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Tolerating extremism : to what extent should intolerance be tolerated?

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Citation

Guiora, A. N. (2013, October 16). *Tolerating extremism : to what extent should intolerance be tolerated?*. Retrieved from <https://hdl.handle.net/1887/21977>

Version: Corrected Publisher's Version

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Cover Page



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Title: Tolerating extremism : to what extent should intolerance be tolerated?

Issue Date: 2013-10-16

CHAPTER ONE

Defining Extremism

I. Defining Extremism in Civil Society

What is extremism? Many have commented, written, spoken and pontificated on this question.²⁷ 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.²⁸ 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"²⁹:

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

²⁷ 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.

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

²⁹ Minow, *supra* note 3.

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

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.³¹

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.³²

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

³⁰ *Id.* at 454.

³¹ 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>.

³² 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 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 Crow³³ was perceived by many³⁴ as beneficial to American society while others³⁵ 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-

³³ “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>.

³⁴ 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>.

³⁵ 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.”³⁶

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 bus³⁷ 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,³⁸ 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 some³⁹ 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.⁴⁰ 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

³⁶ 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).

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

³⁸ See Jannell McGrew, *An interview with Rosa Parks* (Dec. 1, 2000), http://www.montgomeryboycott.com/bio_rparks2.htm.

³⁹ 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>.

⁴⁰ 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.⁴¹ In discussing religious extremism Professor Boyer suggests, "extremism is simply an excessive form of religious adherence."⁴²

⁴¹ "[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>.

⁴² 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,’⁴³ 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.⁴⁴ 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.⁴⁵ In other words, different motivations with similar results.⁴⁶

⁴³ 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).

⁴⁴ 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>.

⁴⁵ 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).

⁴⁶ 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.⁴⁷ 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 crimes⁴⁸ 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

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

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

⁴⁸ 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.⁴⁹ 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 South⁵⁰, those who sought to ensure African-Americans have the right to vote⁵¹ and those who participated in demonstrations against the institutionalized segregation and racism of the American Deep South.⁵²

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

⁴⁹ 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; 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>.

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

⁵¹ 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/>

⁵² 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.⁵³

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"⁵⁴ 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.⁵⁵ 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,⁵⁶ Mississippi Burning⁵⁷ 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

⁵³ http://web.utk.edu/~mfitzge1/docs/374/wallace_seg63.pdf, last viewed June 5, 2013

⁵⁴ 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).

⁵⁵ 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 (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).

⁵⁶ "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.

⁵⁷ "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.⁵⁸

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.⁵⁹

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 Carmichael⁶⁰, H. Rap Brown⁶¹ and Huey Newton.⁶² While it has been suggested that Dr. King's power and prestige was on the wane when he was killed,⁶³ his impact on American culture and politics was extraordinary. Arguably, his "I Have Been to the Mountaintop"⁶⁴ 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.

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

⁵⁹ GOLDENHAGEN, *supra* note 6.

⁶⁰ 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.

⁶¹ 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>.

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

⁶³ April 4, 1968.

⁶⁴ Martin Luther King Jr., Address at the Mason Temple: I've Been To The Mountaintop (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.⁶⁵

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

⁶⁵ 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.

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.⁶⁶ 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.⁶⁷ 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."⁶⁸

⁶⁶ 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).

⁶⁷ 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>.

⁶⁸ *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.⁶⁹

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..."⁷⁰

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,⁷¹ 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

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

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

⁷¹ *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*⁷², 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*⁷³ 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

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

⁷³ 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.⁷⁴ 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*⁷⁵, 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."⁷⁶

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.⁷⁷ Should Shirvell be allowed

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

⁷⁵ *Phelps*, 131 S.Ct. 1207.

⁷⁶ *Id.* at 1213.

⁷⁷ 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.⁷⁸ A jury later agreed with Armstrong and awarded Armstrong \$4.5 million in damages⁷⁹

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*⁸⁰ 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

⁷⁸ Brian Montopoli, *Andrew Shirvell Fired After Harassment Charges*, CBSNEWS (Nov. 8, 2010), http://www.cbsnews.com/8301-503544_162-20022143-503544.html.

⁷⁹ 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>

⁸⁰ *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.