

U.S. ELECTIONS 2020: WHERE AND HOW DO WE DRAW A CONSTITUTIONALLY PERMISSIBLE LINE TO A CANDIDATE’S INFLAMMATORY POLITICAL RHETORIC?

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From November 2019 to April 2020, the ABA Section of Civil Rights and Social Justice’s Rights of Immigrants Committee hosted a six-part webinar series exploring immigration at the intersection of national security law, public international law, and U.S. Constitutional law. What follows is a transcript from the second panel of the series, which took place on December 18, 2019. The transcript has been edited for clarity.

Engy Abdelkader: Welcome to the American Bar Association webinar, “U.S. Elections 2020: Where and How Do We Draw a Constitutionally Permissible Line to a Candidate’s Inflammatory Political Rhetoric?”

My name is Engy Abdelkader and I’ll be acting as the program moderator. Today’s webinar is hosted by the Section of Civil Rights and Social Justice, and it’s sponsored by the Rights of the Immigrants Committee. It’s part of a six-part national lecture series with a new program on the third Wednesday of every month. We’re excited to have a number of other important co-sponsors including the ABA

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Elie Mystal is Managing Editor of *Above the Law* and host of *Thinking Like a Lawyer*. Mystal received a degree in Government from Harvard University and a J.D. from Harvard Law School. He was formerly a litigator at Debevoise & Plimpton but quit the legal profession to pursue a career as an online provocateur. He’s written for *City Hall News*, *New York Press*, *New York Daily News* and the *New York Times*, and has appeared on both MSNBC and Fox News without having to lie about his politics to either news organization.

Wajahat Ali is a journalist, writer, lawyer, playwright, TV host, and consultant for the U.S. State Department. As Creative Director of Affinis Labs, he works to create social entrepreneurship initiatives that have a positive impact for marginalized communities. Ali has written various works on Muslim Americans, including a play called *The Domestic Crusaders*, a report for the Center for American Progress entitled *Fear Inc.*, *Roots of the Islamophobia Network in America*, and various articles for outlets such as the *New York Times* and *Washington Post*. He was honored as a “Generation Change Leader” by Secretary of State Clinton, and as an “Emerging Muslim American Artist” by the Muslim Public Affairs Council.

James Weinstein is the Dan Cracchiolo Chair in Constitutional Law in the Sandra Day O’Connor College of Law, a faculty fellow in the Center for Law, Science and Innovation at Arizona State University and an associate fellow with the Centre for Public Law at the University of Cambridge. He is co-editor of *Extreme Speech and Democracy*, and the author of *Hate Speech, Pornography and the Radical Attack on Free Speech Doctrine*. Professor Weinstein has litigated several significant free speech cases, primarily on behalf of Arizona Civil Liberties Union. He received his J.D. from the University of Pennsylvania.

Commission on Immigration, the ABA Criminal Justice Section, the ABA Center for Public Interest Law, the ABA Section of International Law as well as the ABA Government and Public Sector Lawyer's Division. We appreciate all of your support.

It is also important to highlight that none of this would be possible without the technical and logistical support of ABA staff. Thank you, Paula Shapiro and Alli Kielsgard, for making this program a success. I'm humbled to have our esteemed panelists join us today. But before we begin it's important that I lay the substantive groundwork as the moderator

As many of you are aware, political candidates running for public office have long exploited popular fears, racial anxieties, and other divisions as an electoral strategy. Increasingly, and most recently, this has led to socially oppressed groups to claim that some political rhetoric is so inflammatory that it impermissibly inspires violence against community members. According to the most recent FBI Hate Crimes Statistics Report, the amount of hate crimes involving physical violence, including intimidation, assault and homicide, has reached a 16-year high and many of the impacted minority groups including Latinos, Black people, Jews and Muslims attribute this increased violence to Donald J. Trump's inflammatory political rhetoric and discriminatory policies.

It's important to note that scholars have long observed that political discourse and political events can contribute to the frequency of bias incidents. In fact, this phenomenon has a name today. It's called the Trump Effect.

Since he first launched his presidential campaign in 2015, Trump's rhetoric was racially charged. Upon announcing his run, for instance, then candidate Trump described Mexican immigrants as rapists, bringing drugs and crime into the U.S. He claimed, "they're sending us not the right people. The US has become a dumping ground for everyone else's problems." During the speech, Trump also announced his plans for a border wall, claiming that he would make Mexico pay for it. Shortly after those remarks, two brothers attacked a homeless Latino man in Boston, Massachusetts. One of the attackers stated that he was inspired by Mr. Trump's immigration rhetoric.

Once in the Oval Office, Trump's divisive rhetoric and politics that contributed to the dehumanization and debasement of Latino immigrants continued unabated. He shut down the government for 35 days to secure funding for a wall on the US-Mexican border. He sent three times as many workers to help victims of Hurricane Harvey in Houston as compared to those of Hurricane Maria in Puerto Rico. He approved 23 times as much money for individual assistance for Harvey's victims.

Further, Trump has used the word "animal," many times to describe those crossing the border and immigrants accused of crimes, such as gang members. During a discussion about MS-13, for example, Trump said, "We have people coming into the country or trying to come in and we're stopping a lot of them, but we're taking people out of the country. You wouldn't believe these people. They aren't people, they're animals, and we're taking them out of the country at a level and at a rate that's never happened before." Critics responded that no one deserves to be likened to "animals," no matter their offense.

Moreover, during immigration talks with lawmakers in the Oval Office, President Trump used an offensive and inappropriate description of Haiti, El Salvador, and African countries when asking, "why are we having all these people from shithole countries come here?" Trump then expressed a preference for increased immigration from European countries, like Norway.

To be sure, Trump's xenophobic rhetoric, including calling Latino immigrants "invaders" who are "infesting our country" continues to embolden perpetrators of hate crimes in what has emerged as a broad national trend where supporters often explicitly reference Trump during attacks. For instance, in a 2017 attack against an undocumented immigrant in Michigan, two male assailants stapled a note on the victim's stomach stating, "Trump doesn't like you." In a distinct incident last year, a Latino man and his mother who were doing yard work in California were verbally attacked by a woman who called them "illegals" and "rapists." When the man confronted the woman after hearing her yell "go back to Mexico" to his mother, she said "you're all illegal, go back to Mexico." When he responded, "Why do you hate us," she responded "because you're Mexicans." When the victim, who happens to be a US citizen, explained, "We're honest people right here," the woman retorted "Yeah, rapists. Even the President of the United States says you're a rapist."

And, as Trump embarks on his 2020 reelection campaign amid charges of impeachment, he continues to play on popular fears, racial anxieties and other divisions. Just a few months ago, President Trump asked an audience at a rally how they would stop migrants from attempting to enter this country. When a supporter responded, "shoot them," the President grinned, nodded and failed to offer any appropriate corrective.

For many in a Latinx community, the El Paso mass shooting targeting Mexicans on August 3rd was a natural progression from inflammatory speech by national leaders to xenophobic violence. Mimicking the President's language, the shooter wrote in his manifesto posted online, that the El Paso attack was "in response to the Hispanic invasion of Texas." On Facebook alone Trump's campaign is responsible for more than 2,000 ads in the last year that reference an "invasion" when referring to immigrants on the southern border. More recently a 61-year-old white Milwaukee man attacked his Latino victim with acid while saying, "Why did you invade my country and why don't you respect my laws?" The victim, who happens to be a US citizen, sustained second-degree burns on his neck and third-degree burns on his face.

Such attacks are part of a much broader pattern of hateful violence. In fact, hate crimes against the Latino community has surged more than 40% since the 2016 US presidential election cycle. Latino advocacy groups are blaming the vitriol coming from President Trump and the right wing of the Republican Party. As noted, Latinos are not alone in their sentiment. The NAACP, for instance, has attributed the continued rise in anti-Black hate crimes to Trump's political rhetoric and racist policies. Trump's invective has focused on black athletes, lawmakers, countries, and communities. The NAACP believes that such divisive and hateful language has manifested in racist acts against people of color. In fact, according to the most recent FBI Hate Crime Statistics Report, African Americans remain the most targeted racial

group, while they comprise only 13% of the total U.S. population. Anti-Black hate crimes make up approximately 60% of all such crimes, speaking to the grossly disproportionate levels of violence that that minority community experiences.

Similar to their Latino and Black compatriots, Jewish and Muslim Americans have also voiced similar concerns. In August of 2017, hundreds of white supremacists marched on to the University of Virginia's campus in Charlottesville as part of the Unite the Right Rally. They chanted "Jews will not replace us." Counter-protests confronted rally participants who were responding to the proposed removal of a statue of Confederate General Robert E. Lee. Ultimately, a white supremacist drove his vehicle into those counter-protesters, killing 32-year-old Heather Heyer and injuring 35 others. President Trump responded to the turmoil by condemning "this egregious display of hatred, bigotry and violence on many sides." He then paused and repeated, "on many sides." After the controversy ensued regarding his remarks, Trump revisited his initial statement and specifically condemned the KKK, Neo-Nazis, white supremacists, and other hate groups. Then, a day later, he clarified that there were "very fine people on both sides" while adding that the Left had been "very very violent."

In addition, Jewish-Americans have witnessed a number of tragic attacks against synagogues. Last year, for instance, in what is regarded as the worst anti-Semitic attack on US soil, a shooter espousing white nationalist ideology killed 11 worshipers at the Tree of Life synagogue in Pittsburgh. Prior to the shootings, the attacker posted online about a Jewish nonprofit, HIAS, assisting immigrant invaders. Like their Latino and African-American counterparts, Jewish organizations have also blamed Trump's anti-immigrant rhetoric and the emboldening of the far-right as part of what is contributing to anti-Semitic incidents. According to the most recent FBI Hate Crime Statistics Report, anti-Semitic hate crimes account for nearly 60% of all such religiously motivated crimes. Notably, Jews comprise a mere 2 to 3 percent of the total U.S. population. They too are experiencing disproportionate levels of violence. According to Rabbi Joseph Jacobs, "through his rhetoric the President, his advisers, and many his supporters are fanning the flames of this hatred. The rhetoric and dog whistles have resulted in Neo-Nazis feeling empowered to march in the streets. Mosques and synagogues being regularly targeted for vandalism and violent threats and people who don't fit the white nationalist and Christian profile being attacked on the streets."

Muslims are well aware of the Trump Effect as well. In fact, during the 2016 US presidential election cycle they were the canaries in the coal mine, complaining that the inflammatory political rhetoric coming from the Republican Party was causing violence against their community. According to academic research Muslim Americans were three to five times more likely to be victims of threats or acts of violence during the 2016 presidential elections when political invective frequently cast them as terrorists, religious extremists, and undesirable refugees.

The Trump campaign was particularly Islamophobic. During a 2015 campaign rally, Trump nodded along as a supporter claimed "we have a problem in this country. It's called Muslims." Trump nodded saying "right we need this question." Then he asked, "when can we get rid of them Muslims?" Trump said, "we're going to be looking at a lot of different things." In fact, Trump called for the

warrantless surveillance of mosques, a Muslim registry or database and the notorious Muslim Ban. Trump also falsely claimed that "Islam hates us." In the Oval Office, President Trump immediately signed executive orders banning immigrants from seven Muslim majority countries, making good on a campaign promise, calling for a total and complete shutdown on Muslims entering the U.S. As signing the order, he insisted he was keeping the "Islamic radicals out," even though no one from the enumerated countries has ever killed anyone here.

Such policies and rhetoric has created fertile soil for anti-Muslim violence. Indeed, shortly after ascending to the US presidency, a businessman assaulted a Muslim American woman in a hijab in New York, while stating, "Trump is here now, and he will get rid of all of you." Muslim advocacy groups claim that anti-Muslim hate crime surged immediately following the implementation of the Muslim ban. What is more, according to a 2018 report from South Asian Americans Leading Together, one in five perpetrators of hate violence incidents against the MASA community have cited President Trump, a Trump policy, or a Trump campaign slogan. Both as a candidate and now as President, Trump continues to inspire anti-Muslim hatred and violence. According to the most recent FBI Hate Crimes Statistics Report, Muslim Americans are also experiencing disproportionate levels of violence.

Beyond these socially oppressed group claims, journalists have also complained that hateful speech demonizing them has incited physical assaults and threats. In fact, according to Gallup, 58 percent of American now blame recent mass shootings on inflammatory political rhetoric by prominent politicians or political commentators. Research from the Public Religion Research Institute has made similar findings.

But, this isn't just a matter of public perception. A number of academics have published research to bolster such claims. For instance, American researchers from the University of Alabama and Loyola Chicago confirmed that the 2016 US presidential election and Trump's ultimate ascension to the Oval Office was associated with a statistically significant surge and reported hate crimes across the country. Another team of researchers from the University of North Texas, found that counties that hosted a 2016 Trump campaign rally saw a two hundred-and-twenty-six percent increase in reported hate incidents over those that did not. What is more, counties that voted for President Trump experienced the largest increases in reported hate crimes. Notably the United States experienced no similar spike in hate crimes in the wake of the elections of presidents William Clinton, George W Bush or Barack Obama. The academic research confirms that the Trump Effect is around 33 times larger than the effect on hate crimes after terror attacks such as those in Orlando, Florida or San Bernardino, California. In fact, the Trump effect is so statistically significant to hate crimes that it is rivaled by few other events in modern American history with the exception of September 11th.

As you know, First Amendment doctrine provide robust protections for free expression principles. More speech is the preferred response to negative speech. Ultimately the most truthful of meritorious claims should prevail in a proverbial marketplace of ideas. In *Whitney v. California*, Justice Louis Brandeis famously explained counter speech: "if there be a time to expose through discussion the

falsehoods and a fallacy it's to avert the evil by the processes of education the remedy to be applied is more speech not enforced silence."

But, the current socio-political context raises some difficult questions. How does the counter speech doctrine translate in the lives of socially oppressed groups who lack access to resources in the marketplace of ideas? For instance, is it reasonable to expect financially-strapped families scrapping to survive to effectively counter odious speech by multi-millionaires demonizing their religious, racial or ethnic identity? What, if any, role do news media outlets play in facilitating the counter speech doctrine, amplifying marginalized voices in order to equalize the playing field? Should social media technology giants shut down or at minimum temporarily suspend accounts engaging in such noxious rhetoric? Do these candidates jeopardize free speech norms in addition to public safety? Where do we draw the line to hateful political speech in a pluralistic democratic society such as ours that values peaceful coexistence among different racial ethnic and religious groups as well as free expression principles?

To help us grapple with these issues we have three esteemed panelists joining us today. What we're going to do is actually a little different than many past ABA webinars. Typically, we ask our panelists to present their talk for approximately 15, 20, 30 minutes and then engage in Q&A from audience. But today we're going to ask you to actually present your questions as you hear each of our panelists engaging with one another. They're going to each present opening remarks for about five to ten minutes and then after they're done we're going to have a conversation with one another. I'm going to facilitate that conversation by asking pointed questions based on responses and things that I've prepared to help facilitate our discussion. As I said, you're welcome to also post questions. You can do so by using the control panel on the right-hand side of your screen. Just input your questions and we'll be monitoring them, posing whatever we deem to be appropriate.

So, our first panelist is Elie Mystal. He joined Above the Law in 2008 by winning the Above the Law Idol Contest. Prior to joining them Elie wrote about politics and popular culture at City Hall News in New York Press. Elie received a degree in government from Harvard University and a JD from Harvard Law School. He was formerly a litigator at a big law firm but quit the legal profession to pursue a career as an online provocateur. He's written editorials for the *New York Daily News* and in *New York Times* and he has appeared on both MSNBC and Fox News without having to lie about his politics to either news organization.

Welcome, Elie.

Elie Mystal: Thanks for having me. So, I want to start with this simple fact: when horrible political rhetoric happens, when hate speech happens in the political sphere, the people who pay the price for that are Black people, brown people and Jewish people.

All right. Nothing that I can say here today, nothing that I can say on the television, nothing that I can write online is going make roving bands of Black people stand outside a Cracker Barrel waiting for white people to come out and do them some harm. But, nearly anything that Trump says, that the Republican Party says, that people online who are pushing hate speech say can lead to death and

destruction in African-American communities, Muslim communities, Latino communities and Jewish communities.

So, from the perspective of a person of color, from the perspective of an "other"—and sorry I should have also said the LGBT community because they also feel the brunt of this rhetoric. So, from the perspective of an "other," when we talk about hate speech, I am NOT talking about some kind of theoretical issue, about First Amendment jurisprudence. I am talking about a literal issue that goes to my safety, the safety of my wife, and the safety of my Black children.

Okay, let's start there. Now, within that milieu of what the problem is, we also have to understand the political desires of the Republican Party. The Republican Party has realized that their policies, generally speaking, are wildly unpopular. All right, people actually don't favor tax cuts for the wealthy. People actually don't favor like endless wild, wild west mass shootings. People don't favor climate change denialism. Republicans have figured out that the only way to get those unpopular ideas through is to explicitly tie them to bigotry, misogyny, homophobia and hate. So, what they are offering the most rabidly violent sections of our society is the hate in exchange for them voting against their own interest on economic and other policies. All right? So, that is part of the Republican agenda. That's why we see it in the political sphere.

So now what are we supposed to do about it? Look, as you said in my opening, I'm an online gadfly. Free speech is damn important to me. Without it I couldn't have a job and without a real understanding of the limits of government power—this government especially—would have me in a gulag if they could. So, I understand my entire career is based on the protection of free speech, and especially political speech, because without it I'm toast. Without it, this current government would have me on the first train out. So, I understand implicitly how important it is to respect speech. However, and I think Engy you set it up exactly right, the so-called solution for hate speech is more speech. That framing, and that phraseology, was invented by white people to protect white people. That phraseology has never worked for African-Americans, Latinos, and so on and so forth. Because the response that we get for more speech is more FBI files, more assassination attempts, more lynchings.

That's what happens to us when we try to inject more speech into the marketplace of ideas. So, for me, the solution has to be to simply move the line a little bit further back on a couple of key legal issues. We're talking to a friendly legal audience. So, I can get a little bit in the weeds here. There are two main ways to stop hateful political speech. One is incitement. Two is true threat. Those are not protected categories of speech. If you incite people to violence, that's not protected. If you are truly threatening somebody, that's not protected. I don't want to really mess around with true threats. I'll leave true threat where it is for now. But, regarding incitement to violence, our current jurisprudence understands incitement to violence needing to be something entirely imminent. So, you can be speaking in front of a crowd and say something should be done about Bob. That's not incitement to violence. If you're speaking in front of a crowd outside of Bob's house, and say something should be done about Bob, then maybe you get into the incitement category. That's where the line is now. We have to move that line back slightly. I

don't want to live in a world where you can't stop somebody until they start shooting at me. I want that line moved back to understand that incitement to violence happens a little bit before our current understanding of imminent. Incitement to violence can happen at a political rally. Incitement to violence can happen on Twitter. If we simply understand that...if we simply move the trigger for when the speech becomes unprotected to the point where we could say a reasonable person would understand that speech as a future call to lawlessness, that would do a lot of the work of allowing us to get at the most awful purveyors of hate speech while still leaving more than enough space for online provocateurs, for people running for president, for a whole host of speech that might be difficult to hear, that might be inflammatory to some but still kind of safely within what should be protected.

Engy Abdelkader: Thank you. Thank you, Elie. Really provocative, thought-provoking comments and I want to definitely give you an opportunity to expand on some of them. But, first, let's go on to our next speaker and then we'll return to you, Elie.

Our next panelist is Wajahat Ali, who's a *New York Times* contributing op-ed writer, as well as CNN commentator, TEDx speaker, an award-winning playwright, a recovering attorney, and a former consultant for the US State Department. Ali has given keynote speeches around the world from Ted to the Aspen Idea's festival to Google to United Nations to New Yorker festival. His writing appears regularly in the *New York Times*, *The Atlantic*, *The Washington Post*, and *The Guardian*. He helped launch the Al Jazeera America Network as co-host of "The Stream," a daily news show that extended the conversation to social media and beyond. He was also a national correspondent, a political reporter and social media expert for Al Jazeera America. There he focused on stories of communities and individuals often marginalized or under-reported in the mainstream media. As a playwright, Ali is the author of *Domestic Crusaders*, the first major play about Muslim Americans post 9/11 which was published by McSweeney's and performed off-Broadway and at the Kennedy Center. He's the Peabody nominated producer of the series "The Secret Life of Muslims," a series of short form first-person documentary films featuring a diverse set of American Muslims.

Ali was also the lead author and researcher of "Fear Inc., Roots of the Islamophobia Network in America," the seminal report from the Center for American Progress. But perhaps his most noteworthy achievement is being married to a phenomenal Muslim-American woman, a physician, Sarah Qureshi, at Georgetown Medical Center. And they have been blessed with two beautiful children.

Welcome, Wajahat.

Wajahat Ali: Thank you, Engy. But, if I wasn't married, that biography would easily get me at least three dates. So, I appreciate that. Amazing introduction. And, now, I have three kids. So, we just had a new girl. So, that's why I believe it should be very impressive that I don't look dead. Thank you for inviting a recovering attorney who has not practiced law in about eight years to join this esteemed panel to discuss the 2020 elections. Of course that means I'm the ideal person to be giving

you attorneys advice. But, as a Muslim American, the talk about immigrants the last several years under the Trump administration have been really exciting.

My people are really popular with this administration. It's like reading a "Choose Your Own Adventure" book. You kind of don't know what'll happen next. I wondered whether or not one day there will be more countries added to the Muslim Ban. But, it's not a Muslim Ban. It's a travel ban that is actually a Muslim Ban but you can't call it a Muslim Ban. I don't know if Pakistan, my parent's country, will be added to the "shithole countries," which apparently he didn't say "shithole." He said "shit-house," because there's a difference between "shithole" and "shit-house." Apparently "shit-house" has Wi-Fi. We wonder what new conspiracy theory Donald Trump will tweet out about marginalized people, especially before the elections. Will it be a remake of the tweet he did about General Pershing, who allegedly instructed US soldiers to dip their bullets into pig's blood to kill Muslim terrorists. That is false. He never instructed them to do that. And, heads up, I want this to be a very pig-friendly panel. You won't need to dip bullets into pig's blood to kill Muslims because regular bullets work just fine. We're not like Dracula.

There's another conspiracy theory he tweeted that maintains that Muslim Americans celebrated the 9/11 terror attacks. He allegedly saw the video of them celebrating in New Jersey, but no one can find the video. Or, he retweets on his own, unannounced, no one asked him to do it about the hate group Britain First, which is a hate group suggesting that Muslim refugees committed violence. Those are fake videos and the hate group was so bad that then Prime Minister of UK, Theresa May, had to come out and denounce Britain First. And, of course, let's not forget for the last few months he has retweeted several times the hate monger Katie Hopkins. She is a British hate monger who has asked for the "Muslim Solution," has called refugees coming to the UK vermin and cockroaches, and she casually promotes white supremacy.

And, of course, my favorite—birther conspiracy. President Obama might or might not be a Muslim, who might or might not be born in the United States. I'm really glad Elie started this conversation by saying there is a violent cost to this political rhetoric. There is a violent cost to these tweets. The rhetoric is born by the most marginalized of communities including but not limited to Muslims, immigrants, Black people, Latinos, LGBTQ and women. It's fascinating that in 2019 America, for millions of our fellow Americans to feel "Great Again," the rest of us have to suffer.

And, as Engy mentioned, in 2010 I started doing a report for the Center for American Progress, a think-tank. It was published in 2011. That's called "Fear Incorporated." You can see it online. What we did, for the first time, is we traced about 42 million dollars that was funneled into what we call this nerve center, this very interconnected incestuous group of think-tanks, grass root groups, activists, religious leaders, politicians and media outlets. They created and promoted what was once considered fringe conspiracy theories, such as "Obama is a Muslim," "There is a Sharia threat," and on and on and on. That report landed August 2011, coincidentally right when Anders Brevik, a terrorist in Norway, decided to kill 78 people, blew up a building, and then took a machine gun and mowed down 69 mostly

teenagers. And, he said that he wanted to punish Europe for its multiculturalism and its pro-immigrant policy. He warned that these trends would cause the Arabization of Europe. In his 1500-page manifesto, which he left as a training manual for future would-be terrorists, he cites nearly every single individual that I listed in "Fear Incorporated."

Now, fast forward nearly 10 years. It's 2019 and every single person that we mentioned in "Fear Incorporated: The Roots of the Islamophobia Network" are now either in the White House or one step removed from Trump's White House. I'll repeat this: nearly every single person that we cited in "Fear Incorporated," those same people whose ideology and writings influenced the terrorist Anders Breivik, [are in or connected to the White House]. This [Anders Breivik] is a man whose writings Marc Sageman, a counterterrorism expert, said that even though you can't necessarily blame these individuals for directly causing Anders Breivik, he nonetheless emerges with the same "intellectual infrastructure." Those individuals influenced Pompeo, John Bolton, Stephen Miller, Donald Trump, Kellyanne Conway. Just let that sink in.

There is a violent cost to this rhetoric. And, speaking about political rhetoric and the elections, let's take it back. Let's take a step back to the 2018 midterm elections. President Trump was riding a good economy. Job numbers came out and he decided to double down, maybe triple-down on only one talking point: "invasion." A caravan of rapists, criminals and terrorists were coming in from the border. Mexicans and Middle-Eastern suspects? Maybe, or maybe not. They were funded by George Soros, the Jewish American billionaire? Who knows, but "the invasion" became the talking point that got mainstreamed. It comes from the white supremacist swamp. It literally is a white supremacist conspiracy theory that says specifically, George Soros and a bunch of globalists have a diabolical plot, a global plot to use Black people, people of color, immigrants and Muslims to overrun and take over Europe and bring down Western civilization. Specifically, it is called the Replacement Theory. That language in November, during the midterms, was used by Robert Bowers who decided to invade the enemies at the Tree of Life synagogue and he killed 11 people. He was on the right-wing social media site, "Gab" and he retweeted a tweet that says, "We have to punish the evil filthy Jew bringing in the evil filthy Muslims." He wanted to stop the invasion.

Fast forward to March, Christchurch. There was a terrorist in New Zealand who attacks two mosques on Friday during Jumu'ah prayers with more than 50 people. He puts on a GoPro headset and like a Call of Duty video game live streams it. He leaves behind a manifesto called "The Replacement Theory." Voila. He says that Donald Trump is a renewed symbol of white identity with whom he shares a common purpose. He does not attack Latinos. He sees the invaders as Muslims. Fast forward to August, El Paso Texas. There's another terrorist who attacks and kills nearly two dozen people at a Walmart. He's inspired by the Christ Church killer. The Christ Church killer was inspired by Anders Breivik. And, the El Paso Texas terrorist leaves behind a five-page manifesto regurgitating the same rhetoric. In fact, for him, the invaders weren't Muslims, they were Hispanics. They were going to replace the workers, replace him, and replace white people. There is a cost to this rhetoric. White

supremacist hate groups are now the number one domestic terror threat according to the FBI, according to Christopher Wray, who Trump appointed.

White supremacist groups and plots are the number-one plots that they have infiltrated and uncovered, according to the FBI. The FBI is now saying that the popular mainstream right-wing conspiracy theories that are now featured at Trump rallies—QAnon, the deep state conspiracy theory that there's a deep state out to get Trump - is now a domestic terror threat. They fear, leading up to the 2020 elections, that individuals or groups will be radicalized by this conspiracy theory to commit violence. So, there is a cost to free speech. Free speech is not an absolutist right. The First Amendment is being achieved by some as a coward's sword for a bigot's refuge. And what happens when the First Amendment is killing the rest of us. If it has been used and abused to launder hate and mainstream conspiracy theories and fear against people of color, and to weaken democracy, the irony is that one of the fundamental freedoms of this democracy is being used by some as a Trojan horse to upend it. How do you "both sides" when one side is an extremist? And, another question is how will we fight back within the limits and expanses of the First Amendment? I know Jim will expand on that, and a quick answer to this, it will take a multicultural Coalition of the Willing

I will leave it at that because I want to get to the Q and A. I'll expand on this, but I will say without any hesitation and without any hyperbole and to give a pop cultural reference we're taking on Thanos. We're witnessing the death rattle of white supremacy which has transformed into a death march from here to Europe. And, we need a multicultural coalition. We need the Avengers. It will take all of us - lawyers, activists, educators, media personalities, citizens - to combat this threat leading up to 2020. Because even if Trump is defeated, Trumpism will last. And, we're witnessing, in particular, one political party - I'm sorry to say the Republican Party - that it's becoming more radicalized. That it is laundering and mainstreaming hate. It's not going away. It's a moment of urgency where no one can sit on the sidelines and claim neutrality. With that, I will give it to Jim, and I look forward to all the questions.

Engy Abdelkader: Thank you. Thank you for that impassioned talk, Wajahat. Our next Speaker, Jim Weinstein, is a free speech scholar.

He is the Dan Cracchiolo chair of constitutional law at the Sandra Day O'Connor College of Law in Arizona, a faculty fellow in the center for law science and innovation at Arizona State University, and an associate fellow with the Center for Public Law at the University of Cambridge. Professor Weinstein's areas of academic interest are constitutional law, especially free speech, as well as jurisprudence and legal history. He is the co-editor of *Extreme Speech and Democracy* with Oxford University Press, the author of *Hate Speech, Pornography, and A Radical Attack on Free Speech Doctrine*, and has written numerous articles in Law Review symposium on a variety of free speech topics including free speech theory, obscenity doctrine, institutional review boards, commercial speech, database protection, campaign finance reform, the relationship between free speech and constitutional rights, hate crimes in campus speech codes.

Professor Weinstein has litigated several significant free speech cases primarily on behalf of the Arizona Civil Liberties Union. Earlier in his career he wrote several influential articles on the history of personal jurisdiction and its implication for modern doctrine. Professor Weinstein also has been a principal speaker at numerous national and international conferences on free speech issues. During law school he was a member of the University of Pennsylvania Law School Review Board of Officers. After graduating he served as a law clerk to James R. Browning chief judge of the Ninth US Circuit of Appeals and had practiced civil litigation in Los Angeles for several years before joining the faculty in 1986.

Welcome Jim.

Jim Weinstein: Thank you Engy. I have been asked to describe American free speech doctrine. The central feature of First Amendment doctrine is its intense hostility to content regulation. As the Supreme Court of the United States has explained, “As a general matter the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”

Now content-based regulations come in different varieties, some worse than others from a First Amendment standpoint. The most egregious form of content discrimination are laws that discriminate on the basis of viewpoint. Viewpoint discriminatory laws, to quote the Supreme Court's cumbersome phrase, are laws based on “the specific motivating ideology or the opinion or perspective of the speaker.” An example of a viewpoint-based law would be one that prohibited anyone from saying that abortion is murder; or, with particular relevance to this webinar, a law punishing hate speech, such as then-candidate Trump's statement referring to Mexican immigrants as rapists. Viewpoint-based laws, however, do not exhaust the category of content-based regulation, which also include regulation of the subject matter of speech. Thus a law prohibiting speakers in a park from talking about abortion, whether in favor or against abortion rights, would also be considered content based.

Again of particular significance to this webinar, the rule against content discrimination extends even beyond laws disfavoring particular viewpoints or subjects; it also encompasses bans on highly inflammatory words or symbols. For this reason, an anti-war protester has the right to wear a jacket in public bearing the message “fuck the draft” or to burn the American flag, decisions that many on the left really liked. But by the same token, a homophobic preacher has a right to carry a sign in public bearing the virulent hate speech, “God hates fags.” By design, this protection of inflammatory words and symbols applies to highly offensive speech from those on the far left, extreme right and all points in between.

In counter-distinction to content-based laws, content neutral laws regulate expression for reasons unrelated to its message, such as time, place or manner of the speech. An example would be an ordinance prohibiting the use of loudspeakers in residential neighborhoods after 10 p.m. While content-based laws are almost always invalidated, content-neutral laws are generally upheld.

While remarkably broad and exceedingly strong, the rule against content regulation is not absolute. Rather, the Supreme Court has explained that the First

Amendment permits content regulation in a few limited areas, including as listed in a recent case: obscenity, defamation, fraud, incitement, and speech integral to criminal conduct.

But I want to dispel here a peculiar misunderstanding, fortunately not shared by today's panelists, but which is rampant among college students and also among some journalists and politicians: that the mistaken view hate speech is among these exceptions, and therefore can be banned. But this is manifestly not the case. The Supreme Court has never even suggested that hate speech is, like fraud or incitement, a category of unprotected expression. To the contrary, the Court has on several occasions invalidated hate speech laws.

For instance, in a 2017 decision the Court unanimously struck down a hate speech provision in the federal trademark law. In the lead opinion of that case, Justice Alito explained that "speech that demeans on the basis of race, ethnicity, gender, religion, age, disability or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express the thought that we hate."

Now coming back to something that Elie said, incitement to violence *is* one of the exceptions not protected by the First Amendment. For that reason, speech inciting racist violence can be constitutionally punished: but *not* because it's hate speech but because it's incitement unprotected by the First Amendment. Now, as Elie also mentioned, the standards that the Supreme Court set for what can be punished as incitement is very, very strict. In a cornerstone First Amendment case called *Brandenburg v. Ohio*, the Court emphasized that "mere advocacy" of violence or other criminal activity is protected speech. Under the First Amendment, someone has a First Amendment right to proclaim, "Hitler was right. The Jews should all be exterminated." To constitute incitement punishable under the *Brandenburg* test, advocacy must be "directed to inciting or producing imminent lawless action" and in addition "must be likely to produce such action." Under this extremely strict standard, none of President Trump's comments mentioned earlier, despicable as they may be, constitute incitement unprotected by the First Amendment.

The *Brandenburg* test can and has been reasonably criticized as being too restrictive of government's power to punish harmful speech. But while there are good arguments for slightly modifying this highly speech protective test, I think it would be a bad mistake to allow punishment of "a future call to lawlessness" as Elie urges. It was under such a standard that during the cold war the Court upheld the conviction of the leaders of Communist Party. I shudder to think what the Trump administration would do under this standard to members of minority groups, particularly Muslims, who engage in intemperate condemnation of existing laws.

As has also been mentioned hate speech bans are permitted under the constitutions of other liberal democracies. In fact, several countries including India and Japan, expressly prohibit hate speech in electoral contests. So, it can certainly be argued that the Supreme Court was wrong to interpret the First Amendment to prohibit bans on hate speech. But I think that, on balance, that the Court has for our country go it right with respect to hate speech bans. I've written extensively on this subject, most recently in 2017 in a symposium in *CONSTITUTIONAL COMMENTARY*. There is insufficient time to go into this in detail here, so I'll just mention of few of

the biggest problems with hate speech laws. First of all, one can doubt how much good a ban on hate speech would do. It is not at all clear that banning hate speech will result in less violence against minorities in this country. There are a lot of open questions regarding the nexus between hate speech and violence. In addition, minorities have been particularly targeted by hate speech laws. But the biggest problems is defining hate speech precisely enough to prevent misapplication.

In Europe, which as mentioned does have hate speech laws, there has been some real misuse. It's been used to punish speakers for merely referring to homosexuality as immoral; for expressing the view in an academic seminar that Mohammed was a pedophile; for saying that certain ethnic groups are undesirable as guest workers, not calling them rapists or the like, just undesirable; and for advocating the boycotting of purchase of Israeli products. While many people would find some of these views highly offensive, they are views that people in a liberal democracy should have a right to express and to hear.

Now I'll end my opening remarks by saying that although under the First Amendment a direct ban on hate speech in political campaigns would be unconstitutional, this doesn't mean that there can't be legal consequences for candidates engaging in hate speech. In *Trump vs. Hawaii*, the dissenting Justices were of the view that President Trump's rhetoric could be used to show anti-Muslim animus, thereby rendering the travel ban at issue in that case unconstitutional under the Establishment Clause. If an elected official had made a lot of bigoted statements as part of an election campaign, it is possible that such hate speech could be used as a basis to invalidate an executive order or even legislation supported by that official.

I'll leave it at that for now.

Engy Abdelkader: Okay, thank you, all. Excellent opening remarks. Jim, I want to begin with you. Thank you for laying the foundation regarding free speech doctrine in the United States context as well as providing a comparative analysis with other state approaches around the world to issues such as hate speech and government restrictions on content. You know, in the past several months, particularly in response to mass shootings by individuals tied to white supremacist and far-right extremist ideology, there have been some murmurings, calls for law reform. For example, a couple of months ago, there was an op-ed in *The New York Times* that asked whether the First Amendment was killing us because of the robust protections that are afforded to individuals who are espousing such racist viewpoints. More recently, I believe last month, there was an op-ed that ran in a *Washington Post* by a former high-level official with the Obama administration making a similar observation. It called specifically for reform to our laws surrounding free speech. It's noteworthy that these calls were met with fierce backlash and characterized as attacks on free speech and yet I think it speaks to the increasing apprehension among segments of the American population regarding what I believe Elie and Wajahat have characterized as the violent costs of free speech particularly among historically marginalized groups be they Latinos or African Americans or Muslims or Jews.

What is your response to these calls for law reforms? What is your response to the concerns that you're hearing expressed from your co-panelists? We all, every

person on this panel, makes their living due to the protections afforded under the First Amendment and particularly from free speech doctrine. None of us would be able to pursue our livelihoods without those protections. By the same token there is growing consensus among advocacy groups, among activists, among academics, that the Trump effect is real and has violent consequences—particularly among minority groups. So, what is your response to the calls for law reform? What is your response to concerns about physical safety and well-being of these minority communities?

Jim Weinstein: I think that, first of all, there's very little chance that the present Court would recognize a hate speech exception to free speech. Whether there should be such an exception is a harder question. It's something I've thought a lot about. Though my mind remains open on the question, I think that, on balance, in this country with our institutions the First Amendment should protect hate speech. It's very a difficult question though and I can only summarize my views here.

First, as I've already mentioned, I have doubts about how much good a law banning hate speech would actually do. I am not aware of any empirical study that shows that hate speech laws would significantly reduce violence against minorities in this country. On the other hand, it would be difficult, if not impossible, to alter First Amendment doctrine to allow for punishment of hate speech without also permitting the repression of speech that must be protected in a free and democratic society.

In this regard, it is crucial to remember where our currently highly protective free speech doctrine comes from. It is largely a correction of World War I First Amendment jurisprudence that allowed more than 2000 people to be prosecuted, and over 1000 to be convicted, most for doing no more than vehemently protesting America's involvement in that war. Contemporary free speech doctrine was consciously developed by the Court with these disastrous World War I cases in mind. It reflects a belated understanding that in a liberal democracy, people have to be able to vehemently, even intemperately, criticize laws, institutions and social policies, be it the country's involvement in a war or the commitment to racial or religious equality.

For these reasons, I think on balance we should leave First Amendment doctrine's rigorous protection of dissident views, even noxious ones, pretty much where it is, perhaps with some minor adjustments to the incitement standard. I'll leave it at that for now.

Engy Abdelkader: No, that's excellent. So, I actually want to piggy back on that and focus on incitement a little bit more. We heard from Elie and his suggestion that he believes that we need to move the standard on incitement. You mentioned during your opening remarks, Jim, that the US Supreme Court has in fact carved out exceptions to the free speech doctrine. These includes defamation, obscenity, fraud, and significant to this discussion, imminent incitement to lawless action.

We've also heard and are aware of the fact that there's academic research that shows that there is in fact a statistically significant relationship between the

political rhetoric coming from individuals like Donald J. Trump and the hate crimes against Jews and Black people and Muslims and Latinos.

We also know that at least in one of five of these hate crimes that the word Trump or a reference to the Muslim ban or other discriminatory policy or “Make America Great Again” is in fact cited at the place of the criminal incident. So, this could be the word “Trump” on a Black church at the time of an arson. It can be the note that’s stapled to an undocumented immigrant’s stomach saying that Trump does not like you. There are numerous, too many incidents, where Trump is specifically referenced by the perpetrators themselves as the inspiration for the criminal, lawless action.

So, is there an opportunity to challenge and signal that Americans want a change in terms of what we deem socially and politically acceptable from those in public office or aspiring to be? Perhaps by filing a class-action lawsuit? We’re not challenging laws because there are no laws from the government in any state or from our federal government actually infringing upon First Amendment protections. Rather, what we have are various communities all making the same claim. So, is there an opportunity to move the standard as Elie suggests with respect to imminent, lawless action in order to hold these individuals accountable and send a clear message that in our pluralistic society we respect peaceful coexistence and we demand it among various racial, ethnic and religious groups?

Jim Weinstein: It’s a very good question. There are two lawsuits currently pending in the lower courts that are both pushing against the boundaries of the incitement standard. One involves a negligence claim by a policeman against an organizer of a Black Lives Matter protest claiming that the organizer’s speech lead to his injury from an object thrown at the policeman by a protestor. The second is a lawsuit against White Supremacists who organized the notorious Charlottesville “Unite the Right” rally by those injured in the violence resulting from that protest. The theories of these lawsuits are somewhat different but similar enough to show, I think, that loosening the protection of the incitement standard and other First Amendment doctrine protecting political protest is likely to “cut both ways.”

So, if you loosen up free speech protection to allow protestors who chant “Jews will not replace us” in a torch light march to be held liable for personal injury based even in part on such hate speech, then you should expect that the Black Lives Matter organizer will similarly be liable for urging fellow protestors to block a highway. Yes, maybe there could be some adjustment to the incitement standard to allow for such liability, but you need to realize the cost not just to speech that you hate but also to which you support.

Elie said that the speech protective rules I described were made for white people to protect white people. I disagree with Elie about this. These laws were made to primarily to protect dissidents challenging the status quo, be they religious minorities like Jehovah Witnesses, political minorities like Communists or members of the Ku Klux Klan, but in particular, and most prominently, the civil rights movement of the 1960s. So if you care about the ability of minorities to protest, you should be very careful about tinkering with the protection afforded by the First Amendment; such diminishment of rigorous free speech protection is likely to come

back to bite you or your allies who use inflammatory rhetoric or advocacy in the pursuit of social justice. etc. Personally, I try not to let my own political views influence my judgment about what free speech doctrine should be. Rather, I try my best to support neutral principles that protect people who want to vehemently challenge existing laws and or policies and to even intemperately advocate for social change, while allowing government the power to punish incitement of violence and other serious law violation where such expression is likely to result in such conduct. But for those who look at this question from the perspective of what's best for "my side," please bear in mind if free speech doctrine is changed to allow for the punishment of the speech of White Supremacists, doings will likely also remove First Amendment protection for intemperate speech used by groups on the left.

Engy Abdelkader: Okay great. So, it's interesting because this reminds me of the debate we had a few weeks ago regarding domestic terrorism laws. There's no current law recognizing or criminalizing domestic terrorism per se. But, the concern is that if we do create such a law to prosecute white supremacists or white nationalists that are committing acts of domestic terrorism that it'll actually be misused against minority communities and further exacerbate their social and political repression.

So, Elie, I want to go to you. If we move the standard on incitement to violence do we open up minority communities—African-American community, the Jewish community, the Muslim community—to increased prosecution or oppression? Will these laws be used against them such as in the Black Lives Matters case that Jim is highlighted?

Elie Mystal: Sure, of course, they will. Whenever white people catch a cold, Black people catch the flu.

I think it's unavoidable that anything that we do to make ourselves more able to catch and prosecute the white purveyors of hate speech in the first instance, it will hurt Black and brown communities more. That's just how it works. I totally agree with Jim on that point.

My point is: the laws that we have are already disproportionately disadvantaging Black and brown communities. Jim is exactly right to bring up the DeRay lawsuit. That's the Black Lives Matter guy that Jim was talking about. He's absolutely right to bring that up. I view that case as the proof that even under our current very narrow hate speech laws, black people are still in trouble. Black people are still in trouble for speaking up. Jim brought up the *New York Times Co. v. Sullivan* case. That was to protect the *New York Times*. That's why they did that. Like the African-Americans who speak out, the minorities who speak out, gay people who speak out are always under more scrutiny, trouble, and problems from the legal system even as it is today. I'm trying to expand the law to catch the white people too. Because we're already under threat, we're already under stress, we're already in danger of running afoul of the prevailing white society.

Look, I am NOT saying Jim is wrong. I am saying Jim is right and I don't care because I am so focused on trying to stop some of this other white led hate speech. I accept as gospel that if we change the laws in the way that I want, in the

way that I'm advocating for, and Bill Barr is still the Attorney General, when that change happens the first person to get prosecuted under my new standard will be AOC, Rashida Tlaib, or some other woman of color.

Like that's just how it works. And, I get that and that is horrible. But, if we can find a way to start to get at the white purveyors of hate speech, that is basically a trade I am willing to make. We were talking earlier about *Brandenburg v. Ohio*, we were talking earlier about the World War One overreaction over narrowing of speech that produced our current Free Speech Doctrine. Just for viewers to remember, as Jim pointed out, none of this was happening at the founding. This was not, 'We are not living under the free speech doctrine as envisioned by Thomas Jefferson.' Thomas Jefferson was long dead and gone by the time these laws were made.

But, *Brandenburg v. Ohio* is a case protecting the Klan. Like that's how that standard got written. And, all I want is to have a free speech standard written in a time where Black and brown people are allowed to have a voice. Because that's what we don't have. When I say that it was written by white people for white people, I mean literally these doctrines were written in a time where only white people were allowed to have an influence on the law. The World War One laws came at a time when Jewish people weren't even allowed on the court. The *Brandenburg v. Ohio* opinion came during a time when there were no Black people allowed into the judiciary, there were no Latinos allowed in the judiciary. Where you couldn't be openly gay and be a judge. That's when our current doctrine was written. I don't think it's too much to ask that we rewrite our doctrines with input from minorities and from non-white people. And, if all that means is that we move the standard a little bit differently, [then] I accept, again, that the majority culture will use those laws against us, I understand how that works, but if we simply allow input from non-white citizens so that we can get to a point where perhaps some of the white purveyors of hate and destruction can also be caught, like I said earlier that ultimately is the Faustian bargain, but, it's ultimately the horrible trade that I am willing to make.

Engy Abdelkader: Thank you, Elie. Wajahat, I want to build on Elie's comments and move on to you. You know, there is a perception among some members of minority communities that the free speech doctrine has been reduced or manipulated as a tool to further subjugate and oppress historically marginalized communities.

Specifically, there's been a number of high-profile cases in the past few years that prove problematic on this score. Consider, for example, Colin Kaepernick, a person of color who attempts to exercise free expression to express his opposition...his objection to police brutality and suffers economically violent consequences because of it, notwithstanding American constitutional values. The First Amendment guards us, protects us, from the government, not private actors such as the NFL. And, yet, we still pride ourselves as Americans as having these enshrined values that derive from the Constitution that protect free speech and free expression. Collin Kaepernick is really just one of many high-profile incidents from the past several years.

Reza Aslan lost his show on CNN because of some off-color tweet he made about Trump. So, his show “Believer” was canceled. We see the same repercussions against people of color in the political sphere and in a number of different contexts. As a result, there is this perception among people of color, among historically marginalized communities, that it's free speech for some but not for all. And, specifically, when any person of color, anyone from a historically marginalized community actually says or does something that challenges the status quo, that challenges or makes the establishment feel uncomfortable that they suffer very severe consequences as a result of that. What is your response to that?

Wajahat Ali: So, some people might not like this answer, but this is the way to really understand it. We are witnessing again the death battle of white supremacy which has transformed into a death march both here and across the globe. That's the framing from which to really understand why, how a lot of these laws written by white people—sometimes with the best of intentions—and the existing double standards that exist in the applications of the laws, in arrests, in sentencing, in media coverage, in rhetoric.

I'll give you one example: economic anxiety. There you go. It's 2019 and to this day, as you know, as a person of color who covered the election, you know many of us, many people of color were journalists and writers and poets said, “Guys, it's not economic anxiety. We're telling you that it's culture, it's racial anxiety.” And, they said, nope. No, it's economic anxiety, the “hillbilly elegy,” the Rust Belt. And now fast-forward. It's 2019, and every single sober study that has been done by academics says the primary motivation for a lot of Trump voters—not the exclusive motivation but the primary motivation—was what? Racial anxiety. Now, you get to 2019 and you listed the litany of sins that Trump has committed. We still don't say racism. What do we say? Racial hiccup, racial flair, racial trip up. Meanwhile, the rest of us are saying, ‘For the love of God, just call it what it is. It's racism.’

The double standard that exists now, we see the both-sides-ism, right? And, this is why what I warn about is from a media landscape and from a framing landscape: how does a democracy survive when one of the political parties is mainstreaming and promoting white supremacist conspiracy theories and is hijacked by an extremist ideology and we decide to both-sides-it and give him an equal platform? What we've seen with free speech and with the kind of social contract that we have to give both sides argument is when you actually advance both sides ... I'll give you one example: climate change. Climate change denialism versus climate change acceptance. About 99% of people believe in climate change, [and on the other side, you have like two cranks.] When you both sides it, it actually hurts truth and promotes climate change denialism because people say, ‘Oh, this is a legitimate platform. Let me go Google and research climate change nihilist.’

The same thing happens with a vaccination. You have full vaccination [and] anti-vaxxers. Fast forward now to 2019 and the World Health Organization says that vaccine hesitancy is a top 10 global threat and we have made measles great again. So, I'm just giving an example of how some of the best intentions of both sides and clean everything works against the marginalized communities.

Colin Kaepernick is a great example. He goes, 'Listen man, you guys said exercise First Amendment free speech.' And it's precisely those actors who were apparently the First Amendment warriors, the free speech warriors, who were saying, 'Whoa whoa, whoa ... not on the football field, Ducky. Whoa, whoa, Ducky. Just throw the football. Don't non-violently protest the fact that Black bodies are being killed.' The question becomes, 'Well, what do you want me to do? If I'm exercising my First Amendment right in a non-violent fashion as you have told me, if I'm following the footsteps of Free Speech Warriors, even that is not good enough for you. So that means die, die quietly, suffer quietly. And so, the tension that both Jim and Eli have brought out is exactly the tension over this. Because historically this has always been used against communities of color. This has always given teeth or ammunition to law enforcement to go against Black people, in particular, or those deemed radical by the government. And specifically, you made a good point Engy, when it comes to domestic terrorism.

There is no federal law on the books. So the reason why there's so much coverage on the 'war on terror' when it comes to Muslims is because we have material support against terrorism as a crime that supports foreign groups. Who are the foreign groups? ISIS and Al-Qaeda. Georgia State University did this report last year that shows that even though the number one domestic terror threat in America are white supremacist terrorism, when there is a Muslim suspect there's four to seven times as much media coverage. There is seven times longer sentence when it comes to the criminal sentencing. This is the double standard. So, our civil liberties groups, a lot of people of color say, 'No, no, just don't give law enforcement more teeth with a domestic terrorism bill because they will go against more people of color.'

But, then you say, the number one domestic terrorist threat is white supremacist and they're going to kill us anyway. Like we got to have some teeth. So, this is the bridge that we have to kind of cross, because no matter what we do, due to white supremacy were effed. We have to challenge it, chip away at it and it's not just going to be the law. But, it's going to be also the media, education, culture. More where white people are doing the labor that we've been doing trying to convince people, "Hey, we do not have to suffer for you to feel great again." That's going to be a process, a cultural process, education process, political process. But, then, if the First Amendment is killing us anyway, which it is, then can we not articulate or define or move the needle to then go against those harmful actors who are deliberately using it to promote hate?

And, the final thing I'll say on this is: when I do a call back to my report "Fear Incorporated," all of those actors after 9/11 were able to launder their hate under the guise of national security. They said, 'We're just national security experts,' 'We were worried about national security, war on terrorism, domestic terrorism,' 'We're the Paul Revere's,' 'We are the individuals who are warning you,' 'We're the Luca Brasi's of our community willing to do the dirty work and call out the people.' That's why they got funded. Once that ship had sailed, guess what all those national security experts rebranded themselves? The past three or four years Engy, they are now 'free speech warriors,' 'First Amendment crusaders,' 'for the sake of the First Amendment and free speech we're willing to say what's unpopular and politically

incorrect.' This was lo and behold one of the selling points of Trump—keep it real, we're mad as hell, I shoot from the hip.

If President Obama did what Trump did... That should be like a novel. What Trump gets away with. It goes back to the white supremacy narrative and I know people hate hearing that. I know people hate hearing the words white privilege but one of the benefits of privilege is being ignorant to that privilege and not realizing the blind spots that exist within the law made with the best of intentions that affect the rest of our communities. And so that's how we move forward. I just wanted to tease that out and give context. I know it's messy, but this is all messy.

People want clean-cut answers, but we have to talk about the holistic range of stuff. And the final thing I'll say is about social media. People say, 'Oh the First Amendment. Why are you for de-platforming people because now it'll be used against people of color.' When you de-platformed Alex Jones, finally, guess what happened to Alex Jones? He becomes marginal. When you de-platform Milo Yiannopoulos, guess what happens? He becomes marginal. When Twitter and Facebook actually implement their terms and conditions, you know who would be de-platformed? Donald Trump. And, our national security would be in a much, I could sleep easier.

When it comes to Elie's point—and I promise I'll stop after this. I'm from the Bay Area. I could tell you these tech giants were run and created by white men. There were not women there in the room. There were not people of color in the room. The number one victims of hate and bullying on social media platforms are women.

Thank you for coming to my TED talk.

Engy Abdelkader: Thank you. Thank you. I actually do want to go back to the media. First, I want to move on to Jim. Jim, what I actually wanted to speak...though we're starting to run out of time, [but] we still have a few more substantive subjects that I want to touch upon before we do. But, you know, I want to speak about counter speech. Many First Amendment absolutists will respond that the appropriate response to this sort of vitriolic inflammatory political rhetoric is more speech not censorship. The counter speech doctrine was developed in a different era and we currently find ourselves in a context where you have socially, politically, economically, marginalized groups that are being targeted by very powerful individuals, including some multimillionaires. The question is: is it realistic to expect that a mother of three kids who holds down two jobs and is financially strapped trying to make ends meet trying to simply survive is in any kind of privileged position to engage meaningfully with the individuals who are helping manifest discrimination in her life and in her children's lives on a daily basis?

Jim Weinstein: That's it's a very good question which I will try to answer. But I wanted to first talk a bit about the social media. I agree that it is particularly gendered in terms of women being chased offline by harassment and I think there's a lot that can be done about that by the social media platforms themselves. They are private actors not bound by First Amendment, which applies only to government. There is a lot that they can and should do to prevent online harassment. As far as the

government is concerned, I've just written a piece taking issue with my friend Eugene Volokh, in which I argue that there's considerably more room than he acknowledges under current free speech doctrine for both civil and criminal remedies to combat cyber harassment. For instance, subject to adequate First Amendment safeguards, there can in my view be liability for online expression constituting invasion of privacy or intentional infliction of emotional distress.

Now to your question about counter speech which, as you said came from Justice Brandeis' *Whitney* opinion. Some of the harms of hate speech are dignitary or inflict psychic damage. I remember going online for a Sunday school project my daughter needed help with. I typed in "Jew" as part of a Google search, and got this horrible anti-Semitic diatribe full of lies and misrepresentations. This experience really upset me but, fortunately, my daughter wasn't with me to see this material. Counter speech isn't going to really help that kind of harm. Nor will it help the poor mother of three to fight against the billionaire. But where counter speech has been very effective is on college campus. If there's a racist incident on campus, like the horrid speech in 2015 by those frat boys from the University of Oklahoma, you often have people come out en masse to condemn the hate speech. The same thing happened in Phoenix where some bigots visiting a mosque used their cell phone to broadcast ugly anti-Islamic messages. Members of the Christian and Jewish communities, came out in large numbers along with Muslims to protest this hate speech. This is where counter speech really does work: it helps reassure minorities that most Americans strongly reject these hateful views. In this respect, I agree that some of the awful recent incidents that of been mentioned earlier in this webinar are a death rattle of White Supremacist, or at least I hope so.

Engy Abdelkader: Thank you. So, I want to move on to social media but first I do want to give you an opportunity to respond and provide your insights regarding the counter speech doctrine. Research suggests that racist speech on Facebook, on Twitter, eventually translates into violent actions in the real world. Again, primarily targeting members of communities of color.

What kind of policies do we need on social media, whether it's with respect to ads that play on racial and ethnic and religious hatred and division and fears, or calls for violence? For instance, calling for lawmakers to be hung or to be harmed on Twitter, or references to General Pershing killing Muslims with bullets laced with pigs blood. What kind of policies do we need across the board with respect to speech on social media, and that is not run by the government? These are privately run corporations with business interests, so they're not governed by the same legal principles as government entities. What would you suggest?

Elie Mystal: First of all, I want to respond to the marketplace, the counter speech arguments. Professor Tim Wu has a really good article from the Knight Institute about how we need to re-understand our First Amendment problem not as a scarcity of speech and thus worry about government controls stopping speech and pushing it down. But as a scarcity of listener attention and that the government's role under the current government at least of drowning out other people's speech is in

fact the kind of speech problem that the founders at least would have recognized as an issue.

Let's go back to World War I for a second, on those anti-war protests that sparked some horrible speech laws. Those were in response to the US government's actual Ministry of Propaganda that it set up to promote World War I. There's nothing that Nazi Germany invented; they got a lot of ideas from us and they got a lot of ideas from what we were doing in the teens and 20s. And, one of the things that we were doing was pumping out state-sponsored propaganda.

So, one way of re-understanding our speech laws is to maybe think about whether or not the First Amendment, which is supposed to respect everybody's right to speech, actually has a role to play in tamping down government propaganda that drowns out everybody else's speech. It's a law review article. So, it's a little in the theoretical clouds. But, it's an interesting way to kind of think through this problem of where we are and what we're actually seeing in society. It's not that people don't have access to speech. It's that people don't have access to random people's attention.

So, that's number one. And, that leads me right into where we are with social media. It is the sparkly, attention-grabbing thing that we're all looking at. The milieu which all this is being dissolved in is Facebook or Twitter or Instagram or whatever. As you say Engy, absolutely, they're private companies. If they could decide today to stop white supremacy on their platforms. And, they could do it. The reason why, and they have said this, they do not do that is because doing the things that it would take to stop white supremacy in the same way that they did the things that it took to stop ISIS recruitment on Twitter would catch too many Republicans.

There are too many elected Republican officials that traverse in this crap that Twitter feels that if it did the things that it would need to do, there are too many congressmen and Senators, to say nothing of the President of United States, that would also have to be banned. So, they have literally said they have a lower standard for white supremacy and white domestic terrorism than they do for international terrorism because Republicans don't track in those waters. It's disgusting.

So how can it be stopped? Well A, again, they're private companies. If they got a clue they could do what they want. B, they are in a marketplace. If you could make your competing social media platform—I know that's the Republicans Valhalla solution, just start your own company and somehow magically things get better. My solution: you start regulating these social media companies as public utilities. In the same way the electric company, which is a public utility but not a government organization, cannot deny me service because I'm Black, they can't refuse to wire my house because the color of my skin. If you start regulating social media companies as public utilities, you can start to think about how to unwrap some of the racism and sexism and bigotry that is inherent in those platforms. It's a lot of work and it is fraught with danger. I think all of us would agree that almost the last thing we want is @Jack deciding who gets to have a voice and who doesn't. Like that's not great. Last thing you want is Mark Zuckerberg actually being in charge of who gets to say what. That would be wrong. So, it's a lot to unpack.

The last thing I'll say about that though is we, as lawyers, we'd love the bright line. It's one of the brightest things we have in our laws - the difference between government stamping on speech and private citizens stamping on speech.

We really like the fact that our speech laws are about the government actions and not about private citizen actions. Most private citizens don't easily understand the difference between the two, but lawyers we learned it from day one of law school. But, let's not forget that these companies take their cues from the government and from what is socially and politically allowed.

So, if you start saying that incitement is wrong and you move the timeline back a little bit that is a cue that Zuckerberg will take. It would take one lawsuit where one of these crazy mass shooters people was sued by a victim, and the victim sued not only the shooter, not only the gun company, but also Facebook for promoting their rhetoric. It would take one successful lawsuit of that nature to completely change the business calculus for Facebook, Instagram, Twitter and Snapchat. That is how you do it. You make them liable for something and you can't do that until you start regulating them as a public utility. But, you do that once, and their whole game changes quickly.

Engy Abdelkader: So, we need to litigate. That's what you're telling us. I want to go back to something you said earlier regarding the access to listeners' attention. Along those lines, do news media outlets have a role to play in ensuring that members of historically marginalized groups have access to the marketplace of ideas, have access to actually counter this noxious speech that directly impacts their lived experiences?

Elie Mystal: You got to trust the people to vote with their feet on that. Again, I think one of the interesting things about Tim Wu's argument is that it makes it interesting to think about how you might go about stopping state propaganda...which is also known as Fox News in this country. That's an interesting way to get at that particular kind of nugget of a problem. But, I think in a broader sense, we've been successful as a nation with just having lots of newspapers. In its initial inception, the most important part of the First Amendment from the perspective of the founders was the protection of the media. It was the protection of the news. These guys were not sitting in the middle of Times Square, not that there was a Times Square, just shouting things out to the Native Americans about what they thought about the British. These people were writers, these people were publishing books and pamphlets. And, that is what fundamentally the First Amendment is trying to protect.

If we go back to a sense where the people that we really need to protect are journalists, I think we get around some of the more difficult issues about scaling free speech protections. Where the protections of the press are kind of sacrosanct, you can deal with Fox if you have CNN and MSNBC. You can't deal with Infowars if that is being promoted and retweeted and amplified by the government of the United States to propagandize and proselytize and ruin the citizens.

So, I try to draw a distinction. But, as Jim says, it's all messy. None of this is easy, there's no magic bullet, there's no bullet dipped in pig's blood that's going to stop all this. It takes lots and lots and lots of small tweaks here and slight tweaks there to try to live in a world, in a pluralistic society where alt-right hate mongers have some pause before they get into the marketplace of ideas and promote violence.

Engy Abdelkader: Thank you, Elie. Wajahat, I want to give you an opportunity to answer the same set of questions that I posed to Elie regarding counter speech, as well as what is currently happening on Facebook on Twitter.

Wajahat Ali: So, the marketplace of ideas, like counter speech, would be great if the marketplace was truly free. What happens if it is rigged and a lot of people don't have entry or don't have the power, Number One. Number Two, I was working with Facebook and social media companies a couple years ago in a different capacity. I could tell you working with them closely that I went to several countries. We went to Philippines, we went to India, we went to the Bay Area, we went to Indonesia. We work with people on the ground to come up with solutions that they would come up with to combat the challenges that they're facing. My job was to recruit these people, work with them, get the talent in the room, and do a kind of a hack-a-thon for three days. These people identified the problems. They identified the solution.

The problem with each—whether it was in Philippines or Indonesia or the Bay Area—repeatedly was discrimination. The minority in that community was being used and abused and assaulted by or through social media tools. Same problem. They're the ones who came up with the problem and we just helped them come up with the solutions. I can tell you that Facebook at that time was less concerned with these brilliant solutions. They were really concerned with how it looked.

So, as long as it got in their press release and the press came, as long as the local government was happy, they were happy. Facebook can do a lot more. Mark Zuckerberg, it was just revealed, had dinner with Donald Trump along with Peter Thiel, a billionaire Republican who used his power and clout to take out Gawker from the marketplace of ideas because he's angry at them because they apparently outed him. He's the one who funded Hulk Hogan's lawsuit against them. Yay for lawsuits. So, I have worked closely with these companies and companies, you know, aren't evil. People there are trying to do good, but at the same time, [these] particular companies, Facebook and Twitter—which is, by the way, also allowing under the guise of free speech political campaigns that are lying, which is going to help disinformation, which is going to hurt democracy, in addition to privacy leaks in addition to God knows what they're doing with their data. But one of the primary ways that all the hate groups that we have talked about have been able to mainstream and globalize their message is social media. Just connect the dots. It's all there. So, I believe first and foremost, if you are a Twitter or a Facebook and you have some terms and conditions—and I don't care who is violating those terms and conditions—enforce it uniformly and consistently.

If that was to happen on Twitter, Donald Trump would lose his Twitter account today. A good reason why they don't is because, unfortunately, so much of the other side of the Republicans is now mired in this hateful swamp. Take it back ten years. Daryl Johnson of the Department of Homeland Security wrote a paper on the rise of the radical revitalization of the right wing. That report was killed by Republicans and conservatives because he said it would have hurt them and would

hurt many of the people in the conservative movement. Darryl Johnson is warning you about the rise of white nationalism. But, it was quietly killed within the DHS and he wrote a book about it. I recommend people reading that book.

So, this is very real. So what do we do? Again, it comes to this question and I want you guys to answer it as audience. If we do the both-sides-approach to society where one of the sides is mainstreaming hate, what do we do? This is why I think it's come to a point right now where who would have thought that Mark Zuckerberg would become one of the 21st century villains? Who would have thought when watching "The Social Network," that great movie directed by David Fincher, that he would emerge as one of the great villains? What we need now is a cost to these companies because they are a private for-profit company. They are not in it for the social good. Understand the business model, and no matter how much Zuckerberg says, 'Oh, we're not journalists.' Guess what? You kind of do journalism.

Most people get their news now across the world from Facebook. There's a cost to that hate. That cost is borne on us. So, I'm for the breaking up of these companies, I'm for the regulation of these companies, I'm for private actors pressuring these companies, I'm for a political cost to these companies trafficking in white supremacy and profiting off of white supremacy, and I believe in the absence of the spotlight. This really intense spotlight on Twitter and Facebook, in particular. By the way, don't forget Facebook also owns WhatsApp and also owns Instagram. Also, don't forget that Sri Lanka had to suspend WhatsApp and Facebook because of the racial riots that were being engineered against Muslims. I was thinking about writing an op-ed saying that Facebook is killing Muslims around the world. Look at Myanmar, look at Sri Lanka, look at India. Social media disinformation conspiracy theory hate: it spreads like wildfire. It always affects the most marginalized communities in that country. In America, it happens to be Black people, LGBTQ, Latinos, and Muslims.

So, I'm for a full-frontal assault on these social media companies because in the absence of this assault or this regulation or the scrutiny—call it what you will—there will be a cost. Not only to minority communities but also to the truth and to democracy. We have left them unchecked for far too long. We have emulated them as our saviors, the titans of tech who will come and save us. Well, instead of a utopia, they're creating a dystopia.

Another problem is: notice that we as a society come up with technology—a tool, a toy, and unleash it—and then afterwards, go 'Oh crap, we should have thought about how it could be abused and now we're dealing with the consequences.' Social media is a tool. It depends on how it is used. It can be abused both for good and for bad. So, I don't want to just knock on social media in general. We've all seen the rise of Black Lives Matter, for example, through social media. We've all seen the rise of journalists of color through social media. But, this is going to be really fundamental moving forward in 21st century, after so much of the world is relying upon social media for representation, for information, for journalism or data. If we don't combat this, and if we don't exercise some restraints, it's going to get worse. So, that's my moment of urgency, my clarion call. You got to do something.

Engy Abdelkader: So, I'm hearing somewhat of a consensus that there needs to be costs and that perhaps litigation is one way to make those costs happen.

So, as we wind down the webinar I do want to give each of you a few moments to share your concluding insights and observations with our audience. So, Jim, let's start with you. What are some of your concluding remarks before we go?

Jim Weinstein: Well, first let me say that I'm not an expert on social media. But I do think a full-frontal assault on social media is probably not the way to go. I do think, however, there's room, a lot of room, for more work for them to do themselves.

As private companies they can impose restrictions on the platform without triggering the First Amendment concerns. But lawsuits are considered state action that can violate the First Amendment, as would an attempt to regulate social media like public utilities.

One small point about *New York Times v. Sullivan*. Yes, that case did indirectly protect a media company. But what was directly protected in that decision was speech protesting the way the civil rights workers, particularly Martin Luther King, had been treated by southern law enforcement officials. And the large judgment nullified in that case was not just against the *New York Times* but also against the individuals who placed that the advertisement in the newspaper. One of the reasons that the civil rights movement succeeded was that the nation was made aware of brutal tactics, including the use of police dogs and the fire hoses against children, that southern authorities employed against civil rights protestors. It was decisions like *New York Times v. Sullivan* that allowed media to report this information without fear of being put out business by defamation judgments.

It's interesting, and ironic, to note who else is now criticizing the protection afforded speech by *New York Times v. Sullivan*: Donald Trump and Justice Clarence Thomas. They know the power of free speech and press to spur a progressive social movement. So I'd be really careful about frontal assaults on media. This is not to deny that there's a real problem, a huge problem, with this death rattle of White Supremacists. But assaults on First Amendment doctrine designed to assure free speech and press is not, in my view, a wise course of action. If law reform is needed to more effectively combat violence by White Supremacists, look to strengthening laws against hate crimes, not to weakening the protection of free speech.

Engy Abdelkader: Thank you, Jim. Wajahat, let's hear concluding remarks before we wrap up.

Wajahat Ali: So, when I say frontal assault...I mean if we don't confront the death march of white supremacy the rest of us are going to die. And, the death march of white supremacy turns into authoritarianism. And, for those who don't think you have skin in the game, you know it's the immigrants, it's the Blacks, it's Latinos, it's Muslims, it's the women...

Look at Trump, for example, it's also Republicans, it's also law enforcement. So, when I say full frontal assault, I say it with figurative language of course, but I say we use the tools at our disposal. That's what I'm saying. It's going to get worse

because after Trump goes Trumpism is going to last. And, all that needs is a better more polished, less reckless vehicle to be the messenger.

These ideas are already mainstreamed and so when I said that analogy about the Avengers, that's exactly it. We need lawyers. We need people who are journalists. We need educators. We need citizens. And, I'll end it on this. Everyone thinks, 'Oh man, I'm not on TV like you. I'm not on a webinar. I'm not a professor. So, what can I do?'

I think each person has a responsibility in their specific sphere, whether it is their vocation or their community or their church or their mosque or even their family, to at least do something. I'll give you an example. We, as a society, have kind of these rules. We're all subjective actors despite all of our protests. We're being pressured as we wait for the laws in society to catch up because everything's going to move very slowly.

I'll give an example how we make a choice as a society. The KKK has a First Amendment right to exist, to say what they want, to protest. But, we as a society back in the day maybe pre-2018 said, 'Yeah, KKK, you can survive and thrive here if you want. But, we're not going to give you a platform. You're not going to get a microphone. We're not going to invite you and give you both sides. If we do invite you, we're going to use our privilege, our authority, our space to actually challenge you and explain to people why you're hateful and don't represent our values.'

I now have teachers coming up to me and saying, "What do I do? How do I teach history when some of my students challenge the fundamental facts or some of my students probe Confederacy? How am I supposed to both sides this?" This was a fear that was initiated in 2016 by certain teachers. Now, it's 2019, and that fear is realized, and you realize that you cannot be neutral. You can't be a neutral on this train. You just can't anymore. So, we have to make a decision as subjective actors: how will we confront hate? Will we enable it through our silence? Will we enable it through this fake both sides, false equivalence? Will we enable and be complicit just because we're afraid? Or, will we interject using the powers that we have to try to shift the society towards justice and equality? And, that's what I want to leave you guys with. We all have certain superpowers.

You can't stay neutral anymore. You just can't. And, this both sides, false equivalence is going to kill the rest of us. And, I know you might not care about it but think about what happens. What do authoritarians do? They always attack truth first. Always. They always attack the institutions of truth. Then, they always say, we are the truth. And, only we can be believed. What happens when the First Amendment is used as a sword against the rest of us? That's the question we tried to answer today. It's going to be messy. But I do believe there's a way forward and there's no real right answers. We need change agents to do the right thing and each person has to step up and do the right thing.

Engy Abdelkader: Thank you, Wajahat. Elie, last words?

Elie Mystal: Reject absolutism. The solution to our current problems or speech problems, in particular, lies in nuance. It lies in incrementalism. It lies in rethinking. It lies in re-imagination. It lies in creativity. It does not lie in the easy

answer of absolutism. The thing that we have seen most from the current Free Speech absolutists is this belief, false belief, that the First Amendment is something that came down from Moses off the mountain, that it has always been with us and can never be violated.

That is simply not true. That is not true of our history. That is not true of our doctrine. That is not how we've gotten to this point. So, that's why I believe—especially for lawyers with a real understanding and a deep respect for the nuance of this very difficult issue—you as lawyers can be ambassadors for that nuance. When you are dealing with people who don't have your training, then you can also help us move forward in a rational way.

Wajahat Ali: Here's to messiness.

Engy Abdelkader: On behalf of the American Bar Association I want to thank each of you Elie, Wajahat, and Jim for joining us and sharing your expertise with all of us today. It's been an enlightening conversation and I want to thank members of our audience for joining us as well. Without you, these webinars would not be possible. Please make sure that you join us for our next webinar next month that exploring immigration related decisions at the US Supreme Court. For those of you observing the holidays, have a wonderful joyous season and we'll see you again soon.

Thank you.