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AMOS N. GUIORA

Freedom From Religion

SECOND EDITION

Rights and National Security



FREEDOM FROM RELIGION

RIGHTS AND NATIONAL SECURITY

Second Edition

Amos N. Guiora

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About the Author

As Professor of Law at the University of Utah School of Law, **Amos N. Guiora** teaches Criminal Law, Global Perspectives on Counterterrorism, National Security Law, and Religion and Terrorism. He is the author of *Constitutional Limits on Coercive Interrogation* (Oxford, 2008) and *Top Ten Global Justice Law Review Articles 2008* (Oxford, 2009). Before his distinguished career as a legal scholar, Professor Guiora served as Lieutenant Colonel in the Israel Defense Force's Judge Advocate General's Corps. He also served as Commandant of the IDF School of Military Law, Legal Advisor to the IDF's Gaza Strip, and Judge Advocate of the IDF's Navy and Home Front Command.

This book is dedicated to three individuals, only of one whom I have met.

To the Rev. Dr. John C. Lentz, Jr., a truer friend one could not hope for. His sage advice, extraordinary humor, and honest criticism made this book possible. Though much of this book was conceived, researched, and written in today's Europe, the Europe of yesteryear cannot be forgotten.

To Anne Frank, her diary written in an age of unimaginable horror represents the hope of teenagers everywhere.

To Sandra Samuel, an Indian nanny who—in the face of immediate death by religious extremists bent on killing innocent men, women, and children—saved a little two-year-old boy, thereby representing the very best of the human spirit.

PREFACE

That as religion, or the duty which we owe to our divine and omnipotent Creator, and the manner of discharging it, can be governed only by reason and conviction, not by force or violence; and therefore that *all men should enjoy the fullest toleration in the exercise of religion*, according to the dictates of conscience, unpunished and unrestrained by the Magistrates, unless, under color of religion, any man disturb the peace, the happiness, or safety of society, or of individuals. And that it is the mutual duty of all to practice Christian forbearance, love and charity towards each other.

Virginia Declaration of Rights—
a forerunner to the Declaration of Independence,
George Mason's version of Article XVI

Since the first edition of this book was published, in 2009, numerous developments have occurred in the context of religious extremism. Those events strengthen my thesis that religious extremism poses a danger to western society and that threat is insufficiently appreciated and understood. I do not feel vindicated; rather, I am deeply troubled and anxious that an obvious danger is so readily dismissed by so many thoughtful people. In undertaking a second edition, my intent is twofold. I intend both to address new developments and respond to the many comments and criticisms expressed regarding the first edition.

In doing so, I adopt a—for lack of better term—somewhat conversational tone. One of the obvious benefits of a second edition is the opportunity not only to strengthen particular arguments, to tweak certain points but also to incorporate—or at least respond to—compelling counterarguments raised by thoughtful readers, commentators, and participants in book talks in the United States, Canada, and Holland, and numerous follow-up interviews conducted in Israel. To that extent, I—and hopefully the reader—am the beneficiary of comments from literally thousands who have attended my book tour talks and lectures since the first edition was published. Many have made unequivocally clear they disagree with the primary thesis of the book; that said, they have graciously commented on my willingness to directly address the proverbial “elephant in the room.”

This edition is not a rewrite of the first edition, nor is it a major revision, even though it includes both updated material and a new chapter examining Comedy Central's self-censorship decision regarding a *South Park*

episode with a depiction of the Prophet Mohammed. Rather, it seeks to build on the first edition by highlighting the clear and present danger posed by religious extremism. In book tour talks and subsequent dialogue, I have consistently urged readers and listeners alike to both recognize the threat posed by religious extremism and to consider the most effective measures of self-protection available to democratic society.

Doing so requires admitting the threat exists. In the aftermath of the first edition's publication I have been repeatedly confronted by innumerable questions posed in emails, talk shows, academic conferences, and public lectures. Though the breadth, perceptiveness, and concerns raised are extraordinary, two questions—in particular—stand out as frequently asked: Why do I emphasize religious extremism rather than secular terrorism? Why are we, as a society, afraid to admit the threat of religious extremism exists? The two questions are not “one and the same:” the first reflects disagreement—or at least skepticism—regarding my fundamental thesis while the second reflects concern regarding public failure to recognize the threat, if it indeed exists. Needless to say, answers to both are complicated and complex.

Society has historically—unjustifiably and blindly—granted religion immunity.¹ That immunity has been extended to include religious extremism. In many ways, the failure to adequately protect society falls squarely on the shoulders of society; the refusal to directly address—much less impose limits on—religious extremists is purely self-imposed. Religious extremists—for lack of better word—manipulate society's sensitivities.² This, in large part, results in an unjustifiable and dangerous tolerance of

1 The suggestion that religion has been granted immunity fostered debate, see <http://opiniojuris.org/2010/10/01/freedom-from-religion-rights-and-national-security-3/>, last viewed January 1, 2012.

2 The prosecution of Geert Wilders, a member of the Dutch Parliament and leader of the Party for Freedom, was ordered by a Dutch court for the crime of “incitement to hatred and discrimination.” The decision to prosecute Wilders, subsequently acquitted, was based on his comments equating Islam with violence and likening the Qur'an to Hitler's *Mein Kampf*. The court's order reversed an earlier decision by the public prosecutor's office not to prosecute Wilders; according to the prosecutor, Wilders made his comments outside parliament as part of the larger public discussion regarding Islam and a criminal offense had not been committed. Wilders' prosecution and the trial itself will be addressed in my forthcoming book, *Tolerating Extremism? Preferring National Security Rights or Individual Rights*, (forthcoming, Oxford University Press, 2013).

intolerance.³ Needless to say, the intolerant do not reciprocate; tolerance—much less encouragement—of questioning and criticism is not tolerated. As one reader wrote me “we gotta stop this ‘kill the infidel’ bullcr*p.”⁴

Similar frustration has been repeatedly expressed to me since publication of the first edition; it is my hope that additional voices will join the discussion. Disagreement regarding how to respond is welcomed and inevitable; critical is acknowledgment of the threat. Prof. Nadine Strossen, in her gracious comments regarding the first edition, correctly noted that the fundamental question is “whether legal protections for religious speech and conduct should be reduced in order to counter the threat posed by religiously motivated terrorists.”

I am convinced that the answer must be a resounding *yes*; how that affirmative response is translated into concrete measures is extraordinarily complicated for it requires a re-articulation of values and principles considered sacred and protected. However, though freedom of speech and freedom of religion are sacred, the right to life is similarly sacred. That is, while the First Amendment of the Constitution of the United States is often referred to as the “holy of holies,” there are other—equally vital and powerful—rights that must be similarly protected.

The tension between these powerful competing sacred values is palpable; *however*, that must not deter either the conversation or recommendations for concrete measures limiting the power of religious extremism.

A short list, compiled since the first edition was published, unequivocally demonstrates the danger posed both by religious extremism and religious extremists. Simply put, the below demonstrates the determination of religious extremists to engage in acts of terrorism and of extremist faith leaders to incite religious extremist actors: Major Nidal Malik Hasan’s—incited by Anwar al-Awlaki⁵—murderous attack on American

3 In response to the seemingly failed terrorist attack in Stockholm (December 11, 2010), see Swedish Prime Minister Fredrik Reinfeldt’s comments on tolerance, <http://www.washingtonpost.com/wp-dyn/content/article/2010/12/12/AR2010121202901.html?referrer=emailarticle>, last viewed December 13, 2010.

4 Private email, in author’s records.

5 <http://english.aljazeera.net/news/middleeast/2010/11/201011613102535305.html>, last viewed December 12, 2010; http://topics.nytimes.com/topics/reference/timestopics/people/a/anwar_al_awlaki/index.html, last visited December 12, 2010; Awlaki was subsequently killed in a drone attack, <http://www.cbsnews.com/stories/2011/09/30/501364/main20113732.shtml>, last viewed January, 1, 2012.

military personnel in Fort Hood;⁶ Umar Farouk Abdulmutallab's attempt to blow up Northwest Airlines Flight 253,⁷ apparently under the direction of Anwar al-Awlaki, akin to Maj. Hasan; Faisal Shahzad's attempt to explode a SUV on 42nd Street in New York City;⁸ Mohamed Osman Mohamud's plan to detonate a bomb at a Portland, Oregon, Christmas tree lighting ceremony;⁹ Comedy Central's self-censorship of a *South Park* episode referencing the Prophet Mohammed, in the face of threats by a radical Islamic group;¹⁰ the Michigan-based Huratree Christian militia accused, but ultimately acquitted, of intending to kill police officers;¹¹ the burning of mosques in the West Bank by Jewish extremists;¹² the publication of *The King's Torah* by Rabbi Shapira and Rabbi Elitzur justifying attacks by Jews on Gentiles;¹³ virulent attacks on women—religious and secular alike—by Orthodox Jews in Israel;¹⁴ and a rabbinical ruling that Jews must not sell property to Arabs.¹⁵

- 6 http://www.msnbc.msn.com/id/33678801/ns/us_news-crime_and_courts/, last viewed December 12, 2010.
- 7 <http://www.cbsnews.com/stories/2009/12/27/national/main6026747.shtml>, last viewed December 12, 2010.
- 8 http://topics.nytimes.com/top/reference/timestopics/people/s/faisal_shahzad/index.html, last viewed December 12, 2010.
- 9 http://www.oregonlive.com/portland/index.ssf/2010/11/fbi_thwarts_terrorist_bombing.html, last viewed December 12, 2010.
- 10 <http://ethicsalarms.com/2010/04/22/comedy-centrals-unethical-self-censorship/>, last viewed December 12, 2010.
- 11 http://news.yahoo.com/s/ynews/ynews_ts1361 last viewed December 12, 2010; <http://www.reuters.com/article/2012/08/08/us-usa-security-hutaree-idUSBRE8770ZQ20120808> <http://www.usatoday.com/news/nation/story/2012-03-27/hutaree-militia-group-conspiracy-dismissal/53815972/1>, last viewed September 14, 2012; seven members of the group were acquitted of conspiracy charges while three were sentenced on weapons charges.
- 12 <http://blogs.reuters.com/faithworld/2010/10/04/korans-burnt-in-west-bank-mosque-attack-blamed-on-jewish-settlers/>, last viewed December 13, 2010.
- 13 <http://www.a-w-i-p.com/index.php/2010/08/03/revered-israeli-rabbi-preaches-slaughter> last viewed December 12, 2010.
- 14 http://www.huffingtonpost.co.uk/2011/12/28/israel-beit-shemesh-protests-ultra-orthodox-jews_n_1173232.html last viewed January 2, 2012.
- 15 http://news.yahoo.com/s/ap/20101207/ap_on_re_mi_ea/ml_israel_radical_rabbis, last viewed December 12, 2010; for critical commentary see Michael Avraham, "Taking the Name of Halacha in Vein," *Yedioth Ahronoth* December 12, 2010 (p. 20); for additional discussion see Akiva Novak, "Rabbi Ovadia Yosef Against the Rabbi's Letter," *Yedioth Ahronoth* December 12, 2010, p. 8.

Essential to these acts is the role of faith leaders; they, after all, in the overwhelming majority of cases incite the actor. In my conversations with religious extremist terrorists—Jewish and Palestinian alike—a mere handful can be described as lone wolves; the overwhelming majority are directly incited by religious extremist faith leaders. Those leaders—the inciters—will be our focus; limiting their freedom of free speech is the core argument proposed in this book.

Their words—and the potentially tragic impact of carefully chosen, oft-repeated, mantra-like narrow interpretation of religious texts—are the core of religious extremism incitement. How we directly, proactively, but in a limited and cautious manner, restrict their words is a critical challenge facing the public, thought leaders, and decision makers alike. It is a mission I readily embrace.

Concern regarding the recommendation that speech be restricted has been the thrust of the critical comments I have received in the past months. The criticism has been pronounced from scholars and general public alike.

Because words are important, attention must be paid to government terminology and semantics. One can but cringe at the awkward, actually embarrassing, refusal of U.S. Attorney General Eric Holder to use the term “radical Islam” when testifying before Congress.¹⁶ On the assumption that Holder reads daily newspapers (one can but hope), then his testimony is but the most blatant example of turning a blind eye. His testimony alone is justification for this book, much less a second edition.

On the other hand, overreach is equally dangerous. With respect to religious symbols, nowhere is that overreach more telling than how various European governments¹⁷ stumble their way through the questions about

16 http://www.youtube.com/watch?v=HOQt_mP6Pgg, last viewed December 12, 2010.

17 <http://reljournal.com/islam/the-burqa-facts-issues/>, last viewed December 12, 2010; <http://www.france24.com/en/20100930-netherlands-ban-burqa-anti-islam-mp-says> last viewed December 12, 2010; <http://english.aljazeera.net/news/europe/2010/09/2010914184958118128.html>, last viewed December 12, 2010; for a discussion of legislative efforts in Belgium and France to ban face covering veils in public places, *see* <http://www.telegraph.co.uk/news/worldnews/europe/belgium/7653814/Belgian-MPs-vote-to-ban-the-burqa.html>, last viewed December 12, 2010.

burkhas,¹⁸ headscarves/hair coverings,¹⁹ and face veils.²⁰ While religious extremism justifies proactive measures by government, it is important to avoid overreaction. After all, overreaction can—unintentionally—play into the hands of extremists by accentuating the us-them debate that fuels the fire of extremist inciters.

The continued debate in Europe with respect to the headscarf symbolizes overreaction; covering the hair does not pose a national security threat and would not meet American constitutional law tests for vagueness and over breadth. That said, a cogent and compelling public safety argument can be articulated for banning the burkha (full face covering) on public transportation and other public venues. However, an all-encompassing ban does not meet any rational balancing tests predicated on standards and criteria.

I am not a religious person, so how do I allow myself the privilege, perhaps arrogance, of writing a book about religion? That is, how can someone not steeped in the intricacies of any particular faith write a book about religion, much less about the *limits* of religion, entitled *Freedom from Religion*? To this significant question, I offer the following response: I am not an expert on religion, but my entire professional career has been spent trying to understand the role of religious extremism as the primary motivator to one of the greatest threats facing civil society today—terrorism.

I have been asked on countless occasions why I chose to write this book; my answer is unequivocal. As the only child of two Holocaust survivors, I well understand the price of passivity.

The essential assumption of this book is that religion is central to the human existence. Though not always understandable, the reality is best

18 <http://relijournal.com/islam/the-burqa-facts-issues/>, last viewed December 12, 2010.

19 Also referred to as *Hijab*, <http://www.islamfortoday.com/niqaab.htm>, last viewed December 12, 2010; *Hijab* in Arabic means “to cover” and is generally translated as “veil.” Commonly worn today by Muslim women, the veil is a hair covering or scarf that covers the head, but *hijab* also refers to modest dress and seclusion—the system of separating women from men, see <http://suite101.com/article/the-practice-of-veiling-a123005>, last viewed August 12, 2012.

20 Also referred to as *Niqaab*, <http://www.islamfortoday.com/niqaab.htm>, last viewed December 12, 2010; the Niqab is the face veil worn by Islamic women, <http://islamicinsights.com/religion/religion/understanding-niqab-in-islam.html>, last viewed August 12, 2012

summed up as, “It is what it is.” Whether religion holds society together or comforts people in times of personal stress, or eases fears associated with death, it is an undeniable reality in the lives of hundreds of millions of people worldwide.

Though defining religion is no mean task, the thesis explored in this book does not address all aspects of religion. Rather, the focus is on religious extremism. What limits, if any, should be placed on religious extremism is the essence of the focus. The question of whether limits need be placed on the practice of religious extremism is premised on a belief that domestic public order and national security require addressing this issue, candidly and truthfully. Even, it must be added, at the expense of otherwise guaranteed constitutional privileges and protections.

The emphasis of this inquiry is not theological in orientation. Rather, it is focused on national security and public order. Perhaps in a different age, the questions would address various political regimes and movements ranging from the far right to the far left. But that is not the case, for the main danger to a contemporary liberal democratic society no longer comes from secular extremism,²¹ rather from religious extremism. The fundamental premise of this book is to ask *how* a liberal society protects itself against religious extremism while neither unnecessarily nor unduly trampling on civil and political rights. To that end, I offer concrete recommendations for implementing protective measures. Those measures were roundly criticized in the first edition; while I do not back off from those recommendations, explanations have been tweaked in an effort to more effectively present the case for the protective measures proposed.

21 Perhaps 30 years ago, a book of this nature would have analyzed the impact and danger of Baader Meinhof (West Germany), the Red Brigade (Italy), and the Weathermen (United States) but the contemporary threat is largely religious extremism, not secular extremism. That said, it has been suggested to me in a number of settings that framing the book as the “danger posed by extremists” rather than focusing on religious extremism would make the core argument more palatable by not honing in on a particular threat. Those who recommend this approach do not—I believe—disagree with my analysis regarding the danger posed by religious extremism but suggest that the broader issue—extremism—is more nuanced and reflects the reality of additional threats. The suggestion, from a visual perspective, is an umbrella entitled *extremism* and fitting underneath it are distinct forms of extremism, including religious extremism. The suggestion is not without merit; however, given the centrality of religious extremism as *the* threat the book’s core argument will not be altered, though I am aware of the recommendation’s soundness.

During the course of my 20-year career in the Judge Advocate General Corps of the Israel Defense Forces (IDF), I was involved in the legal and policy aspects of operational counterterrorism. Commensurate with that professional experience, I developed a deep understanding and respect for the requirement to balance legitimate, individual civil rights with equally legitimate national security considerations.

In the context of the contemporary era of terrorism, there is no choice *but* to discuss religion and how it is practiced. A primary motivation for numerous terrorist organizations worldwide (whether region specific or global) is religion. Understanding religion, then, as a motivator is essential to understanding terrorism, and therefore counterterrorism.

That reality—terror in the name of God—is *the* reality of our current milieu. It may well be the reality for our children and grandchildren. Precisely because of that, we must have a mature, frank, and candid discussion regarding religion. That discussion must not under any circumstances be American-centric, for the danger is universal. Societies worldwide are under attack in the name of God or, at least, a radical articulation of how to honor God.

I have decided that in order to make my case compelling and convincing, I must look “the tiger in the eye.” Otherwise, I will be joining a long list of authors who have shied away from directly addressing the extraordinary danger religious extremism poses to society.

Writing a book about religion, or more accurately, about limiting religion, is a journey into unfamiliar territory for a secularist. It has only been possible to do so because people from all walks of life have come forward and agreed to share their opinions, perspectives, scholarship, and beliefs with me. As I repeatedly told colleagues and friends, I was literally overwhelmed by how many people were willing to meet with me. The list, while not quite endless, is too long to list every individual with whom I met or spoke. In the five countries under study, I have literally communicated with hundreds of people who freely gave of their time, talent, experience, and wisdom.

Those words written with respect to the first edition are even more appropriate regarding this edition. I have enormously benefitted from remarkably candid exchanges with scholars, public officials, and the general public in the aftermath of the publication of the first edition. Those comments—some extremely critical—have forced me to sharpen my argument, reconsider particular points, and challenge my thesis.

To all, I am most grateful to you for educating me in the intricacies of your faith, religion, and field of expertise. You were generous, candid, and critical; you have my unending respect, thanks, and gratitude. That said, I would be remiss were I not to acknowledge in particular the friendship, forthrightness, and wonderful collegiality of Prof. Leslie Francis, Prof. Terry Kogan, Prof. David Little, Prof. Scott Matheson, the Honorable Judge (now, Professor) Michael McConnell, Prof. (now, Dean) Martha Minow, Prof. Paul Cliteur, and Prof. Tom Zwart.

My designation as a Fulbright Senior Specialist, in 2008, at the University of Utrecht was instrumental in facilitating my understanding of the Netherlands as it afforded me the opportunity to engage with Dutch colleagues and officials. Subsequent visits to the Netherlands facilitated both book talks and meetings with scholars and students; I would like to thank Prof Paul Cliteur for arranging a *Justus Lipsius Fellowship* at the University of Leiden, in December 2010, which provided me an extraordinary research opportunity in the Netherlands.

Although all mistakes are mine, in the first edition I was the beneficiary of an extraordinary team of research assistants. The hours and energy invested by RuthAnne Frost, Brady Stuart, and Artemis Vamianakis—all class of 2009, S.J. Quinney College of Law, the University of Utah—truly humbled me. They, collectively and individually, challenged and argued with me every step of the way. Without a doubt, both the reader and I are the better for their commitment to this project. I can but stand and applaud. The reader will note that the appendix carries their name—this is not by chance as they approached me and asked if they could write it. I immediately said *yes*, as did Oxford University Press. RuthAnne, Brady, and Artemis deserve the recognition and credit.

One of the great privileges and pleasures in teaching is nurturing students. That is particularly true when the relationship changes from professor-student to colleague. I have, over the years, been particularly fortunate in this regard. This book is a vivid manifestation of that as Chapter 9 is written by RuthAnne, now a practicing attorney. When I informed her that a second edition would be published, she immediately suggested writing a chapter addressing Central Comedy's self-imposed censorship. It goes without saying that I was delighted; both the book and reader will benefit from RuthAnne's insights.

Hiram Chodosh, my dean and good friend, has been an extraordinary supporter of this project in both generously making resources available and providing the moral support so necessary for a project of this nature.

I am, as always, most grateful to Hiram for creating a unique research and writing environment at the S.J. Quinney College of Law. My colleagues and I are the beneficiaries of his tremendous efforts.

Kevin Pendergast, my (former) editor at Oxford University Press, has been involved in the book every step of the way as he graciously agreed to read and comment on the draft of each chapter. His comments have been forthright, candid, and spot-on. For that, I am most grateful. This second edition owes much to Kevin's foresight and constant support.

I also send a warm word of thanks to my friends at the Starbucks in Sugarhouse, Salt Lake City, for their constant encouragement and interest.

Finally, to the reader—this book is not an “easy read,” nor is it intended to be. I can but hope you will find it thought provoking and view it for what it is intended to be—a clarion call for action. I can but hope that this second edition will facilitate not only discussion, as did the first edition, but also contribute to a sober analysis of what—if any—measures society should consider to protect itself against the harm posed by religious extremism.

In that vein, I can but hope to meet the bar raised in an extraordinarily gracious email from a law student at Brigham Young University, J. Reuben Clark Law School, where I was invited by Prof. Fred Gedicks to discuss the book. According to the student, one of his classmates described the talk as “the most thought-provoking event that the law school has had this school year!”²²

22 Email in author's records.

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CHAPTER ONE

IGNORING THE STORM

December 17, 2008–December 20, 2008

London, England

The multitudes remained plunged in ignorance of the simplest economic facts, and their leaders, seeking their votes, did not dare to undeceive them. The newspapers, after their fashion, reflected and emphasized the prevailing opinions.

– Winston Churchill, *The Gathering Storm*

In December 2008, I met with politicians, security officials, and academics in the United Kingdom (UK) to get a British perspective on what I consider to be one of the greatest threats to civil society that this generation will face—religious extremism. It was an experience that profoundly impacted this book.

When I first conceived of writing a book about the threat of religious extremism, I planned to examine and analyze legal and policy issues relevant to five countries: the United States, the UK, the Netherlands, Turkey, and Israel. The book's chapters would be formed around a specific topic—the limits of freedom of speech, separation of church and state, the free exercise of religion—and the five countries would hopefully provide context and insight about religious extremism in the modern age. Although I anticipated concentrating most heavily on the United States and Israel—the two countries in which I live and have citizenship—I thought that chapters “dedicated” to individual countries would be unnecessary. It was only after visiting the UK that I decided to change my plan.

The day of my arrival, the banner headline in every major newspaper throughout the UK was that those responsible for the 2007 Glasgow International Airport terrorist attacks had been convicted of their crimes. On that day, my loquacious cab driver shared his worldview with me, ultimately concluding, “Why can’t Muslims just be like us?” I had no doubt that his sentiments were not unique among the British populace.

As I made my way to a meeting with a senior security official in London—who, after greeting me graciously, began our conversation with the words,