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Tolerating extremism : to what extent should intolerance be tolerated?

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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.⁸¹

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 extremists⁸² 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'.⁸³ 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.⁸⁴

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.

⁸¹ 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/.

⁸² As defined in chapter one.

⁸³ 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>.

⁸⁴ 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.⁸⁵

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 disobedience⁸⁶ 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.

⁸⁵ 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.

⁸⁶ 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 enforcement⁸⁷ and convicted for his actions.⁸⁸ 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.⁸⁹ These stemmed from organizing and participating in sit-ins, boycotts, marches, and simply standing in a public place.⁹⁰ 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 inclusionary⁹¹ 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

⁸⁷ 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).

⁸⁸ 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.).

⁸⁹ The King Center, *The Life and Legacy of Dr. King*, GWIRED, http://gwired.gwu.edu/sac/index.gw/Site_ID/7/Page_ID/13579/ (last visited Aug. 24, 2012).

⁹⁰ *Id.*

⁹¹ 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.”⁹²

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.⁹³ 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 pedophile⁹⁴, responsible for untold forced marriages of underage girls; when the Utah Fifth District Court convicted him of ‘accomplice to rape’⁹⁵ the relevant question was ‘what took you so long’?

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

⁹³ 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.

⁹⁴ Private email in my records.

⁹⁵ 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 Texas⁹⁶ 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"⁹⁷ and a series of public statements and writings violated section 137 c and d of the Dutch criminal code⁹⁸ and therefore ordered his prosecution.

While the Amsterdam District Court subsequently acquitted Wilders, after a mistrial had initially been declared,⁹⁹ 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 Islam¹⁰⁰ and the increasing tension between traditional European

⁹⁶ 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; 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>.

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

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

⁹⁹ 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).

¹⁰⁰ 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.¹⁰¹

In ordering Wilders' prosecution, the Amsterdam Court of Appeal *believed* his conduct was offensive to Moslems¹⁰²; 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.¹⁰³ 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.¹⁰⁴ 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

¹⁰¹ 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>.

¹⁰² 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>

¹⁰³ 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.latimes.com/news/la-na-sect12may12,0,5778341.story>

¹⁰⁴ 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."¹⁰⁵ 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..."¹⁰⁶

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.¹⁰⁷ 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 deferments¹⁰⁸ 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.¹⁰⁹ In addition, the deferments were largely legalized when the Israeli Knesset enacted

¹⁰⁵ 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>.

¹⁰⁶ 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>.

¹⁰⁷ 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>.

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

¹⁰⁹ 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”¹¹⁰; 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 inciting¹¹¹ 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 sing¹¹²; the larger question is whether secular society acquiesces to religious extremist demands that violate the existential core of the IDF.¹¹³

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 left¹¹⁴ and Israeli Arabs¹¹⁵ 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.¹¹⁶

¹¹⁰ 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).

¹¹¹ 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 (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).

¹¹² 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>.

¹¹³ 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>.

¹¹⁴ 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>.

¹¹⁵ 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/>.

¹¹⁶ 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 University¹¹⁷; 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 society¹¹⁸ and harm caused by ignoring risk to the vulnerable.¹¹⁹ The alleged failure of university officials who are state employees to respond forcefully to an eyewitness report¹²⁰ 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.¹²¹ 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.¹²²

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

<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;

¹¹⁷ 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>.

¹¹⁸ 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>.

¹¹⁹ See Mark Gado, *The Kitty Genovese Murder*, TRUTV (copyright 2012), http://www.trutv.com/library/crime/serial_killers/predators/kitty_genovese/1.html.

¹²⁰ Sickles, *supra* note 100.

¹²¹ 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>.

¹²² *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.¹²³ Currently, the Penn State officials responsible for the cover up are awaiting trial.¹²⁴ 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.¹²⁵

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 attention¹²⁶, 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.

¹²³ 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>.

¹²⁴ *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>.

¹²⁵ *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; 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/>.

¹²⁶ *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 separation¹²⁷, 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.¹²⁸ 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

¹²⁷ 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; *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.

¹²⁸ 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'¹²⁹ 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.¹³⁰ 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

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

¹³⁰ 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 commented¹³¹ 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.¹³²

III. Extremist Speech

¹³¹ Notes in author's records.

¹³² 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.¹³³

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.¹³⁴ 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 suggested¹³⁵, 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.

¹³³ See AdmiralMoo, *Army-McCarthy Hearings*, YOUTUBE (Mar. 9, 2008), 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>.

¹³⁴ 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;

¹³⁵ 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.¹³⁶

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

¹³⁶ 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 religion¹³⁷ 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

¹³⁷ 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*¹³⁸ that federal law prohibiting polygamy did not violate the Free Exercise Clause of a Mormon who claimed polygamy a fundamental tenet of his faith,¹³⁹ 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*,¹⁴⁰ 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.¹⁴¹

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.¹⁴² 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,¹⁴³ Mr. Ahmed Marcouch.¹⁴⁴ The dinner was held shortly after Sheikh Fawaz Jneid, a radical imam of the As-Soenna mosque in The Hague, issued a fatwa¹⁴⁵ against Mr. Marcouch, who suggested on a national TV show

¹³⁸ *Reynolds v. U.S.*, 98 U.S. 145 (1878).

¹³⁹ *Id.* at 166.

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

¹⁴¹ *Id.* at 672.

¹⁴² 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).

¹⁴³ Amsterdam is divided into thirteen sub-districts.

¹⁴⁴ 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.

¹⁴⁵ 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."¹⁴⁶ In addition, Marcouch said that full assimilation into the Netherlands was possible only if young Islamic men sought gainful employment and learned Dutch.¹⁴⁷

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.¹⁴⁸ 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.¹⁴⁹ Mr. Marcouch indicated he had received numerous private expressions of support but none publicly. Shortly thereafter at an academic conference,¹⁵⁰ 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."¹⁵¹ 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 fatwa¹⁵² 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

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

¹⁴⁷ *Id.*

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

¹⁴⁹ 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.

¹⁵⁰ 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).

¹⁵¹ 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.

¹⁵² 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 Gogh¹⁵³ 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.¹⁵⁴ 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).¹⁵⁵ 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.

¹⁵³ 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.

¹⁵⁴ 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>.

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