionage Act of 1917, 40 Stat 217, 219.

<sup>548</sup> *Id.* at 230-31.

<sup>549</sup> *Schenck*, 249 U.S. 47.

for having caused and attempting to cause insubordination in the military and to obstruct the recruiting process. The Supreme Court in a unanimous opinion written by Justice Oliver Wendell Holmes, Jr., ruled Schenck's criminal conviction constitutional.

According to Holmes, the First Amendment did not protect speech encouraging insubordination, since, "when a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."<sup>550</sup> In other words, the circumstances of wartime permit greater restrictions on free speech than would be allowable during peacetime.

In the opinion's most famous passage, Justice Holmes sets out the "clear and present danger" test:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic... The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>551</sup>

Holmes was quick to grant deference to the government during wartime; His analysis focuses on more on the government's ability to restrict speech during wartime as apposed to First Amendment protections. Though Holmes used the term "clear and present danger" it is unclear whether the circumstances truly satisfied such a burden. Schenck, after all, was printing and distributing anti-draft materials; whether that is akin to "shouting fire in a crowded theater" is arguable, if not doubtful. The core question is the proximity between the speech and the imminent danger arising from that speech; the facts and circumstances in *Schenck* suggest, from a historical perspective, a greatly removed nexus.

One week after *Schenck*, the Supreme Court decided two additional free speech cases. Jacob Frowherk was a copy editor who helped prepare and publish a series of antiwar articles in the *Missouri Staats Zeitung*, a German-language newspaper. Like Schenck, Frowherk was convicted under the Espionage Act and the Supreme Court, in a unanimous decision upheld his conviction.<sup>552</sup> Again Holmes gave short shrift to the First Amendment issue; though interestingly, he makes no reference in *Frowherk* or *Debs*<sup>553</sup> to the clear and present danger test.

Eugene V. Debs was an American labor and political leader and five-time Socialist Party of America candidate for the American Presidency. On June 16, 1918 Debs

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<sup>550</sup> *Id.* at 52.

<sup>551</sup> *Id.*

<sup>552</sup> *Frowherk v. United States*, 249 U.S. 204 (1919).

<sup>553</sup> *Debs v. United States*, 249 U.S. 211 (1919).



made an anti-war speech in Canton, Ohio, protesting US involvement in World War I; Debs was subsequently arrested under the Espionage Act, convicted and sentenced to ten years in prison and loss of his citizenship. The Supreme Court found Debs had shown the "intention and effect of obstructing the draft and recruitment for the war"<sup>554</sup>; in affirming his conviction the Court cited Debs's praise for those imprisoned for obstructing the draft.

This period marked a low point in free speech in America; the test articulated by Holmes in these three decisions raised great concerns regarding the limits of free speech in the US. However, when the Court reconvened for its next session, Justice Holmes apparently had a change of heart; it has been suggested by some that it was a result of his friendship and correspondence with US District Court Judge Learned Hand. Hand, much revered for his intellect would become one of the most prominent voices in American jurisprudence. Hand, in 1917, was considered a likely nominee for the US Court of Appeals; that (temporarily) changed in the aftermath of his opinion in *Masses Publishing Co. v. Patten*.<sup>555</sup>

At issue in *Masses* was a provision in the Espionage Act granting the Postmaster General authority both to refuse to mail or to impound publications he determined to be in violation of the Act. Hand held the New York postmaster's refusal to allow circulation of an antiwar journal violated the First Amendment. In his opinion Hand held if a citizen "stops short of urging upon others that it is their duty or their interest to resist the law,"<sup>556</sup> then he or she is protected by the First Amendment. Hand's opinion was reversed by the Court of Appeals; in addition, Hand—perhaps in a reflection of the tenor of the times—was not nominated to the Court of Appeals. Hand who would ultimately sit on the Appeals Court reflected that the case "cost me something, at least at the time," but added, "I have been very happy to do what I believe was some service to temperateness and sanity."<sup>557</sup>

Hand, according to many observers, had a profound impact on his friend Justice Holmes. In *U.S. v. Abrams*,<sup>558</sup> Holmes joined Justice Brandeis in dissent, taking a strong pro-speech position. In *Abrams*, the defendants were convicted for printing and subsequently throwing from windows of a New York City building two anti-war leaflets. The Supreme Court ruled 7–2 that the Espionage Act did not violate the freedom of speech protected by the First Amendment. In his dissent, Holmes wrote that although the defendant's pamphlet called for a cease in weapons production, it had not violated the act because the defendants did not have the requisite intent to cripple or hinder the United States in the prosecution of the war.<sup>559</sup> Holmes' dissent set the stage for what would ultimately become the modern-day clear and present danger test.

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<sup>554</sup> *Id.*

<sup>555</sup> *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y. 1917).

<sup>556</sup> *Id.* at 540.

<sup>557</sup> Letter from Learned Hand to Charles Burlingham, Oct. 6, 1917, excerpted in STONE, *supra* note 10, at 170.

<sup>558</sup> *United States v. Abrams*, 250 U.S. 616 (1919)

<sup>559</sup> *Id.* at 628.

#### D. Cold War – Communism

In the aftermath of WWII there was grave concern in the US regarding both the rising influence of the Soviet Union and penetration of communism and communists in the US. In 1940, Congress passed the Smith Act,<sup>560</sup> which criminalized the advocating the overthrow of the U.S. government by force or violence. In 1950 Senator Joseph McCarthy (R-WI) began a nationwide witch-hunt to root out communist sympathizers; virtually the entire nation was swept up in anti-communist fever, if not panic. Judge Hand, now sitting on the Second Circuit Court of Appeals, was critical of Senator McCarthy's efforts. In a public address, Hand stated that, "risk for risk," he would rather take chance that some traitors will escape detection" than risk spreading across the land "a spirit of general suspicion and distrust."<sup>561</sup> Now in 1950, would the great mind behind the decision in *Masses*<sup>562</sup> stand up for the First Amendment against the tidal wave of fear?

Eugene Dennis the secretary of the Communist Party of America was an outspoken advocate of communism. Dennis, along with several others party members, was indicted (July 1948) in accordance with the Smith Act for conspiring and organizing the overthrow and destruction of the United States government by force and violence. Smith and his co-defendants upon conviction by the trial court appealed to the Second Circuit. Though Hand was a strong advocate for free speech, as an Appeals Court Judge he was bound by Supreme Court precedent. In analyzing previous Supreme Court holdings Hand concluded that the Court had been applying a version of the clear and present danger test. As he eloquently put it, "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as necessary to avoid the danger."<sup>563</sup>

The question before the court, according to Hand, was one of imminence. How long must the government, having discovered such a conspiracy, wait before acting? When does the conspiracy become a "present danger?" According to Hand, "the jury found that the conspirators will 'strike as soon as success seems possible.' "<sup>564</sup> The government is not required to wait till the actual eve of hostilities; rather at the point when the danger becomes clear and present.<sup>565</sup> Hand analysis balances the clear and present danger test with national security concerns; as the level of danger increases, the imminence government must demonstrate before it can act decreases. Essentially, Hand proposed a cost-benefit analysis weighing costs of suppression with the cost of the potential harm was the speech not restricted. The Supreme Court adopted Hands balancing test holding the threat of communism justified a broader

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<sup>560</sup> Smith Act, 18 U.S.C. § 2385 (1940).

<sup>561</sup> STONE, *supra* note 10, at 399.

<sup>562</sup> 244 F. 535 (S.D.N.Y. 1917).

<sup>563</sup> *United States v. Dennis*, 183 F2d 201, 212 (1950).

<sup>564</sup> *Id.* at 212-13.

<sup>565</sup> *Id.*

interpretation of imminence. Regarding the defendant's, Judge Hand later stated he would "never have prosecuted those birds;"<sup>566</sup> in his view, the prosecution would do nothing but "encourage the faithful and maybe help the Committee on Propaganda."<sup>567</sup> But, he added, this "has nothing to do with my job"<sup>568</sup> which was to faithfully apply the law. In upholding the convictions, the Supreme Court in *Dennis*<sup>569</sup> appeared to give the 'green light' to government officials to aggressively target communist supporters. Between 1951 and 1957, the government arrested and prosecuted 145 members and leaders of the Communist Party; 108 were convicted, 10 were acquitted, and the rest were awaiting trial when *Yates*<sup>570</sup> was decided (June 1957).<sup>571</sup> In none of the prosecutions was evidence presented suggestive of concrete plans to use force or violence to overthrow the government.

But between *Dennis* and *Yates*, the political climate in America changed significantly: Stalin, the Soviet leader, passed away; an armistice had been declared in Korea; the Senate had condemned Senator McCarthy; and the public attitude toward the 'red scare' had relaxed. In addition, significant changes occurred on the Supreme Court as Justices Harlan, Brennan, Whittaker, and Chief Justice Warren, replaced justices Vinson, Reed, Minton, and Jackson; this change in the Court's make-up led to a significant shift in the Court's judicial philosophy. In *Yates*,<sup>572</sup> the Court drew a distinction between actual advocacy to action and mere advocacy in the abstract. Justice Harlan stated that the Smith Act did not prohibit "advocacy of forcible overthrow of the government as an abstract doctrine" even "if engaged in with the intent to accomplish overthrow." Such advocacy was simply "too remote from concrete action."<sup>573</sup>

While Harlan did not require that the unlawful action be imminent, he did insist that, to be punishable, the advocacy must include a call for specific, concrete action. Thus, a speaker who teaches the general principles of Marxism, even with the intent to promote a revolution, will not cross the line drawn in *Yates*; the Court recognized that actual "advocacy to action" circumstances would be "few and far between."<sup>574</sup> Indeed, following *Yates*, the government filed no further prosecutions under the Smith Act.

### **E. Incitement – Clear and Present Danger Today**

Brandenburg<sup>575</sup> is the seminal speech protection case in American jurisprudence.

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<sup>566</sup> Letter from Learned Hand to Irving Dilliard, Apr. 3, 1952, excerpted in STONE, *supra* note 10, at 401.

<sup>567</sup> *Id.*

<sup>568</sup> *Id.*

<sup>569</sup> *Dennis v. United States*, 341 U.S. 494 (1951).

<sup>570</sup> *Yates v. United States*, 354 U.S. 298 (1957).

<sup>571</sup> STONE, *supra* note 10, at 411.

<sup>572</sup> 354 U.S. 298 (1957).

<sup>573</sup> *Id.* at 318, 321.

<sup>574</sup> *Id.* at 327.

<sup>575</sup> 395 U.S. 444 (1969) (per curiam).

The U.S. Supreme Court reversed the conviction of a Ku Klux Klan leader who had advocated violence, holding that the government cannot, under the First Amendment, punish the abstract advocacy of violence.<sup>576</sup> Under *Brandenburg*, the government can only limit speech if: (1) the speech promotes imminent harm; (2) there is a high likelihood that the speech will result in listeners participating in illegal action; and (3) the speaker intended to cause such illegality.<sup>577</sup>

In an age where religious and non-religious violence threaten civil society, should this speech-protective case be re-examined, or even overruled? The question is one of line drawing; the challenge is in clearly, and concisely drawing that line. Not in a "case by case" analysis but, rather, by developing and recommending criteria for limiting freedom of speech that does not unduly trammel on otherwise guaranteed rights. As noted above, the difficulty is compounded as means of communication undergo radical transformation posing extraordinary challenges particularly when balancing broader societal interests while preserving guaranteed individual rights.

In 1964, Clarence Brandenburg, a KKK leader, was charged and convicted for advocating violence under the State of Ohio's criminal syndicalism statute for his participation in a rally and for the speeches he made. In particular, Brandenburg stated at one point "Personally, I believe the nigger should be returned to Africa, the Jew returned to Israel."<sup>578</sup> In an additional speech amongst several Klan members who were carrying firearms, Brandenburg claimed, "We're not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."<sup>579</sup> Brandenburg appealed his conviction to the Supreme Court, claiming the statute violated his First Amendment rights; the Court, in its most speech protective holding, sided with Brandenburg holding the statute violated his First Amendment rights.

However, the question is whether this holding sufficiently protects society; re-articulated: does *Brandenburg* grant the speaker too much 'wiggle room' thereby posing danger to individuals in particular and society at large. That question, widely asked, has no wrong or right answer. The answer depends on a wide range of circumstances including the respondent's political, economic cultural, social and religious background and milieu. It also depends on 'current events'; that is, the answer cannot be separated from particular developments that directly affect individuals and society alike. For that reason it is essential that discussion regarding limits of free speech be conducted dispassionately, divorced from the hurly-burly of particular events.

While the Supreme Court articulated a three-part test in *Brandenburg* the

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<sup>576</sup> *Id.* at 448.

<sup>577</sup> See *id.* at 447-48.

<sup>578</sup> *Brandenburg*, *supra* note 54.

<sup>579</sup> *Id.* at 446.

question is its efficacy in protecting individuals and society. In asking this question the intent is to not only protect the speaker's rights, but also to ensure that potential targets are sufficiently protected. Herein lies the rub: how do we satisfactorily determine there is a potential target rather than casting too broad a net thereby, unjustifiably and unnecessarily, limiting speech that does not meet the incitement test. To that end, I propose the following standard of determining whether the relevant speech morphs into incitement. My proposal is based on an analysis of *Brandenburg* that suggests its test is overly protective of freedom of speech and does not, for instance, adequately address the *potential* danger posed by a pastor who weekly preaches fire and brimstone against abortion- performing physicians.

How, after all, is a police officer supposed to know that such a sermon is meant only rhetorically and therefore fails the third element? How is a police officer to know whether there is a high likelihood that a congregant will act in the spirit of such a sermon? Furthermore, as the sermons are given weekly, does that mean the harm they promote is "imminent?" Audiences and commentators alike expressed repeated concern regarding these dilemmas; question and answer sessions resulted in little agreement, perhaps because this where the proverbial "rubber hits the road." These questions caused discomfort among many; "operationalizing" limits on free speech, after all, challenges the essence of democratic values. Needless to say, the question is one of line drawing; the challenge is to clearly draw that line.

If *Brandenburg* is to be rearticulated, an alternative clear, workable test must be established. States cannot engage in case-by-case—rather than principled—approach in determining whether religious liberties can be limited. Amorphous criteria both invite government excess and create significant due process concerns whereby speaker, potential and law enforcement will not be equipped to consistently predict whether the speech conforms to the law. Therefore, I propose three possibilities:

### **1. Unprotected Speech**

Categorizing religious extremist speech that promotes hatred or violence of others as wholly unprotected incitement, without the need for determining intent or for ascertaining whether the speech likely resulted in illegality. In other words, this approach would apply only the first element of the *Brandenburg* test and remove the last two;

### **2. Lower Intent**

Lowering the bar for the intent element of the *Brandenburg* test whenever the speaker in question is a figure of religious authority; or

### **3. Intermediate Scrutiny**

Leaving the three *Brandenburg* elements as they are, but lowering the standard

from traditional strict scrutiny to intermediate scrutiny in the case of extremist religious speech.

#### **F. Prior Restraint – Pentagon papers**

The First Amendment was intended to protect against prior restraints on speech; Blackstone declared that “the liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no previous restraints upon publication, and not in freedom from censure for criminal matter when published.”<sup>580</sup> A prior restraint prevents speech from occurring, as opposed to punishing it after the fact. It typically takes the form of a license or injunction; it has been said, that although a criminal statute “chills,” an injunction “freezes.”<sup>581</sup>

As the Supreme Court held in the Pentagon Papers case “[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”<sup>582</sup> This is because “prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.”<sup>583</sup>

The Supreme Court’s initial foray into prior restraint was *Near v. Minnesota*<sup>584</sup>; the Court held prior restraints to be unconstitutional, except in extremely limited circumstances such as national security issues. That was not the case in *Near*; quite the opposite for the ruling was in reaction to a prior restraint order issued against a newspaper (owned by *Near*) after it published exposés of Minneapolis’s elected officials’ alleged illicit activities. The Court held that the state had no power to enjoin publication of the paper as this was prior restraint reflective of censorship.

The most famous prior restraint case is known as the Pentagon Papers; in 1967, Secretary of Defense McNamara commissioned compilation of a “History of U.S. Decision-Making Process on Vietnam Policy, 1945–1967,” otherwise known as the Pentagon Papers. The Papers took two years to complete and resulted in over 7000 pages of classified documents; McNamara later commented, “[Y]ou know, they could hang people for what’s in there.”<sup>585</sup>

In 1971, Daniel Ellsberg, a one-time consultant and supporter of U.S. policy in Vietnam, turned anti-war activist leaked the papers to the New York Times (NYT). The Justice Department immediately sought an injunction in federal court, claiming both that publication was a violation of the Espionage Act of 1917 and presented a serious threat to national security because the papers contained critical intelligence information relevant to the ongoing war effort. Pending the

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<sup>580</sup> William Blackstone, Commentaries, 151-152 (1769).

<sup>581</sup> See Alexander M. Bickel, *The Morality of Consent* 61 (Yale 1975), referenced in STONE, *supra* note 10, at 506.

<sup>582</sup> *New York Times v. United States*, 403 U.S. 713, 714 (1971).

<sup>583</sup> *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976).

<sup>584</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>585</sup> See DAVID HALBERSTAM, *THE BEST AND THE BRIGHTEST* 663 (Random House 1972).

District Court's decision, Ellsberg released the papers to the Washington Post; the Justice Department similarly sought an injunction against the Post. Judge Gesell of the Federal District Court in Washington, DC ruled the government failed to present evidence that the Papers posed a serious danger to the nation. Thereafter, Judge Gurfein of the Southern District of New York also denied the government's request for an injunction against the NYT; the government immediately appealed both rulings to the Supreme Court.

The government based its appeal on the "national security" exception discussed in *Near*,<sup>586</sup> however, in a brief *per curiam* decision the Supreme Court agreed with the lower court, holding the government had not met its "heavy burden" of showing a justification for a prior restraint and ordered the injunction be lifted immediately.<sup>587</sup>

Several of the Justices wrote their own opinions in this critical free speech case. Justice Hugo Black wrote "every moment's continuance of the injunctions against these newspapers amounts to a flagrant, indefensible, and continuing violation of the First Amendment."<sup>588</sup> Justice Brennan insisted that even in wartime a prior restraint on the press could be constitutional *only* if the government proved that "publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea."<sup>589</sup>

### G. Fighting words

Fighting words, like incitement, are not protected by the First Amendment and can be punishable. The difference between incitement and fighting words is subtle, focusing on the intent of the speaker. Inciting speech is characterized by the speaker's intent to make someone else the instrument of her unlawful will whereas fighting words, by contrast, are intended to cause the hearer to react to the speaker.

The Supreme Court first developed the fighting words doctrine in *Chaplinsky*<sup>590</sup> in 1942. Chaplinsky was arrested for disturbing the peace after uttering to the local marshal: "You are a God damned racketeer" and "a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."<sup>591</sup> The Supreme Court upheld the conviction in a unanimous opinion, holding:

There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include. . . "fighting" words — those, which by their very utterance inflict

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<sup>586</sup> 283 U.S. 697 (1931).

<sup>587</sup> *New York Times*, 403 U.S. at 714.

<sup>588</sup> *Id.* at 715.

<sup>589</sup> *Id.* at 726-27.

<sup>590</sup> *Chaplinsky*, 315 U.S. at 568.

<sup>591</sup> *Id.* at 569.

injury or tend to incite an immediate breach of the peace.<sup>592</sup>

Since *Chaplinsky*, the Court has continued to uphold the doctrine but also steadily narrowed the grounds on which the fighting words test applies. In *Street v. New York*<sup>593</sup> the court overturned a statute prohibiting flag burning, holding that mere offensiveness does not qualify as "fighting words". Consistent with *Street*, in *Cohen v. California*,<sup>594</sup> the Court held that Cohen's jacket with the words "fuck the draft" did not constitute fighting words because the words on the jacket were not a "direct personal insult" and no one had reacted violently to the jacket. This ruling established that fighting words should be confined to direct personal insults.

In 1992, in *R.A.V. v. City of St. Paul*<sup>595</sup> the Supreme Court overturned a city ordinance that made it a crime to burn a cross on public or private property with the intent to arouse anger, alarm or resentment in other based on race, color creed, etc. According to the Court:

The ordinance, even as narrowly construed by the State Supreme Court, is facially unconstitutional, because it imposes special prohibitions on those speakers who express views on the disfavored subjects of 'race, color, creed, religion or gender...' Moreover, in its practical operation, the ordinance goes beyond mere content, to actual viewpoint, discrimination... St. Paul's desire to communicate to minority groups that it does not condone the 'group hatred' of bias-motivated speech does not justify selectively silencing speech on the basis of its content...

In addition, the ordinance's content discrimination is not justified on the ground that the ordinance is narrowly tailored to serve a compelling state interest in ensuring the basic human rights of groups historically discriminated against, since an ordinance not limited to the favored topics would have precisely the same beneficial effect."<sup>596</sup>

## H. True threats

Similar to "incitement" and "fighting words," a "true threat" is another area of speech that is not protected by the First Amendment. A true threat exists where a speaker directs a threat to a person or group of persons with the *intent* of placing the victim in fear of bodily harm or death. Yet the line between protected expression and an unprotected true threat is often hazy and uncertain often turning on the determination of intent.

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<sup>592</sup> *Id.* at 571-72.

<sup>593</sup> *Street v. New York*, 394 U.S. 576 (1969).

<sup>594</sup> *Cohen v. California*, 403 U.S. 15 (1971).

<sup>595</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

<sup>596</sup> *Id.* at 393-96.



For example, in *Watts v. United States*<sup>597</sup>, Watts, a young African-American man, was arrested for saying the following during an anti-war protest in Washington D.C., “If they ever make me carry a rifle the first man I want to get in my sights is L.B.J. They are not going to make me kill my black brothers.” In overturning his conviction, the Supreme Court ruled that Watts’ statement was political hyperbole rather than a true threat. “We agree with [Watts] that his only offense here was ‘a kind of very crude offensive method of stating a political opposition to the President’ . . .”<sup>598</sup>

In *Virginia v. Black*<sup>599</sup>, the Supreme Court decided a case similar to *R.A.V.*<sup>600</sup> under the true threats doctrine. The Court held that cross burning could constitute a true threat and thereby be proscribed by law, *if* it is done with the intent to intimidate or place the victim in fear of bodily harm or death. It may not, however, be used as *prima facie* evidence of intent to intimidate, because cross burning may serve other intentions, such as a show of solidarity.

## I. Hate speech

Hate speech is a hotly contested area of First Amendment debate. Unlike fighting words, or true threats, hate speech is a broad category of speech that encompasses both protected and unprotected speech. To the extent that hate speech constitutes a true threat or fighting words, it is unprotected; to the extent it does not reach the level of a true threat or fighting words it is protected.

During the 1980s and early '90s more than 350 public colleges and universities sought to combat discrimination and harassment on campuses through the use of so-called speech codes.<sup>601</sup> Proponents of the codes contend that existing First Amendment jurisprudence must be changed because the marketplace of ideas does not adequately protect minorities. They charge that hate speech subjugates minority voices and prevents them from exercising their First Amendment rights. Similarly, proponents posit that hate speech is akin to fighting words, a category of expression that should not receive First Amendment protection, because as the Court held in *Chaplinsky* they “are no essential part of any exposition of ideas, and are of such slight social value as a step to the truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”<sup>602</sup>

However, speech codes that have been challenged in court have not fared well; though no case has been brought before the Supreme Court on this question, lower courts have struck these policies down as either overbroad or vague. The

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<sup>597</sup> *Watts v. United States*, 394 U.S. 705 (1969).

<sup>598</sup> *Id.* at 707-08.

<sup>599</sup> *Virginia v. Black et al.*, 538 U.S. 343 (2003).

<sup>600</sup> 505 U.S. 377 (1992).

<sup>601</sup> David L. Hudson Jr., *Hate Speech and Campus Speech Codes*, FIRST AMEND. CENTER (Sep. 13, 2002), <http://www.firstamendmentcenter.org/hate-speech-campus-speech-codes>.

<sup>602</sup> *Chaplinsky*, 315 U.S. at 572.

District Court for the Eastern District of Wisconsin in the University of Wisconsin school code case articulated the reasoning behind the codes' lack of constitutional muster:

This commitment to free expression must be unwavering, because there exist many situations where, in the short run, it appears advantageous to limit speech to solve pressing social problems, such as discriminatory harassment. If a balancing approach is applied, these pressing and tangible short run concerns are likely to outweigh the more amorphous and long run benefits of free speech. However, the suppression of speech, even where the speech's content appears to have little value and great costs, amounts to governmental thought control.<sup>603</sup>

## VI. Recent Cases

The American public has been confronted with a number of significant free speech issues in the past few years; I shall examine four: religious extremism incitement (see previous section); a Koran burning pastor; Christian extremists demonstrating at funerals of US military personnel; an Assistant Attorney General (Michigan) who specifically (ruthlessly) targeted a University of Michigan student who was student body President and a homosexual. In examining these four examples the question is whether the test articulated by the Supreme Court in *Brandenburg* sufficiently protects the speaker, his audience, the larger public and the intended target of the speech.

Pastor Terry Jones, of Florida, leads a small but vocal congregation. On March 20, 2011, Jones held a Qu'ran burning that resulted in anti-American violence in Afghanistan, killing at least 12 people. Jones was urged not to do it by virtually every national leader including President Obama, Secretary of State Clinton and perhaps most importantly, General Petraeus, the commander of U.S. forces in Afghanistan who argued that Pastor Jones' conduct would endanger US military personnel in Afghanistan. Jones eventually did go forward with his threat, however, his possible actions present a significant First Amendment dilemma: is speech protected even though harm *may* result both domestically and internationally.

In that vein, Jones was arrested for attempting to protest outside a Mosque in Dearborn, Michigan. After a brief trial, a jury upheld the city's injunction, claiming that Jones' protest would disturb the peace; ultimately, Jones was held on \$1 bail and then released.<sup>604</sup> While Jones' conduct is considered, by many (never say all), to be reprehensible (at best) numerous constitutional law experts claim the court's action was a gross miscarriage of justice and a violation of Jones' First Amendment rights. The same concerns are relevant with respect to a

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<sup>603</sup> *UWM*, 774 F.Supp. at 1174.

<sup>604</sup> *Pastor Who Planned Mosque Protest Out of Jail*, CBS News (Apr. 22, 2011, 10:35 PM), <http://www.cbsnews.com/stories/2011/04/22/national/main20056660.shtml>.

pastor who, along with his tiny but vocal community, shouts degrading comments at family and friends of fallen soldiers as they gather to bury their loved one who died while serving the U.S.

The basis for the pastor's conduct: the soldier died because God hates the United States for its tolerance of homosexuality, particularly in America's military. The Supreme Court addressed this issue in *Snyder v. Phelps*<sup>605</sup>, where members of a small but extremely vocal Westboro Baptist Church, protested the funeral of a U.S. Marine who had been killed in Iraq. The protesters carried signs, as they have done at nearly 600 funerals throughout the country over the past 20 years, displaying placards such as "America is doomed", "You're going to hell", "God hates you", "Fags doom nations", and "Thank God for dead soldiers."<sup>606</sup>

Dissenting Justice Samuel Alito likened the protests of the Westboro Baptist Church members to fighting words and of a personal character, and thus not protected speech. However, the majority disagreed, stating that the protester's speech was not personal but public, and that local laws, which can shield funeral attendees from protesters, are adequate in the context of protection from emotional distress.

Andrew Shrivell, a former Assistant Attorney General for Michigan who has been sued for stalking Chris Armstrong, the first openly gay University of Michigan student body president. Armstrong claims that Shrivell has been showing up everywhere he goes, including school and home. Shrivell apparently started a blog campaign against Armstrong and his "radical homosexual agenda." Shrivell claims that the stalking charges are moot because he has never actually spoken to Armstrong, and that he is simply exercising his First Amendment rights.<sup>607</sup> Should Shrivell be allowed to exercise his free speech rights in this manner? How does the doctrine of hate speech apply?

## VII. Analysis of American Free Speech Jurisprudence

While a literal interpretation of the First Amendment forbids any law abridging speech in any form, the Supreme Court has taken a more nuanced approach recognizing legitimate competing interests that must be considered. For example, while free speech is a guaranteed right according to the First Amendment the executive branch is similarly charged with protecting the safety and security of the nation's citizens. As Justice Holmes articulated, "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic..."<sup>608</sup>

This statement, which has been endorsed by every Court since, reflects an

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<sup>605</sup> *Phelps*, 131 S.Ct. 1207.

<sup>606</sup> *Id.* at 1213.

<sup>607</sup> David Jesse, *Shrivell Fires Back, Claims He's Victim of Gay Agenda*, DETROIT FREE PRESS, May 10, 2011, available at <http://www.freep.com/article/20110510/NEWS05/110510041/Shrivell-fires-back-claims-he-s-victim-gay-agenda?odyssey=mod|mostcom>.

<sup>608</sup> *Schenck*, 249 U.S. at 52.

understanding that with free speech—as with other constitutionally guaranteed protections—there is no absolutism. Powerful competing interests must be balanced against other competing interests; the question is whether the balancing reflects a rights minimization or rights maximization paradigm. Free speech jurisdiction has travelled a long road in American jurisprudence, arguably in concert with society, which superficially—at least—is more tolerant of dissent than in the past. The caveat is pertinent because one must never forget the rigid, Puritan roots of the American culture; a casual perusal of public discussion regarding same sex marriage, children of same sex parents and abortion highlights a constant strain of ideological rigidity, largely premised on a literalist interpretation of religious scripture. While the assumption that freedom of speech is ‘safer’ today than 100 years ago is largely correct—as evidenced by recent Court decisions—to assume it is a ‘lock’ is, arguably, to wade into dangerous waters.

This, of course, cuts both ways: should, in the name of free speech, Senator McCarthy have been allowed to run wild, ruining careers and causing extraordinary devastation while the executive branch consistently failed to confront him directly. President Eisenhower’s pusillanimous conduct was shameful; in that ‘spirit’ McCarthy has an extraordinary ‘run’ unabated by the Court, Congress or the executive. Is that in concert with the free speech protection articulated in the First Amendment?

While some would argue that the ‘marketplace of ideas’ should take precedence over efforts to limit free speech protections the reality is, arguably, more complicated. As I have argued elsewhere,<sup>609</sup> the danger posed by religious extremist incitement should give serious pause as incitement occurring in Houses of Worship meets the tests articulated by the Supreme Court discussed in section one above. In that vein, while the Supreme Court begins its analysis of free speech questions with the presumption that ALL speech is protected, unless it falls within one of two exceptions, it is not an absolute right.

The analysis must determine whether the proposed restriction is content-based or content-neutral; the former refers to restrictions that apply to particular viewpoints then the proposed restriction carries a heavy presumption that it violates the First Amendment. In such a paradigm, the Court applies a strict scrutiny standard in evaluating its lawfulness; to survive strict scrutiny, the restriction must be *narrowly tailored* to achieve *an important governmental interest*. That means that it cannot be, among other things, over-inclusive, under-inclusive, or vague. This standard effectively places a heavy burden on the government in defending the restriction.

However, if the restriction is content-neutral, whereby the concern is not with the speech itself but rather pertains to the details surrounding the speech, then the government is allowed to set certain parameters involving time, place, and manner. Content-neutral restrictions on speech are reviewed under

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<sup>609</sup> GUIORA, *supra* note 9.

intermediate scrutiny rather than strict scrutiny because the speech is restricted solely in the manner in which the information is communicated rather than content itself.

In *U.S. v. O'Brien*<sup>610</sup>, the Supreme Court established a four-part test to determine whether a content-neutral restriction on speech is constitutional: (1) Is the restriction within the constitutional power of government, (2) Does the restriction further important or substantial governmental interest, (3) Is the governmental interest unrelated to the suppression of free expression, (4) Is the restriction narrowly tailored, i.e., no greater than necessary. Subsequently, a fifth factor was added in *City of Ladue v. Gilleo*<sup>611</sup> inquiring whether the restriction leaves open ample opportunities of communication.

Finally, there is an exception to the content-based rule that requires an analysis of the value of the speech in question. Certain forms of speech, such as political speech, are thought to be at the very core of the First Amendment's protection, and therefore, merit the greatest protection under the law. The freedom to openly challenge the government is essential to a democracy. However, that principle has been 'fungible'; witness Supreme Court holdings particularly during WWI and somewhat in the aftermath of WWII.

The First Amendment has travelled an extraordinary journey; from clear limits imposed on free speech to an understanding that protecting free speech is important to a vital and vibrant democracy. Needless to say, the road taken has been full of pitfalls and pratfalls reflective both of the extraordinary importance of this protection and the dangers that free speech, arguably, pose. The rocky road directly reflects this tension; to suggest that the tension has been resolved and that limitations will not be posed in the future would be to mis-read American history.

After all, American history is replete with 'roll backs' of rights in times of crisis, whether real or imagined. This unfortunate tendency, in the speech context, is compounded by the ever-changing nature of speech and the media. Rearticulated: given the extraordinary power of social media, and the speed with which information can be transmitted, it is not unforeseeable this will force both government and the Courts to increasingly consider imposing limits on free speech when public safety is arguably endangered. While the Supreme Court's holding in *Snyder*<sup>612</sup> suggests an expansive articulation of free speech American history suggests the possibility of a "roll back"—particularly in the context of national security and public order---cannot be easily dismissed.

Though American society has significantly matured over the past 200 years the response when 'under threat' are surprisingly uniform and consistent in

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<sup>610</sup> *O'Brien*, 391 U.S. 367.

<sup>611</sup> *Gilleo*, 512 U.S. 43.

<sup>612</sup> *Phelps*, 131 S.Ct. 1207.

accepting a rights minimization paradigm imposed by government and upheld by the Court. A careful reading of American history, executive decision-making and judicial holdings suggest this possibility must not be discounted in the free speech discussion. The question, in a nutshell, is whether national security and public order justify minimizing free speech. In some ways, American history has demonstrated a ready willingness to answer in the affirmative. The costs, as repeatedly demonstrated, are significant both with respect to the principles articulated in the First Amendment and on a human, individual basis. A quick perusal of the WWI and post WWII prosecutions offers ready proof. The dilemma is determining how serious is the threat to national security and public order and whether limiting free speech will mitigate that threat and at what cost to individual liberty.

## VIII. UK

The UK, historically, has practiced extraordinary tolerance for free speech. In the context of the freedom of religious speech, that tolerance is based in part on the historically limited influence of the Anglican Church<sup>613</sup> in English life. Great Britain's commitment to freedom of speech predates modern international conventions. British writer and philosopher John Milton was one of the earliest proponents of freedom of expression, and Sir Thomas More helped establish the parliamentary privilege of free speech during the 1500s.<sup>614</sup> In the 1600s, Milton argued that censorship acts to the detriment of a nation's progress, since truth will always defeat falsehood; but a single individual cannot be trusted to tell the two apart, and therefore no individual can be trusted to act as censor for all individuals.<sup>615</sup> John Stuart Mill furthered Milton's arguments in the 1800s by promoting the principle of the *marketplace of ideas*, where objectionable speech has a place since truth will prevail, and even hateful speech has a value in that it provides an opportunity for others to confront opposition, examine their assumptions, and ultimately refine their own thoughts and arguments.<sup>616</sup>

In recent years, homegrown Islamic terrorist attacks, influenced by al Qaeda but ultimately separate from the organization, have rocked the social fabric in Great Britain. On July 7, 2005, 56 people were killed in a series of bombings in the London subway.<sup>617</sup> In August 2006, a plot to simultaneously destroy U.S.-bound

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<sup>613</sup> See U.S. Department of State, <http://www.state.gov/g/drl/rls/irf/2006/71416.htm>. See generally Peter Cumper, *The United Kingdom and the UN Declaration on the Elimination of Intolerance*, 21 EMORY INTL L. REV. 13.

<sup>614</sup> *The Life of Sir Thomas More*, available at <http://www.luminarium.org/renlit/morebio.htm>. See also *Parliamentary Privilege and Free Speech: MPs' privileges and citizens' freedom from oppression*, March 9, 2006, available at [www.adls.org.nz/filedownload?id=b3e74fd4-6cb8-4276-9029-a15a59247246](http://www.adls.org.nz/filedownload?id=b3e74fd4-6cb8-4276-9029-a15a59247246).

<sup>615</sup> JOHN MILTON, AREOPAGITICA (Harlan Davidson 1643).

<sup>616</sup> MILL, *supra* note 551.

<sup>617</sup> CNN, *Bombers Target London*, at <http://www.cnn.com/SPECIALS/2005/london.bombing/> (last visited Jul 7, 2012).

commercial airlines departing from London was uncovered;<sup>618</sup> on June 30, 2007, Glasgow Airport was attacked;<sup>619</sup> and, in December 2010, 12 men with links to Pakistan and Bangladesh were arrested in London on suspicion of plotting large-scale terror attacks in the UK.<sup>620</sup> In the aftermath of the attacks, the British Parliament passed counterterrorism-related legislation.

Under the Serious Crime Act 2007, the common law offence of inciting the commission of another offence was abolished and replaced by three statutory inchoate offences under ss.44-46. The three offences are:

- (A) Intentionally encouraging or assisting an offence;
- (B) Encouraging or assisting an offence believing it will be committed; and
- (C) Encouraging or assisting offences believing one or more will be committed.

- (A) A person commits an offence under s.44 if:
  - (1) He does an act capable of encouraging or assisting the commission of an offence<sup>2</sup>; and
  - (2) He intends to encourage or assist its commission.

But he is not to be taken to have intended to encourage or assist the commission of an offence merely because such encouragement or assistance was a foreseeable consequence of his act. But it is sufficient to prove that he intended to encourage or assist the doing of an act which would amount to the commission of that offence. There is a defence of acting reasonably.

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<sup>618</sup> Statement by Homeland Security Secretary Michael Chertoff announcing a change to the Nation's Threat Level for the Aviation Sector at [http://www.dhs.gov/xnews/releases/pr\\_1158349923199.shtm](http://www.dhs.gov/xnews/releases/pr_1158349923199.shtm) (last visited July 9, 2013).

<sup>619</sup> *Flaming SUV rams U.K. Airport; 2 Arrests*, Associated Press (June 30, 2007), available at <http://archive.newsmx.com/archives/articles/2007/6/30/144208.shtml>.

<sup>620</sup> *12 men arrested in suspected UK terrorism plot*, FOXNEWS (Dec. 20, 2010), <http://www.foxnews.com/world/2010/12/20/men-arrested-suspected-uk-terrorism-plot/>.

(B) A person commits an offence under s.45 if:

- (1) He does an act capable of encouraging or assisting the commission of an offence; and
- (2) He believes: (a) that the offence will be committed; and (b) that his act will encourage or assist its commission

Where it is alleged that a person believed that an offence would be committed and that his act would encourage or assist its commission, it is sufficient to prove that he believed that an act would be done which would amount to the commission of that offence and that his act would encourage or assist in the doing of that act. A defence of acting reasonably is provided.

(C) A person commits an offence under s.46 if:

- (1) He does an act capable of encouraging or assisting the commission of one or more of a number of offences; and
- (2) He believes: (a) that one or more of those offences will be committed (but has no belief as to which); and (b) that his act will encourage or assist the commission of one or more of them.

A defence of acting reasonably is provided.

As regards whether an act is one which if done would amount to the commission of an offence, if the offence requires proof of fault it must be proved the defendant believed or was reckless as to whether it would be done with that fault or his state of mind was such that were he to do it, it would be done with that fault. If the offence requires proof of particular circumstances and or consequences, it must be proved that the defendant intended or believed or was reckless that, were the act to be done, it would be done in those circumstances or with those consequences.

The question is “where to draw the line” *and* whether the line is to be drawn differently if the speech is religious. Although England has traditionally not imposed restrictions on free speech, does the reality of a specific threat to society require Parliament, the courts, and the police to reconsider how to effectively respond to religiously inspired terrorism? The cases of Samina Malik and Mohammed Siddique potentially suggest that the UK has abandoned its historical roots of respecting free speech—particularly religious speech—in the wake of Islamic based terrorist attacks. In 2007, 23-year-old Samina Malik was convicted of “possessing records likely to be used for terrorist purposes” under



the 2006 Terrorism Act. In June 2008, her conviction was overturned on appeal, and the Crown Prosecution Service decided not to seek a retrial.<sup>621</sup>

In high school, Malik began writing love poems and other poetry inspired by the rap music of Americans 50 Cent and Tupac Shakur. At age 20, she became more religious and began wearing a *hijab* and calling herself the “Lyrical Terrorist,” later claiming that she picked the name because it “sounded cool.” The documents Malik possessed included a library of books on firearms, poisons, hand-to-hand combat, and terrorism techniques. Malik was convicted for possessing documents that included her poetry, in which she expressed a desire to be a martyr, an approval of beheadings, respect for Osama bin Laden, and contempt for non-Muslims. Malik has claimed that the poetry was meaningless and taken out of context, insisting that she was not a terrorist.<sup>622</sup> The judge termed her a “complete enigma.”<sup>623</sup>

Mohammed Siddique was arrested on April 13, 2006, after accompanying his uncle to the Glasgow Airport. There, the two were told they would not be allowed to fly, and Siddique’s cellphone and laptop were confiscated. Siddique was charged with collecting information that would “likely be useful” to a terrorist under Section 58 (1b) of the Terrorism Act 2000. He was found guilty of “collecting terrorist-related information, setting up websites . . . and circulating inflammatory terrorist publications.” Siddique was sentenced to eight years imprisonment. His defense has consistently been that he was a merely a 20-year-old “looking for answers,” a model student who still lived with his parents.

His attorneys have pointed out that there was never any evidence to support the allegation that Siddique intended to join a terrorist group. An analyst who summarized the images, documents, and videos that Siddique had downloaded said, after the conviction that Siddique “lacked the skills, sophistication, lengthy credentials and cold-blooded professionalism” associated with actual terrorists, describing him as “undoubtedly naïve.”<sup>624</sup> The danger posed by these prosecutions is obvious. Neither Malik nor Siddique killed, much less attacked anyone, nor is there evidence that they attempted to commit such acts. Yet both were convicted of serious crimes. Suppose Malik and Siddique are both telling the truth—that they were simply exploring the concepts of terrorism intellectually; however, juries convicted both.

Great Britain is obligated to respect freedom of speech under Article 19 of the

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<sup>621</sup> *CPS Response to Samina Malika appeal*, Crown Prosecution Service (June 17, 2008), [http://www.cps.gov.uk/news/pressreleases/143\\_08.html](http://www.cps.gov.uk/news/pressreleases/143_08.html).

<sup>622</sup> *Lyrical Terrorist Found Guilty*, BBCNEWS (Nov. 8, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/7084801.stm](http://news.bbc.co.uk/2/hi/uk_news/7084801.stm).

<sup>623</sup> *Id.*

<sup>624</sup> *Man convicted of Terror Offenses*, BBCNEWS (Sep. 17, 2007), [http://news.bbc.co.uk/2/hi/uk\\_news/scotland/tayside\\_and\\_central/6997830.stm](http://news.bbc.co.uk/2/hi/uk_news/scotland/tayside_and_central/6997830.stm); *Terror Trial Hears Al-Qaeda Praise Claim*, STV, [http://www.stv.tv/content/news/main/display.html?id=opencms:/news/Terror\\_trial\\_hears\\_al\\_qaeda\\_praise\\_clai](http://www.stv.tv/content/news/main/display.html?id=opencms:/news/Terror_trial_hears_al_qaeda_praise_clai).

Universal Declaration of Human Rights, Article 19 of the ICCPR, and Article 10 of the ECHR. Furthermore, Great Britain has gone so far as to expressly incorporate the ECHR into domestic law. Article 10 states, “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”<sup>625</sup> This article does, however, impose some limitations on the right:

The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>626</sup>

Going beyond the enumerated limitations of Article 10, the UK imposes a number of additional limitations on freedom of speech for it recognizes incitement to racial hatred and incitement to religious hatred as crimes.<sup>627</sup> The UK’s laws on defamation are also extremely strict, imposing a high burden of proof on the defendant—one reason why many public figures who would never sue a publication in the United States regularly file suit in the UK.

## **IX. The Netherlands**

Theo van Gogh was a filmmaker, actor, and columnist well known for his open criticism of Islam, and murdered after the release of his anti-Islam film, *Submission*. The two most striking descriptions are that he was a provocateur and gadfly. There is little doubt that van Gogh irritated, enraged, and offended a wide array of people from different ethnic and religious groups, particularly Muslims. It is also fair to say, based on interviews with people who knew him, that he was unconcerned by the fact that he offended others. Though clearly offensive to many and irritating to others, van Gogh represented an important aspect of liberal democracy—the right to speak, the right to create, and the right to express opinions, even opinions considered outrageous. It was this quality that led to his brutal murder.

On November 2, 2004, Mohammed Bouyeri shot van Gogh eight times, slit his throat, nearly decapitating him, and stabbed him in the chest. Two knives were left in van Gogh’s corpse, one attaching a five-page “open letter to Hirshi [*sic*]

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<sup>625</sup> Charter of Fundamental Rights, Article 10, available at

[http://ec.europa.eu/justice\\_home/unit/charte/en/charter-freedoms.html](http://ec.europa.eu/justice_home/unit/charte/en/charter-freedoms.html).

<sup>626</sup> Human Rights Act, Article 8, available at <http://news.bbc.co.uk/1/low/uk/946400.stm>.

<sup>627</sup> §§ 17–29 of the Public Order Act 1986. The Criminal Justice and Public Order Act 1994 made publication of material that incited racial hatred, a criminal offense.

Ali” to his body that threatened Western governments, Jews, and van Gogh’s collaborator, Ayaan Hirsi Ali. Bouyeri was convicted and sentenced to life in prison with no chance of parole. Bouyeri was a member of the Hofstad Network, which the Dutch government characterizes as a terrorist organization.<sup>628</sup> The Hofstad Network is influenced by the ideology of Takfir wal-Hijra, a Muslim extremist group that advocates armed battle against Jews, Christians, and apostate Muslims in order to restore an Islamic world order. Takfir wal-Hijra’s ideology instructs that the ends justify the means; group members adopt non-Islamic appearances and practices (shaving their beards, wearing ties, drinking alcohol, eating pork) in order to blend in with non-Muslims.<sup>629</sup> The Hofstad Network has been suspected of planning to kill several members of the Dutch government and parliament.

What differentiates the Hofstad Network from Theo van Gogh, who openly espoused highly controversial views in the media? If both Hofstad and van Gogh have the potential to incite, if they both have the potential to persuade people to act on their behalf, should not they both be subject to similar limitations? After all, it is a matter of perspective in determining whose ideas are more offensive when in theoretical form only. The difference is that extremist religious speech more readily instigates violence than secular speech does. Theo van Gogh was a powerful voice to some, a gadfly to others, dismissed in some quarters as a racist not to be taken seriously and considered by some to be an unrepentant Islam basher who needed to be silenced.

But, if the ultimate strength of liberal democracy is the voice that makes us uncomfortable—right or left, religious or secular—then van Gogh manifests that strength. Was he extreme in his views? According to many with whom I met, the answer is yes. But, those views, in the context of the right to free speech, did not fall into the category of words that need to be silenced. The right to free speech was, in some ways, designed for a Theo van Gogh. He was not a spiritual leader; he had no army of followers who were going to endanger either national security or public order. Though offensive to some, he was not a danger to society at large or to specific elements of society.

That is why limits on free speech do not pertain to a Theo van Gogh, but do apply to rabbis, pastors, and imams who espouse extreme views that threaten specific individuals (internal communities) and larger (external) communities alike. Important to recall van Gogh did not advocate violence.

## **X. Norway**

Conversations with Norwegian subject matter experts regarding free speech dilemmas in Norway highlighted how distinct the Norwegian paradigm and

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<sup>628</sup> On January 23, 2008, a Dutch appeals court ruled that the government did not meet its burden of proving that the Hofstad Network is a terrorist organization as defined by Dutch law.

<sup>629</sup> Transcript, *Al Qaeda’s New Front*, produced and directed by Neil Docherty, FRONTLINE, available at <http://www.pbs.org/wgbh/pages/frontline/shows/front/etc/script.html>.

experience from the other surveyed countries. The lack of significant free speech cases in Norway, reflects, according to Norwegian academics, law enforcement officials and public policy commentators a culture that has, largely, not been confronted with free speech dilemmas. As one thoughtful commentator noted: “we are largely a homogenous country, comprised of traditional Norwegians<sup>630</sup>, and therefore have never had free speech challenges and debates.”<sup>631</sup> That homogeneity largely ensured a consensus amongst the ‘traditional’ population that, seemingly, contributed to a conflict free culture and dialogue amongst those who roots of deep commonality.

That is not, however, to suggest that Norwegians have inherently agreed on critical issues confronting Norwegian society. The sharp, and painful, divide between those who collaborated with Nazi Germany and those who did not reflects a homogenous culture choosing two distinct sides. While this reflects a profound lack of consensus on an issue of extraordinary national importance the core homogeneity that defines Norway was, ultimately, not impacted. Therefore, the tensions that define other societies and nations regarding philosophical, legal and practical free speech dilemmas has, in the main, not been a part of Norwegian culture.

A homogenous population sharing deep cultural, religious and societal values and roots is, in the main, an unchallenged society from within. That is, threats to individuals and society described in previous chapters are, largely, missing from the Norwegian experience. While that is not intended to minimize the horror of Breivik’s murderous attack on July 22, 2011 it does highlight an important reality of Norwegian culture and history: profound shared values amongst the traditional Norwegian population. The challenges posed to the other countries are, largely, not faced by Norway either practically or existentially. The caveat, obviously, is Breivik and whether his act is an aberration in the Norwegian ethos or indicative of deeper trends and sentiments shared by others, also capable of action. In that vein, the Norwegian free speech discussion is different from the countries previously surveyed: a homogenous population rarely challenged internally presently forced to confront uncomfortable questions in the face of a terrible domestic terrorist attack.

Conversations with Norwegian subject matter experts reflect a general consensus that Breivik was the action of a lone individual, whose actions were motivated by the blogger Fjordman but not the result of deliberate, consistent incitement reflective of the Rabin assassination. In that context, the distinction between Yigal Amir and Breivik are significant; what is, obviously, unclear is the possibility of an additional Breivik motivated by the July 22, 2011 attack. As previously referenced interviews with Norwegian security and law enforcement officials reflect a powerful ‘wake-up’ call occurred on two distinct fronts: the

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<sup>630</sup> A term that implies white Norwegians; however, it is important to note that immigration to Norway is not only from North Africa, Turkey and Pakistan (as is, largely, currently the case with Holland, the UK).

<sup>631</sup> Phone conversation; notes in author’s records.

presence in their midst of a Norwegian right-wing extremist whose targets are fellow, traditional Norwegians and the need to address both intelligence and security failures.

The second ‘lesson learned’ is directly related to the larger theme this book addresses: the willingness of Western societies to engage in honest discussion and reflection regarding the presence of extremists in their midst. Much like the “conception” amongst Israeli security officials that an Israeli Jew was incapable of assassinating a Prime Minister, Norwegian security officials were overwhelmingly surprised by the actions of a traditional Norwegian. That ‘surprise’ is very much relevant to the free speech discussion: the pre-assassination incitement in Israel was vitriolic and hate-filled and tested the outer limits of free speech. In direct contrast, prior to July 22, 2011 Norwegian public debate, under no circumstances, reflected or mirrored the pre November 4, 1995 Israeli atmosphere. The question is whether the public and decision makers recognize the clear dangers posed by extremist actors and more importantly by extremist inciters. That is, what are the lessons learned from Amir and Breivik and whether applying those lessons results in minimizing individual rights and liberties, particularly with respect to free speech. As made clear by Israeli Ministry of Justice officials with whom I met the answer is, largely, “free speech privileges” and the “marketplace of ideas”. With respect to Norway, the response reflected a conviction that Breivik was a ‘lone wolf’ and belief (perhaps hope is better term) that another Breivik is all but unlikely. Perhaps, perhaps not; the question is whether---and to what extent---Norwegian society will engage in a free speech discussion should extremist inciters (religious and secular alike) push the limits of tolerable speech.

On that note, important to recall---as previously discussed---that the homogenous, traditional Norwegian population essential to understanding the ‘consensus’ culture is undergoing change. How that impacts the extremist-incitement-free speech discussion remains to be seen; nevertheless as noted by an Oslo cab driver “the Norway of tomorrow is not the Norway of yesterday”. With that comment as a springboard we turn our attention to Norwegian legislation and constitution and two cases that directly address free speech.

According to Article 100 of the Norwegian constitution (May 17, 1814 and subsequently amended):

There shall be freedom of expression.

No person may be held liable in law for having imparted or received information, ideas or messages unless this can be justified in relation to the grounds for freedom of expression, which are the seeking of truth, the promotion of democracy and the individual’s freedom to form opinions. Such legal liability shall be prescribed by law.

Everyone shall be free to speak his mind frankly on the administration of the State and on any other subject whatsoever. Clearly defined limitations to this right may only be imposed when particularly weighty considerations so justify in relation to the grounds for freedom of expression.

Prior censorship and other preventive measures may not be applied unless so required in order to protect children and young persons from the harmful influence of moving pictures. Censorship of letters may only be imposed in institutions.<sup>632</sup>

According to Article 135 (A) of the Norwegian General Civil Penal Code:

Section 135 a. Any person who willfully or through gross negligence publicly utters a discriminatory or hateful expression shall be liable to fines or imprisonment for a term not exceeding three years. An expression that is uttered in such a way that is likely to reach a large number of persons shall be deemed equivalent to a publicly uttered expression. An person who aids and abets such an offence shall be liable to the same penalty.

A discriminatory or hateful expression here means threatening or insulting anyone, or inciting hatred or persecution of or contempt for anyone because of his or her

- a) skin colour or national or ethnic origin,
- b) religion or life stance, or
- c) homosexuality, lifestyle or orientation

Section 140. Any person who publicity urges or instigates the commission of a criminal act or extols such an act or offers to commit or to assist in the commission of it, or who aids and abets such urging, instigation, extolling, or offer, shall be liable to fines or to detention or imprisonment for a term no exceeding eight years, but in no case to a custodial penalty exceeding two-thirds of the maximum applicable to the act itself.<sup>633</sup>

While Norway is a 'dualist' country<sup>634</sup> the Human Rights Act of 1999<sup>635</sup>

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<sup>632</sup> See *The Constitution*, STORTINGET, available at <http://www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/The-Constitution/> (last visited Jan 11, 2013); while a number of amendments have been enacted since the constitution was originally drafted, Article 100 was not amended until 2004; for a brief description (English) of the Freedom of Speech Commission conclusion that lead up to the constitutional amendment of 2004 - including the text of the new provision see <http://www.regjeringen.no/nb/dep/jd/dok/nouer/1999/nou-1999-27/13.html?id=142132> (last visited Jan. 11, 2013).

<sup>633</sup> See the General Civil Penal Code, Act of May 22, 1902 available at [www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf](http://www.ub.uio.no/ujur/ulovdata/lov-19020522-010-eng.pdf).

<sup>634</sup> International law and treaties require a particular act to become internal law directly

incorporated the European Convention of Human Rights (ECHR), the International Covenant of Civil and Political Rights (ICCPR) and other international Human Rights instruments into Norwegian law. In doing so, - and stated they should have preference where in conflict with internal, Norwegian law thereby giving both the ECHR and ICCPR “semi-constitutional effect”.<sup>636</sup> According to Article 10 of the ECHR:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.<sup>637</sup>

An analysis of the Norwegian constitution reflects a culture deeply respectful of the individual’s right to free speech and expression; the ECHR is in full accordance with that principle and right. While Norwegian law and ECHR articulate limits on the freedom of speech the provisions are in accordance with free speech traditions and values of Western civil political culture and society. In addition, the traditional Norwegian culture of homogeneity and consensus imply a deep tolerance of free speech precisely because of the paucity of internal challenges to culture and society. That is, the traditional culture of consensus largely minimized dangers posed by free speech; in a society defined as “traditional Norwegian” limits on free speech, beyond the provisions of Article 100 (Constitution) and Article 135 A (Penal Code), would be deemed superfluous and not reflective of societal concerns given the paucity of domestic threats and risks.

As discussed below the question with respect to free speech is when and how should limits be placed. In accordance with across the board advice generously and graciously provided by Norwegian subject matter experts (both in face-face

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applicable.

<sup>635</sup> See generally [http://www.gender.no/Topics/19/sub\\_topics?path=5/964](http://www.gender.no/Topics/19/sub_topics?path=5/964) which discusses the Human Rights Act of 1999.

<sup>636</sup> Email in author’s private records.

<sup>637</sup> *The European Convention on Human Rights*, COUN. OF EUROPE, available at <http://www.hri.org/docs/ECHR50.html>.

interviews and numerous, subsequent email and telephone conversations) two cases stand out as particularly helpful in understanding the practical ramifications of Norwegian free speech provisions. In analyzing and considering both cases important to recall the previous discussion regarding both the core tradition of Norwegian society and the terrible events of July 22, 2011.

#### **A. Mullah Krekar<sup>638</sup>**

“Krekar has voiced support for Islamic terrorists, encourages holy war and, after years of controversy, was ultimately declared a threat to national security in Norway. Local authorities have been unable to deport him, however, because they lack guarantees he won’t be executed back home in Iraq.”<sup>639</sup> To that end, Krekar was protected by Norwegian respect for international law obligations regarding harm that may befall an individual post-deportation. While Krekar ‘pushed the limits’ of free speech—with full confidence that international law provided him extraordinary protections--- a valid argument suggests his support for Islamic terrorists falls within the definition of protected speech.

While his support for Islamic terrorists can be described as troubling and possibly incendiary it does not morph in the realm of violating the Norwegian penal code. In the same vein that the range of opinions expressed daily in the public sphere represent a wide range of perspectives Krekar’s comments reflected his position. The wide gulf between “support for terrorists” and incitement to violence suggests that statements of support fall within free speech protections premised on an extreme tenuousness between his words and the actions of Islam terrorists. However, were terrorists to claim that Krekar’s words of encouragement were the basis for an attack then a direct link could be drawn between the words and resulting conduct.

However, the basis for his trial and conviction were his comments made to members of the foreign press (in Norway) regarding harm that would befall Norwegian officials were he to be deported or harmed: “After claiming that it’s “Norway’s responsibility” to find him a secure country in which to live, he said that if he dies, whoever is responsible for his death will suffer the same fate. “Norway will pay a price,” he told the foreign journalists assembled. “My death will cost the Norwegian society. If a leader like Erna Solberg (a former government minister now in opposition as leader of the Conservative Party) sends me out, and I die, she will suffer the same fate.” Remarks like that led to police protection around Solberg a few years ago. Krekar stated firmly that he

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<sup>638</sup> See *You Deserve a Brick Today*, GATES OF VIENNA (Kar. 28, 2012), <http://gatesofvienna.blogspot.com/2012/03/you-deserve-brick-today.html#more>, last viewed September 26, 2012

<sup>639</sup> *Judges sentences Mullah Krekar to five years in prison for making threats*, VIEWS AND NEWS FROM NORWAY (Mar. 26, 2012), <http://www.newsinenglish.no/2012/03/26/judge-sentences-mullah-krekar-to-five-years-in-prison/>.



hasn't "laid a plan" to carry out any assassination, "but my followers will."<sup>640</sup>

Krekar was convicted in accordance with Articles 140, 147 (a-2) and 227 (1) in the General Penal Code which address the content of his speech, in particular direct threats made against Norwegian officials in positions of authority, particularly Conservative Party chair Erna Solberg.

Article 140. Any person who publicly urges or instigates the commission of a criminal act or extols such an act or offers to commit or to assist in the commission of it, or who aids and abets such urging, instigation, extolling, or offer, shall be liable to fines or to detention or imprisonment for a term not exceeding eight years, but in no case to a custodial penalty exceeding two-thirds of the maximum applicable to the act itself. Criminal acts shall here include acts the commission of which it is criminal to induce or instigate.<sup>641</sup>

Article 147 a. A criminal act...is considered to be a terrorist act and is punishable by imprisonment for a term not exceeding 21 years when such act has been committed with the intention of... (2) seriously intimidating a population...<sup>642</sup>

Article 227. Any person who by word or deed threatens to commit a criminal act that is subject to a more severe penalty than detention for one year or imprisonment for six months, under such circumstances that the threat is likely to cause serious fear, or who aids and abets such threat, shall be liable to fines or imprisonment for a term not exceeding three years...<sup>643</sup>

That is, Krekar was not prosecuted/convicted because of the support expressed for Islamic terrorists rather for direct threats against specific individuals; rather than perceiving the speech as hate or racist speech the emphasis was on incitement with respect to officials in positions of authority. To that end, Krekar's conviction does not fall within free speech rather reflects the incitement to personal harm to specific individuals.<sup>644</sup> As suggested by a subject matter expert, the "Norwegian legal tradition reflects a pragmatic legal approach rather than formalistic which implies a test of context; conviction is possible only if threats

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<sup>640</sup> *Mullah Krekar meets the press*, VIEWS AND NEWS FROM NORWAY (June 10, 2010), <http://www.newsinenGLISH.no/2010/06/10/mullah-krekar-meets-the-press/>.

<sup>641</sup> See *General Civil Penal Code*, UN, [http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR\\_penal\\_code.pdf](http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/NOR_penal_code.pdf) (last visited Jan 11, 2013).

<sup>642</sup> *Id.*

<sup>643</sup> *Id.*

<sup>644</sup> *Norway: Cleric Sentenced for Threats*, N.Y. TIMES, Mar. 27, 2012, [http://www.nytimes.com/2012/03/27/world/europe/norway-cleric-sentenced-for-threats.html?\\_r=3&scp=8&sq=Norwegian&s](http://www.nytimes.com/2012/03/27/world/europe/norway-cleric-sentenced-for-threats.html?_r=3&scp=8&sq=Norwegian&s).

and words are viable”<sup>645</sup>

Important for our purposes is the decision to prosecute Krekar in accordance with Article 147 rather than Article 135; the decision reflects a position that supporting Islamic terrorism does not run afoul of the law whereas incitement to harm specific individuals violates Norwegian law. The prosecutorial decision suggests both enormous respect for the right to express an opinion and little tolerance for speech that potentially harms a specific individual. In the Krekar case, then, the line drawing is, indeed, reflective of a pragmatic (as suggested by a subject matter expert) rather than a formalistic approach. In that context, a pragmatic approach emphasizes potential harm to a specific individual rather than potential harm for which Krekar may bear no responsibility. That analysis, needless to say, would require re-articulation were an Islamic terrorist to state Krekar’s comments motivated and propelled a specific terrorist attack.

## **B. Summary of Decisions**

### **Norwegian Review**

The speaker charged with violation of § 135a of the Norwegian Penal Code (NPC) was acquitted by the Norwegian Supreme Court....Justice Stabel for the majority underlined that the hate speech prohibition had to be interpreted in light of the protection of free speech in NC (Norwegian constitution, ANG) § 100, and that it only covered manifestly offensive speech.

Although finding the speech in question to be “fundamentally derogatory and offensive”,<sup>646</sup> the majority held that it was not offensive enough to constitute a breach of § 135a. In reaching this conclusion, Justice Stabel considered the statement “every day our people and country are being plundered and destroyed by the Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts” to be “absurd” and “spurning rational interpretation”.

Justice Stabel, to support her conclusion that they were nevertheless to be regarded as protected speech, emphasized that no actual threats were made, and that the speech did not amount to any encouragement to carry out particular actions.

Justice Flock for the dissent agreed to the majority construction of the legal foundations found in NPC § 135a read in light of NC § 100 and the international obligations. He underlined, however, that the speech could neither be interpreted purely linguistically, but rather with the aim of establishing how it might reasonably be seen to have been perceived by the people present. To do this, he maintained that in addition to the speech, the situation and the actions

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<sup>645</sup> Email in author’s records.

<sup>646</sup> *Id.*

of the speaker and his crowd had to be taken into consideration.<sup>647</sup>

### **International Review**

Following the NSCt acquittal, a communication was filed before the U.N. Committee on the Elimination of Racial Discrimination.<sup>648</sup> The Committee reaffirmed that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression and concluded that the statements in question, given that they were of exceptionally/manifestly offensive character, were not protected by the due regard clause.

Employing much the same interpretative approach as the NSCt minority, the Committee found the statement of Norway being “plundered and destroyed by Jews, who suck our country empty of wealth and replace it with immoral and un-Norwegian thoughts” in conjunction with the reference to Rudolf Hess and Adolf Hitler and their principles and that the Boot Boys ‘follow in their footsteps and fight for what (we) believe in’ to express racial superiority or hatred; “the deference to Hitler and his principles and ‘footsteps’ to be taken as incitement at least to racial discrimination, if not to violence.”<sup>649</sup>

The Committee underlined that the prohibition of all ideas based upon racial superiority or hatred is compatible with the right to freedom of opinion and expression. It emphasized that the “due regard”-clause relates generally to all principles embodied in the Universal Declaration of Human Rights, not only freedom of speech, and that as all international instruments that guarantee free speech also provide for the possibility, under certain circumstances, of limiting the exercise of this right. It thus concluded that the “due regard”-clause did not protect the manifestly offensive speech by the Boot Boys leader.

### **XI. Final Word**

This is a long chapter, covering a wide swath of territory; its length was dictated by the need to incorporate significant amounts of material in order to fully address the question that is, in many ways, at this books’ core. In inquiring whether free speech should be limited it is necessary to include the writings of philosophers and to engage in country specific discussion. Otherwise, the question remains in the realm of the abstract, devoid of concreteness and practicality. While the ephemeral is intellectually interesting and important it does not facilitate achieving what this book seeks to do: engage in robust discussion regarding free speech in the context of free speech. To that end, analyzing case law, legislation and constitutional provisions of the surveyed

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<sup>647</sup> *Id.*

<sup>648</sup> See generally the International Convention on Elimination of all Forms of Racial Discrimination, UN [http://www.regjeringen.no/upload/kilde/jd/prm/2005/0059/ddd/pdfv/255370-cerd\\_communication\\_30\\_2003.pdf](http://www.regjeringen.no/upload/kilde/jd/prm/2005/0059/ddd/pdfv/255370-cerd_communication_30_2003.pdf) (last visited Jan 12, 2013).

<sup>649</sup> CERD/C/67/D/30/2003, 10.4

countries is intended to enhance the concreteness of the discussion.

The question whether to limit free speech in the face of extremist incitement is not posed casually. It is an issue that cuts to the heart of western democracy both because of the danger in limiting speech and the commensurate risk in not limiting speech when the speaker poses a threat. The dilemma is visceral and complicated for it forces the public and decision makers alike to determine the extent to which society can tolerate intolerant speech. The theme brilliantly articulated by Prof (today Dean) Minow articulates the tension; in many ways, it “sets the table” for the limits of free speech dilemma.

The question, as highlighted in the Israeli paradigm and relevant to the other surveyed countries, is whether advocacy should be restricted when—in the Rawls analysis----“people and institutions are simply overwhelmed” not from the outside but as discussed in this chapter, from the inside. There are, naturally, dangers in advocating limiting of free speech; however, as the discussion in previous chapters suggests there are enormous risks in not addressing this complicated question. In many ways, the dilemma confronting liberal society is whether “risks” are inherent to democracies and, to that end, intolerance is a legitimate price to pay. Conversely, the “counter” question is similarly legitimate: does the government’s duty to protect not outweigh otherwise guaranteed rights. Whether the question is “binary”—rather than subject to “shades of gray”---is legitimate; perhaps, it offers a reasonable way forward that effectively protects vulnerable members of society while minimizing the impact on those who endanger society and individuals alike.

In the introduction I referenced a major judicial matter in which I am presently involved; the timing is fortuitous (in the context of this project) for it highlights many of the issues that are at the core of this discussion. The over-arching question is to whom does government owe a duty: to those at risk or to broader interests, ranging from political to societal to an instinctual response that otherwise guaranteed rights are sacrosanct. My involvement in this matter has, more than anything else, sharpened my conviction that protecting the “at risk” individual outweighs other considerations, regardless of the cost in the context of protected rights. Intensive engagement and interaction with individuals whose rights have been violated by a powerful, and disturbing, combination of religious extremism and government acquiescence have powerfully instilled in me a deep conviction that the state’s primary duty is to protect the vulnerable. Innumerable hours spent interviewing women and children who have been directly harmed, in some cases irreversibly, by this disturbing confluence is the cornerstone for the discussion that follows in chapter seven.

My thesis, then, is predicated both on recognition of the human cost associated with extremism based in large part on my involvement in this case and significant interaction with a wide range of subject matter experts and thought leaders in the US, Europe and Israel. Those two interactions are significantly bolstered by my understanding both of contemporary social realities and circumstances in

conjunction with my analysis of free speech and the rights and obligations it implies. Re-stated: the right to free speech is not an absolute and implies responsibilities and obligations. In the face of religious and secular extremism that twin-headed reality is deserving of our fullest attention even if it suggests minimizing rights. As we turn to the Moving Forward discussion important to recall that the “to whom does the state owe a duty” discussion has, largely, taken a back seat to the “protecting otherwise guaranteed rights” paradigm. The question is whether society, in general and in specific, can continue to espouse this perspective.

## CHAPTER SEVEN

### Looking Forward

When I undertook this project the comments, reactions and criticisms *Freedom from Religion: Rights and National Security* elicited were very much on my mind. As mentioned in the introduction, my hesitation with respect to this project was whether it was sufficiently distinguishable and distinct from *Freedom from Religion*. After intensive meetings with subject matter experts in the surveyed countries I concluded that the two, while sharing a similar theme, are clearly dissimilar. As one reader noted the two books complement each other in addressing extremism through the lens of free speech, individual rights, and the state's obligation to protect both larger society and the particular, endangered individual.

The operative word is "balance"; there is, needless to say, no perfect mathematical formula that will satisfy all interested parties. To suggest otherwise is to engage in wishful thinking. However, as the excerpt from an email I received while writing this book make clear the danger posed by extremism is neither amorphous nor imagined:

Because of your (reference is to mine, ANG) interest in this subject, here is some of the background to the current situation in Colorado City/Hildale. Name and Title redacted (ANG), has been down there, and is very aware of the tendency to exaggerated rumors in the community, but says that the theme of children being removed is a consistent one. Based on what has happened in Texas, and knowing what the FLDS are capable of, it seems a legitimate concern. These are some of the things that have been reported to Name of Organization redacted (ANG)

As you know, Warren Jeffs is still dictating from prison what his followers are to do. He is convinced that if they "purify" themselves then he will be miraculously freed from his prison cell. He has created a group called the United Order (UO) that are those that follow his edicts and are deemed holy/righteous enough to be called "worthy". Only those in the UO are allowed to eat from the storehouses, attend meetings, etc. Those in the UO are not allowed to speak to or even be in presence of those deemed not worthy. Which means those found unworthy are being quarantined in lower parts of the home or rooms by themselves, or worse. Over the past year hundreds have been asked to leave the community and "repent from afar" so they can someday return and be holy enough to be part of the UO. Parents sent to repent are instructed to leave their children as the parent truly believes that if they just repent enough Warren will allow them to come back. He is splitting families and reassigning them

to new families. Children without parents present are being told their father is now Warren Jeffs, they are no longer the children of their biological fathers. As a result we are estimating that there are several hundred groups of children from infant to early 20's in households without parents or with one parent caring for several families children (groups of up to 20-30 at a time). From our experience, and the stories of the young adults we are serving, we know that this is a backdrop for extreme physical and sexual abuse (which is rampant in the community - up to 70% of our clients were abused at some point). As Warren's control and commands have continued to increase, the stories we are hearing and the numbers contacting us are escalating.

This week has been by far the worst though. Here are just the stories we have recently heard:

- 11 yr old boy committed suicide because he was told he was no longer worthy to be part of UO and therefore no longer worthy to eat
- 18 yr old boy committed suicide because no longer worthy to eat
- little girl was placed in a chicken coop behind her home because she was no longer worthy and therefore could not have contact with the rest of the family - she was later allowed back in the home, but no one knows what is happening to her now
- A mother had her 3 children removed from her care and supposedly placed in Lyle Jeffs (brother of Warren Jeffs) home as she was not worthy, but they were
- 3 mothers with children have called for assistance this week as they are fleeing with their kids
- Some are saying the UO has ordered buses and are taking all of the children that have been deemed worthy out of the community by December 23 (birthday of Joseph Smith). Over the past year we have heard reports of vanloads of girls being taken away, but parents have not been willing to file police reports. This is huge. Hundreds of children could disappear and never be seen again. With many parents absent from the homes, the removal of many of these children would be uncontested.
- Numerous accounts of children not being fed because they were not deemed worthy, and even those found worthy not having much because the storehouse is low on supplies. They are a closed society though - so any contact with us is enough to get them kicked out, so they won't let us help them.

That this is going on in Utah and Arizona without the intervention or at least the close scrutiny of the law seems inconceivable.<sup>650</sup>

Whether all the above are precisely accurate is almost beside the point; it is sufficient for some, perhaps even only one claim need be correct for the extraordinary danger to be fully appreciated. What is particularly disconcerting, actually troubling, is the impression state agents are, once again, failing in their duty to protect the vulnerable. This was a recurring theme throughout many of my travels; whether “willful malfeasance” is too strong a phrase is a matter of debate. What is clear is a consistent pattern of ignoring threats, vulnerabilities and harm. As discussed in previous chapters, different reasons have been proffered for this unfortunate and troubling reality. I have found none of them compelling. In rejecting various explanations I harken back to Dean (then Professor) Minow’s law review article discussed in earlier chapters: to what extent should society tolerate intolerance.

This is, obviously, a complicated question, fraught with danger. There is, obviously, great danger in casting too broad a swath in creating a paradigm where intolerance is not tolerated. After all, the essence of democracy is a mosaic of voices, opinions and beliefs. To prevent dialogue, discussion and debate is enormously risky for it raises obvious questions regarding standards, criteria and “who decides”. These are, clearly, weighty issues not easily dismissible; however, given the dangers posed by extremism state leaders cannot sit idly by while vulnerable individuals are endangered.

The themes of vulnerability and endangerment are essential to understanding extremism; emphasizing both highlights the clear danger extremist’s pose. This was highlighted to me in the context:

Over a number of weeks (fall 2012, winter 2013) I conducted a number of personal interviews with former FLDS members; those with whom I met recently left the Church and relocated to the Salt Lake City area. Their ages ranged from late teens to mid ‘40’s; I met with men and women alike. Our conversations, which took place over the course of many hours, were painful, revealing, deeply emotional and immensely important in understanding the regime of fear imposed by Jeffs, regardless of his physical location. The individuals with whom I met were remarkably forthcoming in their descriptions of the FLDS culture and how they had, prior to leaving, been deeply committed to the faith and its “way of life”. In our meetings, I guaranteed anonymity; in their presence I took handwritten notes (which I did not share with them) in an effort to capture both the specific point the individual was making and its relationship to previous comments made by other interviewees. All the notes are in my personal records.

With one exception, all those interviewed indicated that they would never, under any condition return to the FLDS community; one, in remarkable candor, stated that under the correct circumstance she would weigh with the utmost

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<sup>650</sup> Private email; in author’s records.



seriousness the possibility of returning. This, in spite of knowing----in her words--that Warren Jeffs is akin to Hitler and that friends with whom she is in contact have described the current atmosphere as resembling "terrorism". The motivation for this person's willingness to consider returning is a direct result of Jeff's directives that cause unmitigated harm to individuals and families alike: this woman's husband was ordered to leave the community (and obviously, his family) in order to repent for unspecified sins he committed.

As part of the repentance process the husband (a polygamist with three wives and numerous children and grandchildren) is not allowed to have any contact with any family members. Important to note: in spite of the fact that Jeffs is incarcerated in Texas and the husband is, according to his wife, probably in Idaho he refuses to have any contact with her so great is the "regime of fear" created by Jeffs. Nevertheless, in spite of her clearly expressed anger at her husband, the woman was adamant she cannot conclusively reject return to FLDS culture were that the condition for reconciliation with her husband. Re-stated: in spite of her clear understanding of the harm FLDS has caused her and her children the possibility of return was not discounted.

In seeking to better understand the motivation for willingly engage in conduct that endangers the woman made clear that "in spite all the in spite" her commitment to FLDS (not to Jeffs) was unwavering. At first blush her willingness was surprising; upon further conversation with her, other former FLDS members and outside experts her response 'makes sense'. In contrast to those who suffer from "Stockholm Syndrome" FLDS members do not have a normative previous world-view as distinct point of reference; as suggested by a thoughtful non-FLDS member who has long studied the community, members only know the FLDS culture and do not have a suitable comparison paradigm.

That is essential to the harm discussion because the inherent danger of insularity is that conduct deemed harmful by "outside" society has been presented to the group as necessary and essential in seeking to please the leader who is acting on behalf of the divine. In creating a paradigm predicated on "glory to God" or "honoring the leader", the leader ensures loyalty, subservience and unquestioning conduct. Those who have the temerity to question the leader, or are perceived as questioning, are subject to punishment as they are viewed as apostates who must be educated.

In the FLDS culture, the punishment meted by Jeffs for questioning----whether the person questioned Jeffs' leadership is irrelevant----is forced exile for an unlimited period of time to be determined exclusively by Jeffs. The social, personal and familial damage is extraordinary; nevertheless, in the "absolute" model Jeffs has created individuals designated for "exile" accept their "sentence" without question, in spite of the unimaginable pain. In describing the pain when her husband informed his family he had been deemed "unworthy" and therefore must immediately leave the woman was stark and graphic.

Nevertheless, the scenes of pain of families torn apart by fiat are not powerful

enough to convince FLDS members to reject the “unworthy” label and refuse the order to separate. As discussed below, that is ---tragically---not the only fiat that imposes harm on faith members that is willingly and unquestioningly obeyed. Needless to say, other faith requirements in clear violation of the law are fully executed regardless of the damage caused to children and adults alike. Re-articulated: FLDS beliefs result in violations of the law and direct harm to its members alike. Precisely because individual members and the community at large are incapable of protecting themselves from the harmful conduct inherent to the FLDS faith as demanded by Jeffs the state is required to intercede on behalf of those incapable of protecting themselves who have been abandoned by those responsible for their protection.

Re-stated: in the name of obedience to Jeffs’ dictates, parents are violating their obligation to protect their children and are engaged in behavior that directly harms them. Parents may suggest their conduct is not intended to harm their children emphasizing their actions are predicated on devotion to faith and respect for the dictates of the faith leader the result is harmful conduct that endangers their children. On that note, important to recall that FLDS beliefs include the practice of polygamy which has been defined by the Supreme Court of British Columbia as a “crime of harm”. In its decision the Supreme Court wrote: “I have concluded that this case is essentially about harm; more specifically, Parliament’s reasoned apprehension of harm arising out of the practice of polygamy. This includes harm to women, to children, to society and to the institution of monogamous marriage.”<sup>651</sup>

There are, then, three distinct harms pervading modern day FLDS culture: child-brides, lost boys and polygamy. In addition to causing harm to members, all three are in direct violation of the law, yet all three are practiced with impunity on a regular basis in accordance with FLDS beliefs; Jeffs’ instructions; imposition of the instructions by enforcers; the willingness of community members to engage in this conduct and the state’s failure, in an institutionalized manner, to protect the vulnerable. Extensive interviews with former FLDS members highlighted the powerful convergence between the three distinct harms/crimes and the five steps required for their occurrence. It is this convergence between the two forces (crimes) and facilitation that we will focus on in the pages to come.

The perfect convergence between the three crimes----underage marriage, abandoned sons, polygamy----and the five facilitators pose a clear and present danger to the vulnerable members of a closed group. The primary responsibility of a parent is to provide for and protect his children; that is codified in child endangerment laws in numerous states. The laws make clear parental responsibility and the penalties associated with endangering one’s child. The laws were codified in legislative recognition of the failure of many parents to adequately, competently and consistently provide for their children. There is, of course, risk in penalizing parents: as evidenced by the Texas raid, evidence is

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<sup>651</sup> *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588, para. 5 (Can.).

problematic and the state is not necessarily equipped to “step into the shoes” of parents who endanger their children.

What the interviews made clear is that Jeffs exercises extraordinary control over the community; remarkable is the control exercised in spite of his physical presence. In addressing this issue, one interviewee commented that for many community members hearing his voice (an issue to be subsequently addressed) was sufficient cause for acting in accordance with his demands and acceding to new Revelations. The willingness to conform is of particular note when results directly result in harm to individuals and families alike; the unquestioned obedience resulting in destruction of families, under-age marriage and shunning of particular individuals accused of crimes/sins is a most important characteristic of the FLDS culture. As noted by the individuals I met, the overwhelming majority of faith members accept, unquestioningly, Jeffs’ commands.

Rebellion is, necessarily, highly secretive, furtive and modest; one married couple engaged in sexual relations in spite of Jeffs edict that only 12 males he has personally chosen are allowed to impregnate FLDS women (sexual relations, according to FLDS dictates, are exclusively for the purpose of impregnating women); another engaged in foreplay that did not culminate in full sexual relations; others surfed the internet (this is strictly forbidden); another (in his words) partied (i.e. consumed alcohol, flirted with non FLDS girls) and others used birth control measures (this is strictly forbidden). Important to note, while the couple (married) felt comfortable in telling me they had full sexual relations using birth control (condoms) they chose not to answer my question regarding how and where they purchased. The interviewees commented that other members with whom they were acquainted also engaged in “illicit” conduct; that said, they noted that while the conduct contradicted Jeffs orders they were not indicative of wide-spread, open rebellion and noted, with irony, the pleasure they received from engaging in such acts however minor they might seem (to an outsider).

That observation is of particular importance because it highlights, unintentionally, the combination of Jeffs control, enforcement by his handpicked “trusted” bishops and the fear that other community members might “report” conduct that contradicts revelations and orders. That triangle ensures obedience and control; the methodology harkens to “reporting” mechanisms implemented by Mao Tse-Tung whereby children were expected to report to the authorities regarding parental misdeeds. Those interviewed repeatedly emphasized fear predicated on the all-know-ing/all see-ing Warren Jeffs and the constant state of uncertainty regarding correct/incorrect conduct and the powerful consequences if Jeffs determined the individual “unworthy”.

These interviews, then, highlight the practical consequence of extremism; the conversations difficult as they may have been were painfully honest for they articulated the daily and existential lives of individuals living in an extremist paradigm. The FLDS culture is a vivid demonstration of harm caused by

extremism; the interviews poignantly highlighted how an extremist leader controls members of his community. While some are able to leave, the overwhelming majority is either incapable or unwilling to do so. To what extent those who do not leave understand the harm to which they are subjected is an open question; what is not an open question is the harm caused and the failure of state agents to sufficiently protect the vulnerable and endangered.

However, as the proceeding chapters highlighted determining who is endangered and vulnerable is far from “clean-cut”; the trial of Geert Wilders makes that perfectly clear. Rather than protecting Wilders’ right to free speech, the Amsterdam court ordered his trial on the grounds that his speech was offensive to Islam and Moslems. It would be hard to argue that Wilders’ speech endangered Moslems or heightened their vulnerability; while, admittedly, intended to cause discomfort and force public debate the movie *Fitna* accurately depicts events and religious text. Nevertheless the decision was made to order Wilders’ prosecution; this is particularly troubling given Imams who issue *fatwas* targeting specific individuals are not subject to prosecution.

This paradox is highlighted in the chapter addressing multiculturalism; rather than limiting the free speech of an extremist faith leader who deliberately endangered an individual (Marcoush) the decision (by the Court, not the prosecutor) was to limit the free speech of an individual who does not have the ability to harm or endanger others. Perhaps akin to Theo van Gogh who was a provocateur, Geert Wilders seeks to impact public opinion on a particular issue. That is the essence of democracy; devoid of vigorous public debate competing voices, perspectives and opinions are not heard. However, there is an important question directly related to extremism and tolerance: what are the limits of free speech. The follow-up question, as highlighted by the Wilders discussion, is whose free speech should be limited.

It is with respect to both questions that the extremism discussion must focus for the relationship between extremism and free speech is of extraordinary importance. The numerous conversations with subject matter experts in the six surveyed countries consistently reinforced the inexorable link between the two. While other factors are important motivations for extremist action, the role of the inciter is paramount. Whether the inciter is a faith leader or a secular voice the relationship between the actions of the extremist and the speech that propelled him is powerful.

In innumerable conversations in Norway, Israel, the UK and Holland the question of how to minimize the impact of extremism was posed to my interlocutors. The common refrain amongst the overwhelming majority of discussants was that extremism cannot be eradicated but can be minimized. The working assumption from the perspective of academics, law enforcement and national security officials, policy analysts, former extremists and members of the media was the extraordinary ‘staying power’ of extremism. To that somber analysis was added widespread concern regarding an increase in extremist tendencies and

sympathies. In large part this increase was particularly attributable to three distinct factors that have over-lapping characteristics: the current European economic crisis; a heightened sense of antagonism with respect to the 'other', particularly immigrants predicated on sentiment that 'our way of life is threatened and they don't share our values'; the ability and ease with which extremists can communicate through the internet.

Additional factors mentioned include tensions between different extremist groups that contribute to increased manifestations of extremism, whether in actual actions or threats; the failure of state agents to directly and consistently confront extremists; closed communities that accentuate parallel societies and minimize external (state) influence.

In other words, if policy makers determine that extremism (and extremists) pose a threat then the relevant question is how to minimize its impact. Minimize is the operational word given the unanimous assessment by subject matter experts in different countries that extremism cannot be erased. That is, the dilemma confronting policy makers, law enforcement officials, and government leaders is how to minimize the impact of extremism in a manner that neither backfires by enhancing the public image of extremists nor violates otherwise guaranteed rights. It is, needless to say, a fine balance; nevertheless, as made clear by events in Norway, Holland, Israel, the US, the UK and Germany action must be taken.

In chapter five we explored 'soft' measures whereas in this chapter we examine how the law can be used to limit the impact of extremism. Perhaps the correct distinction between the two chapters can be described as the carrot and the stick. A word of caution: there is significant discussion whether extremists wish to be, for lack of better term, de-radicalized. The caveat is of enormous importance for it suggests that the nation state's efforts to de-radicalize may well fall on deaf ears. To that end, the extremists can be divided into a number of different categories of commitment and fervor; while some members are fully engaged to a particular cause others may be defined as swayable and therefore receptive to de-radicalization. The efforts addressed in this chapter are, naturally, focused on the latter category whereas the criminal law measures discussed in chapter eight are more relevant to the former.

Dan Ben-David writes in the foreword to "State of the Nation Report"<sup>652</sup>:

In 1970 Israel was much poorer and its production needs could be supplied by a very large number of workers with low education levels. At that time, over 90 percent of workers in all education level groups were employed---whether they had less than four years of schooling or more than 16 years of schooling.....in 21<sup>st</sup> century Israel, the lower the educational level of prime working age men, the more rapid the decline in their employment rates

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<sup>652</sup> STATE OF THE NATION REPORT, SOCIETY, ECONOMY AND POLICY IN ISRAEL (Taub Center for Social Policy Studies in Israel 2010).

and the lower the level to which those rates have dropped.<sup>653</sup>

Similarly, Haya Stier argues that:

Industrialized labor markets are currently characterized by economic instability that is expressed both in significant fluctuations in unemployment rates and in the employment difficulties of workers who, while they may succeed in finding employment, often earn wages too low to maintain a decent standard of living, or who are employed only part-time despite their desire to invest more of their time in the labor market.....<sup>654</sup>

Prof Ben-David's and Prof Stier's analysis are relevant across the board and are not, therefore, symptomatic only of Israel; both highlight issues critical to responding to extremism. Both commentaries shed light on an increase in international markets, rise in numbers of migrant workers and dwindling employment rates of uneducated workers. The result is the creation of a category of individuals, largely male, best described as 'left behind'.

For extremist groups this category provides large numbers of potential members, often times united by powerful commonalities: low education, minimal job opportunities, anger at the immigrant and a powerful sense of despair at having been 'left behind'. As Europe's history has powerfully demonstrated this is not a unique development; European leaders have either been forced to respond to working class anger or been the beneficiaries of that anger. With respect to the latter, one must only examine the rise of Hitler in the aftermath of the reparations forced on Germany by the Treaty of Versailles.

While the commentary below by Nachum Blass is specific to Israel, the issues it raises regarding educational levels and values are also generic:

.....since ultra-Orthodox curricula stress religious studies over Hebrew, mathematics, English, computer literacy and civics, growth in the relative size of the ultra-Orthodox pupil population is tantamount to an increasing percentage of Israeli pupils whose educational experience fails to respond to the needs and values of Western democracies or to meet the demands of developed modern economies. Second, since the ultra-Orthodox population is largely poor, growth in the relative size of the ultra-Orthodox pupil population is as good as an increasing percentage of pupils whose socioeconomic background is likely to have adverse effects on academic achievements.<sup>655</sup>

Blass' commentary regarding educational levels is of the utmost importance in

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<sup>653</sup> *Id.* at 12-13.

<sup>654</sup> *Id.* at 155-156.

<sup>655</sup> *Id.* at 238.

developing, or at least proposing, mechanisms to minimize the dangers posed by extremists. The analysis is as relevant to countering extremism in Europe as it is in Israel. The three commentaries above, based on research findings of the Center for Social Policy Studies in Israel, reflect the overwhelming importance of both education and employment opportunities in creating a vibrant, economically sound society that minimizes the impact of extremism. There is, of course, nothing new in this analysis; what is important, however, is recognizing two important developments in contemporary Europe.

In many ways, the two are deeply intertwined; the downturn in the European economy combined with immigration, particularly from North Africa, Turkey and Pakistan, have significant impact on enhancing extremism. The term 'other' was repeatedly mentioned in the course of my conversations with subject matter experts; the reference, without doubt, was to immigrants and in particular to non-white immigrants.

As Jamie Bartlett, Jonathan Birdwell and Mark Littler write:

Over the last decade, populist parties have been growing in strength across Western Europe. These parties are defined by their opposition to immigration and concern for protecting national and European culture, sometimes using the language of human rights and freedom. On economic policy, they are often critical of globalization and the effects of international capitalism on workers rights.....(T)he growth of these movements is mirrored online.....(T)his nascent, messy and more ephemeral form of politics is becoming the norm for a younger, digital generation.<sup>656</sup>

What unite these disparate groups, then, are high unemployment, low education levels and enormous resentment of the 'other'. That said, important to recall an important observation suggested by a Norwegian scholar:

Well, the argument only holds true in part. If we are talking about right-wing extremism in Europe, the finding of recent research is that material deprivation alone can not explain it fully (summarized in political scientist Cas Mudde's dictum: 'It's not the economy, stupid!'). It most certainly cannot account for the case of ABB (Breivik, ANG), who could have lived an ordinary life with a reasonable regular income had he so chosen.<sup>657</sup>

There is a need, then, to distinguish between different degrees of activism; much like extremist Moslems responsible for the terrorist attack committed in London on July 7, 2007 and at Glasgow Airport on September 30, 2007 were middle to

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<sup>656</sup> JAMIE BARTLETT, JONATHAN BIRDWELL AND MARK LITTLER, THE NEW FACE OF DIGITAL POPULISM 15 (Demos, 2011).

<sup>657</sup> Email exchange in author's files.

upper middle class UK citizens, Anders Breivik was fully capable of being a member of Norwegian middle class, if not more. Economic circumstances, then, must not be used as a convenient 'hook' to explain the actions of extremists; important to recall that those responsible for 9/11, primarily including Bin Laden, were neither financially destitute nor unemployable. Given that economic circumstances and education levels were not the cause for Breivik's actions on July 22, 2011 nor those of Bin Laden's the measures recommended to minimize extremism do not apply across the board.

It is for that reason, then, that the impact of the triangle of economic conditions, educational level and influx of immigrants applies to a particular category of extremism rather than broadly to all extremists. This particular category is comprised of those whose anger at the 'other' is fueled by a lack of education that directly enhances un-employability. A caveat is warranted: anger at the 'other' whose importance cannot be sufficiently emphasized is not solely the result of education and employment opportunities. As innumerable studies have shown the causes of racism and hatred are varied, complex and dependent on both internal and external circumstances.<sup>658</sup>

Needless to say, this combination is a powerful motivator for their actions regarding the core actors, those 'locked in' on committing egregious crimes on behalf of the particular extremist viewpoint they espouse, the measures discussed in this chapter are not relevant. With respect to those who either directly incite to violence or commit the violent acts themselves and have financial opportunities thereby distinct from individuals described by Prof Ben David, the educational and economic discussion is not particularly relevant.

However, before addressing right wing extremism we turn our attention to radical Moslems in the Netherlands. In exploring both groups---right-wing extremists and radical Moslems----it is important to recall their similarities and distinctions; understanding and appreciating both significantly facilitates implementing measures that reduce their impact. With respect to Islamic extremism the possible influence of moderate Moslems must be considered. Case in point: the Brixton Mosque "..... is an ideal hunting ground for terrorist talent spotters since it attracts mainly young worshipers, including ex-convicts it helps rehabilitate. A criminal background is a useful indication that the candidate is not afraid to break the law. Recruiters often approach their targets at small, private Islamic study groups that meet outside the mosques."<sup>659</sup>

In an effort to protect the mosque from the increasing attempts of extremist protagonists and their followers to destabilise the mosque and provide an alternative violently radical narrative, the administration took some of the following steps:

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<sup>658</sup> See generally Scott Atran, *God and the Ivory Tower*, FOREIGN POLICY (Aug. 6, 2012) [http://www.foreignpolicy.com/articles/2012/08/06/god\\_and\\_the\\_ivory\\_tower](http://www.foreignpolicy.com/articles/2012/08/06/god_and_the_ivory_tower).

<sup>659</sup> Helen Gibson, *Looking for Trouble*, TIME, Jan 21, 2002, <http://www.time.com/time/world/article/0,8599,193661,00.html>.



- Changed the charitable status of the mosque into a trust with a set quorum of trustees who had the sole responsibility of electing and deselecting new or fellow trustees.
- Purchased the mosque premises, placing it under the direct ownership of ‘holding trustees.’
- Prevented the distribution of any publication or leaflets outside the immediate vicinity of the mosque. This included its own material which would, in the event, be distributed from within the mosque premises.
- Prevented any unofficial classes or study circles taking place.
- Provided more access to renowned scholars and their students from the Muslim world.
- Addressed the violent extremists and their ideologies publicly in sermons, conferences and publications.
- Physical preventative measures were adopted for those physically threatening the security of the mosque and its attendees.<sup>660</sup>

A word of caution: not all extremists are driven to action by inciters; Breivik is a prime example of largely self-motivated lone-wolf actor. While influenced by the blogger, Fjordman, Breivik’s decision to attack was unrelated to the larger free speech discussion. In that spirit, lone-wolf actors pose extraordinary challenges for the law enforcement and national security communities because of the paucity of “links” to like-minded individuals or leaders and inciters. While the danger posed by lone-wolf actors must not be minimized, the danger posed by inciters must, similarly, be recognized. In that context, the dilemma is how to more effectively balance free speech protections with protection of individuals and society alike.

The challenge is enormously compounded by the Internet and the resulting cyber incitement. The anonymity, reach and unrestricted tone and content that is the essence of the Internet is ‘low hanging fruit’ for extremists. It avails them, literally, unlimited access to ‘believers’ and provides fertile ground for unhindered, broad scale recruiting. My conversations with website administrators highlighted the built-in advantage enjoyed by cyber-inciters: the websites are easily accessible and administrators are deeply opposed to limiting content, regardless of its tone and tenor. Nevertheless, cyber-incitement deserves our attention; there is great danger in the reflexive response of the administrators whose unwillingness to engage in discussion regarding content restriction ensures unfettered ability to incite.

With respect to motivation for extremism, conversations with subject matter experts highlighted a number of causes. As I discussed in *Freedom from Religion*, religious extremism is, undoubtedly, a prime motivation. Questions abound

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<sup>660</sup> Abdul Haqq Baker, *A view from the inside*, 73 CRIMINAL JUSTICE MATTERS 24 — 25, 2008.

whether it is a prime motivation or the prime motivation. Whether “a” or “the” the reality confronting the general public, decision makers and people of moderate faith is that religious extremism is extraordinarily dangerous, targeting larger society and specific individuals alike.

Our collective failure to directly address, much less recognize, dangers arising from the link between extremism and speech is an on-going reality. The discussion is complicated primarily because extraordinary hesitation to restrict free speech. The common rejoinder of thoughtful readers of earlier drafts of this manuscript was “marketplace of ideas”. In other words, the strength of democracy is the spirit of rigorous debate and discussion; limiting discourse is both an anathema to democracy and ultimately weakens it. That is a valid and important argument that resonates with me, particularly when efforts are made to limit voices considered “outside the mainstream”.

By example: in December, 2012 the Israeli Knesset Election Committee voted to bar the participation of Hanin Zoabi, an Israeli-Arab, from participating in the January, 2013 election.<sup>661</sup> The decision, largely based on MP Zoabi’s involvement in the May 2010 Freedom Flotilla from Turkey to the Gaza Strip<sup>662</sup> is expected to be over-turned by the Israeli Supreme Court.<sup>663</sup> The decision to bar Zoabi’s participation in the election reflects disturbing trends in the Israeli extreme political right; while Zoabi’s involvement in the Flotilla was a matter of intense public debate it would be an exaggeration to suggest her actions endangered the state. The dilemma is concisely described below:

The Coalition Against Racism in Israel, opposing the decision, said it was based on political calculations. ‘A strong democracy is tested by its ability to contain opinions, even if they are different or hurtful,’ said coalition director Nadal Othomann. ‘Even if we do not all agree with Zoabi’s words, we shall fight for her right to express them,’ he said.<sup>664</sup>

However, there is a ‘flip side’ to that coin; the one that asks, as Dean Minow posed, what are the limits that intolerance is to be tolerated. The proverbial clear lines in the sand do not exist; to suggest otherwise is to engage in either political demagoguery or intellectual dishonesty. One of the great challenges confronting western democracy is, indeed, determining the limits of tolerating

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<sup>661</sup> See Johnathan Lis, *Israel election committee isqualifies MK Hanin Zabi rom running for Knesset*, HAARETZ (Dec. 19, 2012, 5:30 PM), <http://www.haaretz.com/news/national/israel-election-committee-disqualifies-mk-hanin-zuabi-from-running-for-knesset-1.485895>.

<sup>662</sup> See *Gaza Flotilla*, HAARETZ, <http://www.haaretz.com/misc/tags/Tag/Second%25252525252520Lebanon%25252525252520War-1.477718/Gaza%20flotilla-1.476996> (last visited Jan. 17, 2013).

<sup>663</sup> This is not the first time a political party has been banned in Israel: in 1988 Kach (founded by Rabbi Meir Kahane) was banned by the Israel Election Commission a decision upheld by the Israel Supreme Court. The basis for the ban was the IEC’s position that the party was “racist” and “undemocratic”.

<sup>664</sup> See Lis, *supra* note 695.

intolerance. To answer that question requires acknowledging that individual rights are not absolute and are subject to minimization in response to particular threats and circumstances. However, that two-step process demands recognition that extremists endanger society and that the state's primary obligation is to protect the vulnerable. It is for that reason that defining extremism is essential for otherwise the paradigm is akin to "round up the usual suspects".

In the journey that is this book the tension was identifying in each culture extremists and then determining whether they posed a danger to specific individuals or larger society. The premise, and conclusion, is that extremists pose a danger to both categories; however, the analysis cannot stop there for attention must be paid to distinct categories.

As discussed in chapters three and five there is a palpable tension in Europe between multi-culturalism and immigration; the former preaches acceptance of the 'other', the latter raises deep concerns regarding parallel communities and a willingness to truly be acculturated into a new society. Research and conversations in the UK, Norway and Holland raised significant questions regarding the context to which immigrants become members of mainstream society and similarly the degree to which traditional society accepts the 'other'. Re-articulated: the distinctions between traditional society and recent immigrants are significant; enhancing the differentiation is concern that newcomers do not "adopt" to the norms and mores of their new society preferring the language, customs and ways of their home culture.

Terminology is important; the semantics in Norway unequivocally suggested that society is divided between traditional Norwegians and immigrants; the former are white, the latter Moslems. Needless to say, not all immigrants are Moslems; after all, Danes and Poles have moved to Norway and are, therefore, immigrants. However, it would be an exaggeration to suggest that my Danish waiter at an Oslo restaurant would be referred to as an immigrant akin to a Moslem from Turkey or Morocco. That was made clear in meetings with immigration experts who emphasized Moslem immigration even though non-Moslems are also immigrants. Conversations with taxi drivers reinforced the sharp distinction between traditional Norwegians and Moslem immigrants; this distinction was never made between traditional Norwegians and white immigrants. Similar sentiments were expressed in the UK and Holland.

Why is this important? For the simple reason that distinctions and differentiations become self-fulfilling prophecies whereby 'outsider' status is reinforced; needless to say, that status can also reflect an unwillingness to join the new culture. This is extraordinarily important with respect to the issues discussed in this book; simply put, 'outsider' status enormously facilitates recruitment by extremist organizations able to magnify the "in-out" distinction. The consequences are dangerous: failure to successfully integrate immigrant communities into mainstream society directly contributes to marginalization compounded by high unemployment, low education and religious extremism.

The statistics suggested by scholars in Israel, Norway and the Netherlands suggest powerful similarity in distinct paradigms: the lack of education directly leads to unemployment<sup>665</sup> with its inevitable and troubling consequences.

Do extremists manipulate this paradigm to their advantage? The unfortunate response is “yes”. In Israel, for example, the high unemployment of adult males compounded by broad scale exemption from service in the Israel Defense Forces directly contributes to distinct societal categories. This is particularly troubling when the distinction implies delegitimization of state institutions. How else to explain attacks on IDF soldiers by nationalist right wing settlers, articulation by orthodox rabbis that religious law supersedes state law and incitement against Arabs and left-wing Jews by right wing Israelis, religious and secular alike? More troubling than the attacks---physical and verbal---is the deafening silence of state authorities tasked with enforcing the law. While various reasons have been offered to explain this, the most telling, and arguably accurate, was suggested by a former Cabinet Minister. His explanation for the failure to question or prosecute rabbis who incited against Rabin: fear of the response of right wing rabbis and their supporters.

Initially I was surprised by this analysis (2008); however, subsequent research in Israel and elsewhere has tragically re-enforced and re-affirmed this theory. The failure to directly confront extremists reflects disturbing weakness by the general public and state officials with particular blame attributed to the latter. There is, after all, only so much the public can do if law enforcement, prosecutors and courts are recalcitrant in their efforts and deleterious in their responsibilities. There is no substitute for a firm commitment by those entrusted to protecting the public in general in specific individuals in particular; just like those responsible for inciting Rabin’s assassin were never prosecuted, state officials in Utah have consistently failed to protect underage brides. In both cases, terrible crimes are committed: the assassination of an Israeli Prime Minister and institutionalized statutory rape.

It is for that very reason that the discussion regarding extremism must move from the abstract to the concrete: the harm is real, not abstract, the consequences visceral, not ephemeral. To that end, the discussion has been three-fold: descriptive, philosophical and legal. The descriptive is essential to recognizing the scope, nature and danger of extremism; the philosophical necessary to understanding its deeper meanings and causes; the legal inherent to addressing the question of how to minimize the dangers posed by extremists. There are, however, two distinct dangers with respect to imposing legal restrictions on extremism: limiting free speech is, needless to say, a dangerous road to travel and relying exclusively on the law to limit dangers is, similarly, a problematic path to traverse.

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<sup>665</sup> As the Taub Center in Israel suggests, the more troubling issue is “unemployability” of profoundly under-educated adult males (Orthodox Jews) whose English language and mathematical skills are, at best, equivalent to a grade school level.

It is to Martin Niemoller's<sup>666</sup> famous poem that we turn our attention:

*First they came for the Socialists, and I did not speak out-- Because I was not a Socialist.*

*Then they came for the Trade Unionists, and I did not speak out-- Because I was not a Trade Unionist.*

*Then they came for the Jews, and I did not speak out-- Because I was not a Jew.*

*Then they came for me--and there was no one left to speak for me.*<sup>667</sup>

On the assumption society cannot afford to turn a blind there are two recommended avenues in minimizing the threats posed by extremists. Failure to choose either option all but ensures realization of the horrifying paradigm Niemoller's powerful poem compellingly depicts. The failure to understand the ramifications both of extremism itself and silence in the face of extremism has extraordinary consequences. Those consequences are relevant both to the fate of particular individuals and to larger society.

Perhaps that is what led both UK Prime Minister Cameron and German Chancellor Merkel to conclude that multiculturalism has failed. While different cultures are important for a broad mosaic there is an important 'but': dangers to specific individuals and broader society if an insular group refuses to adapt to the laws and mores of the home society. While western democratic societies are predicated on freedom of speech and belief there is no justification for that tolerance to become a 'weapon' for extremists within insular communities. That, more than anything, articulates the great danger posed by an indiscriminating embrace of multi-culturalism.

A simple examination of the horrors resulting from honor killings and female genital mutilation sufficiently highlights the dangers to which Moslem females are subjected. Under no condition can either practice be tolerated or 'understood' in the context of respect for other cultures; both acts are a crime that must be met with the full force of the law. Unfortunately, as widely documented and discussed in previous chapters, that is not the case. To that end, even if a particular practice is presented in accordance with the tenets and mores of a faith, society has the obligation to proactively prevent it if deemed to harm individuals. The harm test, then, is essential to this conversation.

As I wrote elsewhere:

In a recent Great Britain honor killing case, Justice Roderick Evans commented regarding a young woman killed: 'She was being squeezed between two cultures

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<sup>666</sup> Niemoller was a prominent Protestant pastor who emerged as an outspoken public foe of Adolf Hitler and spent the last seven years of Nazi rule in concentration camps, *see generally*, *Martin Niemoller: First they came for the socialists*, U.S. HOLOCAUST MEMORIAL MUSEUM, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007392> (last visited Jan 17, 2013).

<sup>667</sup> *Id.*

– the culture and way of life that she saw around her and wanted to embrace, and the culture and way of life you wanted to impose on her.”<sup>668</sup>

In that vein, Gila Stopler sheds important light on the relationship between religion and women:

The symbolic devaluing of women in relation to the divine is achieved in the Hebrew monotheist religion through the establishment of a supreme, male God who makes a covenant exclusively with men that excludes women from the religious ritual and from the religious symbol systems. Through the portrayal of woman, especially her sexuality, as the source of all weakness and evil, this symbolic devaluation becomes one of the two founding metaphors of western civilization.<sup>669</sup>

Where do we go from here? There are, I suggest, three viable alternatives to combatting the dangers posed by extremism. Needless to say, there is a fourth that I find morally unconscionable and legally deeply troubling: ignoring the threat and ‘hoping for the best’. Martin Niemoller brilliantly articulated why that option endangers society and individual alike and is, therefore, not an option.

The viable three options I propose as viable are: limiting the free speech of extremist inciters; enhancing and broadening educational opportunities for those living in extremist cultures; dialogue with extremists. Before addressing the three, important to recall the presumption in this discussion is that extremism does, indeed, pose a threat to society and individuals alike and that turning a blind eye is simply not viable.

With respect to dialogue: perhaps reflective of and influenced by my experience in operational counter-terrorism but dialogue exclusively predicated on dialogue will not convince extremist leaders to ‘de-extremism’. The pages of history are filled with examples of efforts to reach-out to extremists; the dialogue is effective only if coupled with inducements commensurate with self-interest. Herein lies a troubling weakness with this option: self-interest whereby society recognizes the validity and legitimacy of extremist actions is akin to the multiculturalism efforts that both Cameroon and Merkel identified as ‘failed’. That is, the hope that recognizing the uniqueness of particular actions by extremist groups has the ability, clearly, to cause harm.

Otherwise, how explain the troubling paucity of criminal actions against parents and other family members who participate in female genital mutilation and honor killings. Both are direct attacks on females; both are violent, reprehensible and must not be ‘understood’ in the context of dialogue. In this same way, efforts of Orthodox Jewry’s efforts to relegate women to second class status----

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<sup>668</sup> Julia Chamberlin and Amos Guiora, *Polygamy: Not “Big Love” but Significant Harm*, 10 (forthcoming 2013).

<sup>669</sup> *Id.* at 25.

forcing women to sit on the back of buses or preventing women from praying at the Western Wall---is reflective of actions incommensurate with western democracies. In the same spirit, political calculations have led successive Israeli governments to extend deferments from IDF obligation to Orthodox males; while reflective of the 'price' of ensuring electoral support by the Orthodox community the larger questions regarding the nature and ethos of society are, largely, ignored.

This is not, then, dialogue; it is, for lack of better term, capitulation predicated on narrow and political calculations. Re-articulated: the failure to directly address the crimes committed in the name of Islam, the decision to enable sexual discrimination and profound imbalance amongst Israeli citizens suggests a 'one way' dialogue in which society is enabling extremism at the cost of imposing harm on individuals. This is not true dialogue; true dialogue would require the extremists to adopt their ways to that of larger society. As discussed in the proceeding chapters, adoption is antithetical to extremism for it reflects failure to adhere to rigid codes and tenets.

While the physician described in the introduction was not an extremist for he was not, I believe, a person of violence his rigidity was overwhelming. While professing love for his children as paramount, greater value was attached to religious scripture. I am deeply doubtful that his son, whose hypothetical same-sex marriage was the basis for our conversation, could convince my seatmate to attend the wedding. This was vividly reinforced in a dialogue I had with an orthodox Jew who was adamant that he would not attend the wedding of *his* son were he to marry a Gentile. I pressed, suggesting his son's happiness in finding a partner was to be celebrated; the response was clear, "marrying a Gentile is a reject and repudiation of everything I (the father) believe in". This individual who by all accounts is gracious, thoughtful and generous was as uncompromising as my plane seatmate.

Both conversations cast, for me, deep skepticism regarding the efficacy of dialogue not accompanied by significant self-interest. That is, the very essence of extremism---whether accompanied by violence or not---is the absolute commitment to a particular belief or set of principles. While dialogue is, understandably, a compelling alternative the essence of dialogue is an interaction, by at least two individuals open to an exchange of ideas that implies the possibility of changing opinions and viewpoints. That is, in many ways, the existential opposite of extremism, which, in the dialogue-monologue paradigm, is far more reflective of monologue in the echo chamber, as previously discussed.

Accordingly, I am skeptical of the willingness of the extremist to engage in conversation intended to convince him to 'change his ways' for that is the very antithesis of extremism. However, the option of dialogue need not be perceived through the lens of a silo; the more appropriate question is whether dialogue in conjunction with other means can be effective in countering extremism. To that end, of the other two measures suggested as relevant to effectively minimizing

extremism the most relevant----in the dialogue context---is education. As discussed in proceeding chapters, research by the Taub Center (Israel) compelling and convincingly highlights the power of education and its extraordinarily powerful and positive impacts. Conversely, findings demonstrate the dangers, harms and negative repercussions resulting from a failure to educate young people. To clarify: education in this context refers to a broad education extending far beyond rote memorization of religious scripture----Christian, Jewish and Muslim---whereby the individual's world view is extraordinarily limited, devoid of curiosity and engagement with the outside world.

The religious "education" preferred by religious extremists insures perpetuation of ignorance, compliance and rigidity. The interviews with former FLDS members (see above) powerfully highlighted the extraordinarily limited nature of their "education"; that model is as applicable to the FLDS culture as it is to Orthodox Jewry as it is to madrassas' where Moslem children learn. The model is the same, only the text differs; divorced from critical thinking, relying on strict discipline and ensuring perpetual ignorance is the essence of strict religious education. In essence, this is not education rather it is indoctrination with one powerful goal: ensuring the continuation of closed, insular worlds devoid of external influence. As history has repeatedly demonstrated the consequences are deeply distressing; today's newspapers reflect the dangers posed by indoctrination, rather than education, to individuals and society alike.

However, creating infrastructure whereby individuals of deep religious faith can study subjects more commonly associated with liberal western society would represent a dramatic paradigm shift. Whether the impetus would reflect economic reality, internal pressure or other factors is a matter of debate. What is clear, and need not be a matter of debate, is the extraordinarily positive ramifications of such a development. Unlike the dangers of cyber-incitement discussed in chapter five, the positive power of the Internet in opening up new vistas and horizons is unparalleled. It is not by chance that religious extremists deny their followers Internet access; the conversation with FLDS members powerfully articulated the extent to which Warren Jeffs is deeply concerned about the Internet's impact on his community.

In that same vein, the manner in which Orthodox Jewish women use Facebook to communicate with the outside world expressing their distress suggests understanding of the world beyond their immediate cloistered walls. Similarly, economic reality increasingly forces Orthodox women to join contemporary society's workplace, as compared to the traditional role of schoolteacher. Whether this will have an impact on forcing the larger Orthodox community to engage with modern Israeli society remains to be seen; nevertheless, it suggests an important shift whose importance need not be minimized.

Dialogue (not echo chamber) and education are, then, the carrots in minimizing extremism; limiting the free speech of extremist inciters is the stick. We are at a



crossroads: my travels over the past few years have forced me to confront the dangers posed by not aggressively confronting inciters. I have been extremely fortunate that a broad range of individuals have graciously agreed to engage me in discussion on this issue. Needless to say, not all agree with the core recommendation to limit free speech; some find this proposal deeply troubling suggesting it violates the very ethos of liberal western society. They are right.

However, I respectfully disagree with them for there are limits to which the marketplace of ideas is the most effective mechanism to minimize the reach of an inciter particularly when the Internet makes that reach, literally, unlimited. Mills' argument, on which I was raised and educated, may well not be relevant to a world where an inciter has the world, literally, at his fingertips. Whether Breivik ever met Fjordman is not important; what is relevant for our purposes that Fjordman's writings were available to Breivik and millions of others through the Internet. The same is true with respect to Major Hassan who was propelled to kill fellow US military personnel because of cyber-incitement.

However, my recommendation goes beyond the computer: the FBI's failure to directly address the radical imam in Minneapolis who radicalized second generation Somali youth to become suicide bombers is a mistake that we cannot allow to occur again. That is also true with respect to the stunning failure of Israeli authorities regarding right-wing rabbis. In the ultimate paradox, MP Wilders was brought to trial for offending Moslems; his acquittal need not detract from the enormity of the decision to prosecute him. A careful review of *Fitna* and Wilders' public comments reflect an individual raising powerful flags of caution with respect to clear threats to Dutch society. However, rather than prosecute the imam who issued a fatwa against Marcoush, the decision was made to prosecute the 'warner'.

While Wilders' commentary and methods, understandably, cause discomfort that is neither existentially, legally nor practically akin to the clear physical harm Marcoush expressed to me the evening we had dinner. He well understood the very direct threat under which he had been placed. Needless to say, the same is true with respect to Rabin. In that spirit, the same is true with respect to underage girls subject to statutory rape, honor killings and female genital mutilation as I write these lines.

It is to *them* that we owe a duty and it is for their protection that we *must* seriously consider limiting the free speech of those directly responsible for the harm and danger in which they live. Western society's obligation to protect the vulnerable is no less sacred than Western society's obligation to ensure Freedom of Speech.

Somehow, somewhere that balancing requirement must be adjusted before an inciter causes further harm. In that spirit, we cannot take our collective and individual eye off the ball that is the harm posed by extremism.

## **Tolerating Extremism: To What Extent Should Intolerance be Tolerated?**

### **Summary**

The dominant theme we shall explore is: to what extent should society tolerate intolerance? This is, of course, a hugely important question. It is something Karl Popper famously addressed when he wrote that “unlimited tolerance” must lead to the “disappearance of tolerance”. Popper was writing against the backdrop of the rise of the Nazis in the 1930s of the twentieth century. Now we are faced with other extremist challenges. Nevertheless, the type of questions this confronts us with is similar. Addressing this question requires discussing to whom does government owe a duty and what is the harm caused by extremism. These issues will be our focus; in delving into these complicated and complex questions it is clear that the discussion will cause discomfort, if not controversy. That has been very clear to me in the course of my research; conversations with a wide-range of subject matter experts from different countries and distinct disciplines repeatedly reinforced this reality.

To effectively address “tolerating intolerance” requires examining disparate themes covering a broad mosaic. That is necessary to effectively answer complicated questions including: to whom is a duty owed, to what extent should society protect itself against an identifiable threat, how does the nation-state balance protections with freedoms and what should be the definition of extremism. After all, an overly broad definition of extremism will unnecessarily impinge on otherwise protected rights whereas a very narrow definition will grant protections to those who endanger society.

Comparatively - different countries, distinct cultures, unique paradigms - analyzing “tolerating intolerance “ is intended to facilitate understanding of the depth and importance of the query. The chapter “break-down” (see below) is intended to enhance the discussion; the comparative discussion will be interwoven into the issues addressed in each chapter. It is important to emphasize that at its core the question regarding how much intolerance society should tolerate requires examining two over-arching questions: to whom does government owe a duty and when should government intervene, thereby limiting individual rights while protecting individuals.

This work reflects an eclectic approach to an age – old problem. I am not the first, nor the last to address extremism. It is, to be frank, an issue that has been “part and parcel” of human nature and history for thousands of years. It is safe to assume that extremism will continue to be an integral part of the human existence in the years to come. In other words, extremism is a reality. The question, however, is whether extremism endangers society and if yes, to what extent and what can be done to mitigate the harm it causes. As discussed in chapter one, I define extremism as a powerful combination of violence and ideology that must necessarily always be “correct” in the mind of its believers.

For those believers their ideology is invariably “the truth” and must be defended at all costs.

In undertaking this project my intention is to explore religious and secular extremism in a number of different countries. I do so because I am intrigued by a comparative approach. I believe it is an important, and effective, method to examine a particular topic, with the caveat that different cultures and societies have distinct nuances, subtleties and realities. In that vein, it is important to note there is a differential treatment amongst the surveyed countries reflecting the distinct values of each society relevant to the specific issues the project addresses.

While this project focuses on religious and secular extremism I am not engaged in “religion bashing”. Although I will focus on some less pleasant aspects of religion, in particular extremist religion, this exercise should not be mistaken for atheist propaganda in the sense of New Atheism. ; I find that to be uninteresting and vapid. I am, however, interested in exploring ways in which the state can more effectively protect itself against those who seek to harm individuals and society alike while protecting the freedom of speech of those who challenge society.

Re-articulated, my exploration focuses on the relationship between extremism and society, particularly how the latter can more effectively protect itself against the former. In doing so, I believe it is essential to analyze, if not focus, on the relationship between tolerance and intolerance, particularly society’s willingness to tolerate intolerance at the risk of “harm”.

To best understand the relationship between “tolerance”, “intolerance” and “harm” they must be considered both individually and collectively. One of the most important questions is the extent of harm to individuals and society the state should tolerate regarding freedom of speech and freedom of religion. It is for that reason that the chapters ahead focus, in large part, on these two freedoms. While attention is paid to other issues relevant to a broader discussion regarding extremism, the focal point of this project is the freedom of speech and freedom of religion.

There is a direct link between extremism and national security, or what some define as public order. Regardless of the term, the point of departure in this project is inquiring to whom does the state owe a duty. In many ways, that question is essential to resolving the “limits of tolerating intolerance” query. In asking to “whom does the state owe a duty”, my working thesis is that resolving this dilemma suggests it is legitimate for the state to minimize otherwise guaranteed rights. To that end, the two core questions are: should the state minimize individual rights in the face of extremism and, if yes, “how”?

To address these two questions, I made a number of assumptions:

- That extremism exists (secular and religious alike);
- That extremism poses a harm to individuals and society alike;

- That the state owes a duty to protect;
- That the state must act proactively to protect;
- That minimizing individual rights to protect the “at risk” is a legitimate;
- That there are limits to how much intolerance can be tolerated;
- That extremists “push the envelope” in terms of “testing” society;
- That extremists effectively use social media and the internet;
- That speech by extremist leaders endangers society when it reaches the level of incitement and therefore must be subject to surveillance and restriction;
- That a comparative approach facilitates understanding how different countries address confront these common questions and challenges.

Answering these questions required I travel “in country” to the surveyed countries and meet with a wide-range of subject matter experts representing distinct disciplines, beliefs, perspectives and agendas. Needless to say, the subject naturally lends itself to distinct and contentious points of view, reflecting the enormous complexity of the questions posed. My approach was agenda “free”; nevertheless, I was well aware those interviewed articulated positions and perspectives reflecting their particular approach to the subject matter. The project incorporates distinct voices reflecting powerful and compelling disparate opinions, perspectives and values. I have made a deliberate and conscious effort to give wide space and latitude to those voices. Needless to say, the analysis and recommendations are solely mine and I bear exclusive responsibility for their interpretation.

As a condition to speaking with me, the overwhelming majority of individuals requested anonymity; while I agreed with their condition, I am aware of the possible discomfort such an approach may cause. Nevertheless, I felt - after careful consideration and much reflection - that not acceding to this request would deny me access and insight to thoughtful and reflective people whose thoughts were essential to my research. Needless to say, in accordance with academic rigor and standards, all articles and books I quote are cited in full. Furthermore, records of all communications - in-person interviews, emails and phone conversations - are in my personal files. It is also important to note that the reasoning I develop in this thesis and the conclusions drawn are not dependent on anonymous sources. I do not invite the reader to assent to a view on the basis of an authority of whom I cannot reveal the identity. The reason that I engaged with many people is that they pointed out relevant material for study and they provided me intellectual sparring partners for my ideas.

Given the sensitivity and controversy of the subject matter I concluded that not respecting requests for anonymity requests would make this a distinctly different, and very limited, project. I am convinced were I not to include disparate, distinct and controversial voices, the final product would be significantly distinct from the pages that follow. Were I not to respect these requests I would not be in a position to bring “unfiltered voices” to the table; it is my belief that these voices are essential to truly understanding extremism. I am

fully confident this approach significantly enhances the reader's insight to the issues at hand.

Naturally, meetings with senior national security officials in the surveyed countries were conditioned on a guarantee of anonymity. This, for me, was an obvious request; the same holds true for individuals who felt their personal security was "at risk" were their involvement in the project known. While "off the record" conversations with national security officials are, largely, a "given" the same may, understandably, not be readily apparent regarding subject matter experts from other fields. However, as I learned when researching and writing *Freedom from Religion* (first and second editions) the subject matter is sufficiently controversial to elicit repeated requests for anonymity. Important to add that in agreeing to this demand I imposed on myself to be the readers' "eyes and ears" requiring that I be both an honest reporter and objective analyst.

Regarding the methodology of the chapters a few words are in order: each chapter could, literally, be a book onto itself. To that end, the chapters "read" differently, some very detailed, others less so. Similarly, different topics and different countries reflect disparate levels of treatment. The chapters are neither equal in length nor equal in treatment; they are not intended to be so. Some are intended to provide a "window" on a particular issue whereas others present a specific issue in greater depth and intensity. In that vein, some chapters are very analytical, others more descriptive. Important to recall that in addressing the questions posed above my goal was to create the "groundwork" for the final chapter. The significance of this "build-up" cannot be sufficiently emphasized; from a methodological perspective the first six chapters are intended to create the groundwork for the recommendations that are the essence of the last chapter.

Similarly, there is a difference between how free speech in the US is analyzed in comparison to the other surveyed countries. That reflects both the historical richness of US case law and my familiarity with relevant Supreme Court decisions. There is another reason, though, why the case law on free speech in the US is treated much more elaborately than in the chapters on Norway and the Netherlands. This is – it is important to emphasize – not a thesis on the freedom of speech in the countries mentioned. This thesis is not aimed to be a contribution of comparative constitutional law or comparative human rights law. So the comparative approach does not suggest that the surveyed countries are addressed in similar depth and intensity; the intention is to provide the reader with sufficient information to draw comparisons and consider distinct approaches to similar paradigms. To that end, the approach I have adopted does not claim to address each country equally nor provide equal "space" to each issue; that is neither my purpose nor interest.

One of the important discussion points in the tolerance/intolerance debate is multiculturalism. It is, understandably, an issue that causes discomfort amongst readers with some questioning its relevance to this project. I decided to

incorporate a chapter regarding multiculturalism because of its deep - albeit uncomfortable - relationship to extremism. The multiculturalism debate, far more prevalent in Europe than in the US, highlights powerful tensions between “traditional” European society and that of “immigrant” Europe. Numerous professional and personal visits to Europe, particularly in the Netherlands, Norway and UK, highlighted the centrality of the multiculturalism debate in the context of the domestic political debate.

This was very much on the lips of a wide range of individuals with whom I met; while recognizing the importance of the topic, many articulated hesitation, if not discomfort, in the discussion. However, because of multiculturalism’s profound connection to both intolerance/tolerance and extremism it is essential to the broader discussion. There is concern that the multiculturalism discussion is a thinly veiled “finger pointing” exercise aimed at immigrants in accordance with deep concerns raised by the European political far-right. Wide-ranging discussions with subject matter experts from different fields and disciplines emphasized the importance of immigration to Europeans.

A clear connection was “drawn” between immigration, security and extremism; in that vein, the question oft posed was how, and to what extent, does society protect itself against the “outsider”. The irony, needless to add, was that the “outsider” was a member of society though distinct culturally, religiously and ethnically from “traditional” society. As European leaders weigh their individual and collective responses to events both in Europe and beyond its borders sensitivity - the extent is unclear - is necessarily paid to the possible reactions of relevant immigrant populations. In that spirit, chapter five is heavily descriptive for addressing contemporary social tensions in the context of this project requires focusing on a number of issues, particularly the economy, immigration and gender issues relevant to religion.

See: Popper, K.R., *The Open Society and its Enemies*, Volume 1, The Spell of Plato, Routledge & Kegan Paul, London and Henley 1977 (1945), p. 265; Rijpkema, Bastiaan, “Popper’s Paradox of Democracy”, in: *Think*, Volume 11, Issue 32, September 2012, pp. 93-96.

see: Hitchens, Christopher, *The Portable Atheist: Essential Readings for the Nonbeliever*, Selected and with introduction by Christopher Hitchens, Da Capo Press, Philadelphia 2007; Stenger, Victor J., *The New Atheism: Taking a Stand for Science and Reason*, Prometheus Books, Amherst N.Y. 2009.

see: Fraleigh, Douglas M., Tuman, Joseph S., *Freedom of Speech: in the Marketplace of Ideas*, St. Martin’s Press, New York 1997; Barendt, Eric, *Freedom of Speech*, Second Edition, Oxford University Press USA, New York 2007.

## **Het tolereren van extremisme: tot op welke hoogte kan intolerantie worden getolereerd?**

### **Samenvatting**

Het vraagstuk dat in dit onderzoek centraal staat, is: tot op welke hoogte de samenleving intolerantie dient te tolereren. Dat is natuurlijk een uiterst relevante vraag. Het is het beroemde vraagstuk dat Karl Popper behandelde toen hij schreef dat 'onbeperkte verdraagzaamheid' onvermijdelijk leidt tot de 'verdwijning van tolerantie'. Popper schreef destijds met het oog op de opkomst van de nazi's in de jaren 30 van de twintigste eeuw. Nu worden we geconfronteerd met andere extremistische uitdagingen. Niettemin is het soort vragen dat dit met zich mee brengt van vergelijkbare aard. Het beantwoorden van deze vraag vergt een bespreking van de verplichtingen van de overheid en de schade die wordt veroorzaakt door extremisme. Dat zijn de kwesties die het meest van belang zijn, en door ons te verdiepen in deze ingewikkelde en complexe vragen wordt duidelijk dat deze discussie leidt tot ongemak, zo niet controverse. Dat is in ieder geval wat ik heb ervaren in de loop van mijn onderzoek, en deze indruk werd tijdens gesprekken met vele vakspecialisten uit verschillende landen en van verschillende disciplines herhaaldelijk bevestigd.

Om het probleem van het tolereren van intolerantie effectief te bespreken moet een breed palet aan thema's behandeld worden. Dat is nodig om ingewikkelde vragen effectief te beantwoorden, zoals: ten aanzien van wie bestaat een verplichting? In welke mate dient de samenleving zich te beschermen tegen een identificeerbare dreiging? Hoe balanceert de natiestaat inperkingen van vrijheden met vrijheden? En hoe dient de definitie van extremisme te luiden? Immers, een te ruime definitie van extremisme tast anderszins beschermde rechten aan, terwijl een te enge definitie bescherming zal verlenen aan diegenen die de maatschappij in gevaar brengen.

Relatief gezien –vanuit verschillende landen, verschillende culturen, unieke paradigma's– is het analyseren van het vraagstuk 'intolerantie tolereren' bedoeld om inzicht te verkrijgen in de diepte en het belang van de onderzoeksvraag. Het hoofdstuk 'break-down' (zie hieronder) is bedoeld om de discussie te bevorderen en de vergelijkende discussie zal worden verweven in de problemen die in elk hoofdstuk terugkomen. Het is belangrijk om te benadrukken dat, in de kern, de vraag tot op welke hoogte de samenleving intolerantie dient te tolereren twee overkoepelende vragen oproept: ten opzichte van wie heeft de overheid een verplichting en wanneer moet de overheid ingrijpen -met als gevolg dat individuele rechten worden beperkt teneinde individuen te beschermen.

Dit werk weerspiegelt een eclectische benadering van een eeuwenoud probleem. Ik ben niet de eerste, noch de laatste om extremisme te bestuderen. Om eerlijk te zijn: het is een probleem dat onlosmakelijk aan de menselijke natuur is verbonden en onderdeel is van duizenden jaren geschiedenis. We

kunnen veronderstellen dat extremisme de komende jaren een integraal onderdeel van het menselijk bestaan zal blijven. Met andere woorden, extremisme is de realiteit. De vraag is echter of extremisme de samenleving in gevaar brengt en zo ja, in welke mate, en wat kan worden gedaan om de schade die wordt veroorzaakt, te beperken. Zoals in het eerste hoofdstuk wordt besproken, definieer ik extremisme als een krachtige combinatie van geweld en ideologie die noodzakelijkerwijs altijd 'correct' moet zijn in de beleving van de gelovigen. Voor dergelijke gelovigen is hun ideologie steevast 'de waarheid' die koste wat kost moet worden verdedigd.

Bij de uitvoering van dit project is het mijn bedoeling geweest om religieus en seculier extremisme in een aantal verschillende landen te verkennen. Dat doe ik omdat ik geïntrigeerd ben door een vergelijkende aanpak. Ik geloof dat dat een belangrijke en effectieve methode is om een bepaald onderwerp te onderzoeken, onder voorbehoud dat wordt stilgestaan bij het feit dat verschillende culturen en samenlevingen, verschillende nuances, subtiliteiten en realiteiten kennen. In die geest is het belangrijk op te merken dat er een verschil in aanpak is ten aanzien van de onderzochte landen als gevolg van de verschillende waarden van iedere samenleving die aan de specifieke problemen van het project raken.

Hoewel dit project zich richt op religieus en seculier extremisme houd ik mij niet bezig met het 'inhakken op religie'. En hoewel ik me richt op een aantal minder aangename aspecten van religie, in het bijzonder extremistische religie, moet deze oefening niet worden verward met atheïstische propaganda in de zin van 'New Atheism'. Dat vind ik oninteressant en flauw. Ik ben echter geïnteresseerd in het verkennen van wijzen waarop de staat zich beter kan beschermen tegen diegenen die proberen om zowel individuen als de samenleving schade te berokkenen, waarbij tevens de vrijheid van meningsuiting van degenen die de samenleving bekritisieren beschermd blijft.

Geherformuleerd, mijn verkenning richt zich op de relatie tussen extremisme en de samenleving, in het bijzonder hoe laatstgenoemde zich beter kan beschermen tegen eerstgenoemde. Daarbij acht ik het van essentieel belang om te analyseren, zo niet me te concentreren op de relatie tussen tolerantie en intolerantie en met name op de maatschappelijke bereidheid om intolerantie te tolereren wanneer het aankomt op het risico van schade.

Om de verhouding tussen tolerantie, intolerantie en schade goed te kunnen begrijpen moet dit worden bestudeerd op individueel en collectief niveau. Een van de belangrijkste vragen is welke mate van schade aan het adres van individuen en de samenleving de staat moet tolereren met betrekking tot de vrijheid van meningsuiting en vrijheid van godsdienst. Het is om die reden dat de hoofdstukken zich voor een groot deel richten op deze twee vrijheden. Hoewel aandacht wordt besteed aan andere zaken die voor een bredere discussie over extremisme tevens relevant zijn, vormen vrijheid van meningsuiting en de vrijheid van godsdienst het brandpunt van dit onderzoek.



Er is een direct verband tussen extremisme en nationale veiligheid, of wat sommigen omschrijven als de openbare orde. Ongeacht de terminologie, het uitgangspunt van dit project is het beantwoorden van de vraag ten aanzien van wie de staat een verplichting heeft. In vele opzichten is die vraag essentieel voor het beschrijven van de 'grenzen van het tolereren van intolerantie'. Door de vraag te stellen 'ten aanzien van wie heeft de staat verplichtingen', is mijn werkhypothese ontstaan die inhoudt dat het oplossen van dit dilemma veronderstelt dat het voor de staat legitiem is om anderszins gewaarborgde rechten te beperken. Daartoe dienen twee kernvragen, namelijk: moet de staat individuele rechten beperken met het oog op extremisme en, zo ja, hoe?

Om deze twee vragen te beantwoorden, heb ik een aantal veronderstellingen:

- Dat extremisme bestaat (zowel seculier als religieus);
- Dat extremisme schade berokkent aan zowel individuen als aan de maatschappij;
- Dat de staat de plicht heeft te beschermen;
- Dat de staat proactief moet optreden om te beschermen;
- Dat het beperken van individuele rechten van diegenen die 'risico lopen' legitiem is;
- Dat er grenzen zijn aan de mate waarin intolerantie kan worden getolereerd;
- Dat extremisten proberen de grenzen van het maatschappelijk toelaatbare op te rekken;
- Dat extremisten effectief gebruik maken van sociale media en het internet;
- Dat meningsuiting door extremistische leiders de samenleving in gevaar brengt wanneer dit het niveau van 'aanzetten tot' bereikt en dat dit dus onderworpen moet worden aan toezicht en beperking;
- Dat een vergelijkende aanpak het begrip van hoe verschillende landen deze gemeenschappelijke uitdagingen aanpakken vergemakkelijkt.

Het beantwoorden van deze vragen vereist reizen door de onderzochte landen zelf om zo kennis te maken met een breed scala aan experts die verschillende disciplines, overtuigingen, perspectieven en agenda's vertegenwoordigen. Het onderwerp leent zich natuurlijk voor uiteenlopende en controversiële standpunten, hetgeen de enorme complexiteit van de gestelde vragen reflecteert. Mijn aanpak was daar zo open mogelijk in te staan en tegelijkertijd goed op de hoogte te zijn van de verschillende posities en perspectieven van de geïnterviewden. Het project omvatte daarmee het weergeven van de diversiteit van de opinies, die bestonden uit uiteenlopende krachtige en meeslepende meningen, perspectieven en waarden. Ik heb een bewuste poging gedaan om veel ruimte te geven aan die boodschappen. Daarbij dient vermeld te worden dat de analyse en de aanbevelingen exclusief aan mij toe te schrijven zijn en uitsluitend ik draag de verantwoordelijkheid voor de uitleg daarvan.

De overgrote meerderheid van de ondervraagden ging akkoord met het vraaggesprek onder voorwaarde van anonimiteit, en hoewel ik hun verzoek heb ingewilligd, ben ik me bewust van de mogelijke ongemakken die een dergelijke aanpak kan veroorzaken. Desalniettemin voelde ik – na zorgvuldige overweging en reflectie – dat het niet accepteren van die voorwaarde zou betekenen dat ik geen toegang tot en inzicht zou verkrijgen in weldenkende mensen wier gedachten essentieel waren voor mijn onderzoek. Het behoeft geen betoog dat ik in overeenstemming met de academische discipline en normen heb gehandeld, en ik dus alle artikelen en boeken die ik heb aangehaald volledig heb geciteerd. Verder heb ik alle verslagen van alle conversaties - interviews, e-mails en telefoongesprekken – opgeslagen in mijn persoonlijke archief. Het is ook belangrijk op te merken dat de redeneringen en conclusies die ik heb ontwikkeld in dit proefschrift niet afhankelijk zijn van anonieme bronnen. Ik verwacht niet van de lezer dat hij of zij instemt met overwegingen die afgeleid zijn van een autoriteit van wie ik de identiteit niet kan onthullen. De reden dat ik met veel mensen het gesprek ben aangegaan is dat zij mij op relevant studiemateriaal hebben gewezen en omdat zij voor mij intellectuele sparringpartners voor mijn ideeën waren.

Gezien de gevoeligheid en de controverse van het onderwerp heb ik besloten dat niet voldoen aan hun verzoeken om anonimiteit mijn project fundamenteel anders en beperkter gemaakt zou hebben. Ik ben ervan overtuigd dat als ik hun veelzijdigheid aan controversiële opinies niet verwerkt zou hebben, het eindproduct er significant anders uit zou hebben gezien. Ware ik niet op deze verzoeken zijn ingegaan, dan was ik niet staat geweest om deze ‘ongefilterde stemmen’ te horen, en het is mijn overtuiging dat deze stemmen essentieel zijn om daadwerkelijk inzicht te krijgen in extremisme. Ik heb er alle vertrouwen in dat deze aanpak het inzicht van de lezer in deze problemen aanzienlijk verbetert.

Uiteraard vonden ontmoetingen met ambtenaren van veiligheidsdiensten in de onderzochte landen plaats onder de voorwaarde van anonimiteit. Dat was voor mij een vanzelfsprekend verzoek. Hetzelfde geldt voor personen die vonden dat hun persoonlijke veiligheid in het geding zou komen indien hun betrokkenheid bij het project bekend zou worden. Terwijl ‘off the record’ gesprekken met ambtenaren die zich bezig hielden met nationale veiligheid veelal geen verbazing zal wekken, is dit niet zonder meer het geval bij vakspecialisten uit andere disciplines. Echter, zoals ik heb geleerd tijdens het onderzoeken en schrijven van *Freedom from Religion* (eerste en tweede druk), is het onderwerp voldoende controversieel om herhaalde verzoeken om anonimiteit uit te lokken. Belangrijk is om te vermelden dat door in te stemmen met dat verzoek ik mijzelf oplegde om een zo veel mogelijke eerlijke en objectieve vragensteller en analist te zijn.

Met betrekking tot de methodologie van de hoofdstukken vermeld ik tevens het volgende: elk hoofdstuk heeft het in zich om een boek op zichzelf te zijn. Daarom leest elk hoofdstuk weer anders, sommige zijn erg gedetailleerd, andere hoofdstukken zijn dat wat minder. Ook weerspiegelen verschillende onderwerpen en verschillende landen uiteenlopende niveaus van de behandeling

van het vraagstuk. De hoofdstukken zijn niet allemaal even lang noch gelijk in de behandeling, en dat is ook de bedoeling geweest. Sommige hoofdstukken zijn bedoeld om een raamwerk te bieden voor een bepaald onderwerp, terwijl andere een specifiek onderwerp diepgaander en intensiever behandelen. Zo zijn sommige hoofdstukken zeer analytisch en andere meer beschrijvend. Het is belangrijk om in herinnering te roepen dat bij het aanpakken van de bovenstaande vragen mijn doel steeds is geweest om de 'basis' voor het laatste hoofdstuk te creëren. De betekenis van deze 'opbouw' kan niet voldoende worden benadrukt: vanuit een methodologisch oogpunt zijn de eerste zes hoofdstukken bedoeld om de basis voor de aanbevelingen, die de essentie van het laatste hoofdstuk vormen, te creëren.

Evenzo is er een verschil met de wijze waarop vrije meningsuiting in de Verenigde Staten wordt geanalyseerd in vergelijking met de andere onderzochte landen. Dat weerspiegelt zowel de historische rijkdom van de Amerikaanse jurisprudentie en mijn bekendheid met relevante besluiten van het Amerikaanse Hooggerechtshof. Er is evenwel nog een reden dat de jurisprudentie over de vrijheid van meningsuiting in de VS veel uitgebreider is dan in de hoofdstukken over Noorwegen en Nederland. Dit is - nogmaals - niet een proefschrift over de vrijheid van meningsuiting in de genoemde landen. Dit proefschrift is geen bijdrage over vergelijkend staatsrecht en vergelijkende mensenrechten. Het doel is om een weloverwogen weergave te presenteren over hoe om te gaan met extremisme. De vergelijkende aanpak heeft niet als doel de onderzochte landen even diepgaand en intensief te behandelen; het is de bedoeling om de lezer te voorzien van voldoende informatie om vergelijkingen te kunnen maken en om overwegingen ten aanzien van verschillende benaderingen in vergelijkbare paradigma's te maken. De benadering die ik heb gekozen pretendeert niet elk land op gelijke wijze te behandelen, noch om aan elk probleem evenveel ruimte te bieden, dat is niet mijn doel en heeft ook mijn interesse niet.

Een van de belangrijke discussiepunten in het tolerantie/intolerantiedebat is het multiculturalisme. Het is, begrijpelijkerwijs, een onderwerp dat onbehagen onder lezers oproept evenals vragen over de relevantie van dat onderwerp voor mijn onderzoek. Ik heb besloten een hoofdstuk over multiculturalisme toe te voegen vanwege de diepe - zij het ongemakkelijke - relatie met het extremisme. Het debat ten aanzien van multiculturalisme komt veel vaker voor in Europa dan in de VS en benadrukt krachtige spanningen tussen de 'traditionele' Europese samenleving en die van het 'allochtone' Europa. Tal van professionele en privébezoeken aan Europa, met name aan Nederland, Noorwegen en het Verenigd Koninkrijk, hebben mij gewezen op de centrale plaats van het multiculturalismedebat in het kader van het nationale politieke debat.

Dit werd mij vaak gezegd door een divers gezelschap van personen die ik heb ontmoet, en hoewel velen het belang van de discussie inzagen, deden zij dat met aarzeling, zo niet ongemak. Desalniettemin, wegens de diepgaande verbinding tussen multiculturalisme en zowel intolerantie als tolerantie en extremisme, is het essentieel voor de bredere discussie. Er wordt in deze discussie over

multiculturalisme wederzijds, vrijwel openbaar, door de een de ander de schuld toegeschoven, een schuld die gericht is op immigranten, hetgeen gepaard gaat met een diepe bezorgdheid over Europese extreemrechtse politieke bewegingen. Uit gesprekken over uiteenlopende onderwerpen met experts bleek dat het onderwerp van immigratie voor de Europeanen van groot belang is.

Een duidelijk verband werd gelegd tussen immigratie, veiligheid en extremisme; en in die geest is de vraag vaak gesteld hoe, en in welke mate, de samenleving zich dient te beschermen tegen de 'buitenstaander'. De ironie was dat deze 'outsider' onderdeel was van de maatschappij, alhoewel hij cultureel, religieus en etnisch afweek van de 'traditionele' maatschappij. Wanneer Europese leiders hun individuele en collectieve reacties op gebeurtenissen zowel in Europa als daarbuiten afwegen, dienen zij daarbij noodzakelijkerwijs rekening te houden - de mate waarin is onduidelijk - met de mogelijke reacties van relevante immigrantengroepen. Met het oog daarop gaat hoofdstuk vijf diep in op de aanpak van de hedendaagse sociale spanningen en in het kader van dit project moet worden gefocust op een aantal kwesties, met name de economie, immigratie en genderproblematiek die aan religie raken.

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## **Curriculum vitae Amos N. Guiora**

Professor of Law

Co-Director, Center for Global Justice

Amos Guiora is Professor of Law and Co-Director of the Center for Global Justice at the S.J. Quinney College of Law, the University of Utah. Guiora who teaches Criminal Procedure, International Law, Global Perspectives on Counterterrorism and Religion and Terrorism incorporates innovative scenario-based instruction to address national and international security issues and dilemmas.

Guiora is a Member of the American Bar Association's Law and National Security Advisory Committee; a Research Associate at the University of Oxford, Oxford Institute for Ethics, Law and Armed Conflict; a Research Fellow at the International Institute on Counter-Terrorism, The Interdisciplinary Center, Herzlyia, Israel; and a Corresponding Member, The Netherlands School of Human Rights Research, University of Utrecht School of Law.

Professor Guiora has published extensively both in the U.S. and Europe on issues related to national security, limits of interrogation, religion and terrorism, and the limits of power, multiculturalism and human rights. He is the author of *Legitimate Target: A Criteria Based Approach to Targeted Killing*; *Freedom from Religion: Rights and National Security* (first and second editions); *Global Perspectives on Counterterrorism* (first and second editions); *Fundamentals of Counterterrorism*; *Constitutional Limits on Coercive Interrogation*; *Homeland Security: What is it and Where is it Going*; *Tolerating Intolerance: The Price of Protecting Extremism* (forthcoming, 2013) and *Geopolitics and Security: Sovereignty, Intervention and the Law* (forthcoming, 2013).

Professor Guiora has received grants from both the Stuart Family Foundation and the Earhart Foundation and was awarded a Senior Specialist Fulbright Fellowship for The Netherlands in 2008. He served for 19 years in the Israel Defense Forces as Lieutenant Colonel (retired), and held a number of senior command positions, including Commander of the IDF School of Military Law and Legal Advisor to the Gaza Strip.

Professor Guiora has testified before the U.S. Senate Judiciary Committee; the U.S. House of Representatives Committee on Homeland Security; and the Committee on Foreign Affairs in the Dutch House of Representatives.

Professor Guiora was awarded the S.J. Quinney College of Law Faculty Scholarship Award, 2011

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