

MASS VIOLENCE MOTIVATED BY HATE: ARE NEW DOMESTIC TERRORISM LAWS THE ANSWER?

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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 first panel of the series, which took place on November 20, 2019. The transcript has been edited for clarity.

Engy Abdelkader: Welcome to the American Bar Association's video webinar, "Mass Violence Motivated by Hate: Are New Domestic Terrorism Laws the Answer?" My name is Engy Abdelkader and I'll be serving as the program's moderator. Today's webinar is hosted by the Section of Civil Rights and Social Justice and it's sponsored by the Rights of 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 American Bar Association Commission on Immigration, the ABA Criminal Justice Section, the ABA Center for Public Interest Law, the ABA Section of International Law, and the ABA Government and Public Sector Lawyers 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 all of your work to make this program a success.

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David Schanzer is a professor of the Practice at the Duke Sanford School of Public Policy University and director of the Triangle Center on Terrorism and Homeland Security. Schanzer is the lead author of two National Institute of Justice studies: *The Promise and The Challenge and Promise of Using Community Policing Strategies to Prevent Violent Extremism* (2016) and *Anti-Terror Lessons of Muslim Americans* (2010). He has served a member of the Countering Violent Extremism Leadership Forum and has been a Research Fellow for the National Intelligence Council.

Hina Shamsi is the director of the ACLU National Security Project, which is dedicated to ensuring that U.S. national security policies and practices are consistent with the Constitution, civil liberties, and human rights. Her work includes a focus on the intersection of national security and counterterrorism policies with international human rights and humanitarian law. She is also a lecturer-in-law at Columbia Law School, where she teaches a course in international human rights. Hina is a graduate of Mount Holyoke College and Northwestern University School of Law.

Michael German is a fellow with the Brennan Center for Justice's Liberty & National Security Program, which seeks to ensure that the U.S. government respects human rights and fundamental freedoms in conducting the fight against terrorism. German is the author of *Disrupt, Discredit, and Divide: How the New FBI Damages Democracy*, and *Thinking Like a Terrorist: Insights of a Former FBI Undercover Agent*.

I'm humbled to have some of the nation's foremost subject matter experts on national security law and civil rights and civil liberties joining us today. To better understand the significance of this discussion and its ramifications going forward, it's important to take a step back to reflect on how we arrived at this critical juncture. Essentially, why does this conversation matter and how did we get here? To answer these questions, and for purposes of this webinar, we begin in the summer of 2015.

At that time, half a dozen fires of predominantly Black churches erupted in the South after a mass shooting at a Bible study meeting in Charleston, South Carolina. In June, a white supremacist murdered nine people at Mother Emanuel Church with the motive of fomenting a "race war." Dylann Roof was a stranger to the church but was welcomed with a Bible, sheet of Scripture, and a seat next to the pastor. Approximately forty-five minutes later, Roof used a semi-automatic weapon against worshippers and killed nine. The assault on a historic Black church after the ascension of the first African-American to the US presidency served as a traumatic reminder that the United States was far from being a post-racial society as many had claimed at that time.

During President Obama's first term in office from 2008 to 2012, the number of anti-government organizations increased by more than 1000 percent. The attack against Mother Emanuel renewed a debate about racism in America but also one about terrorism as well. Many, including advocates, academics, and journalists, were critical of the disparity in treatment between Dylann Roof, a 21-year-old white Christian male, and other similarly situated violent extremists who happen to be Muslim. They not only highlighted the politics surrounding the perpetrator's identity, where "terrorist" is synonymous with Muslim, but that of the victims as well. Violent assaults against minorities, such as African Americans and Muslims, are rarely characterized as acts of terrorism. Law enforcement officials describe the attack on Mother Emanuel, for example, as a hate crime despite his political motivations, violent extremist ideology, and the innocence of civilians targeted.

Posts on social media revealed the nature and tone of public discourse at that time. Representative tweets from Twitter, for example, included "A white supremacist massacre left many people dead in Charleston. It is a hate crime, it is terrorism, it is America 2015." Another tweet read, "Charleston shooting terrorists wore an apartheid flag on his jacket. If a Muslim man wore an ISIS flag he wouldn't get past security."

In fact, terrorism is frequently associated with international organizations and non-state actors such as ISIS or Al-Qaeda. But, in the aftermath of the mass shooting at Mother Emanuel, many argue that this was an act of terror that reflected a longer history of white supremacism such as Ku Klux Klan terrorizing African-Americans. At that time, back in 2015, the NAACP claimed this was an act of racial terrorism and must be treated as such. According to Professor Jelani Cobb, "The first anti-terrorism law in US history was the Klan Control Act. So really this has been a definition of terrorism." In fact, in 1871, Congress passed the Klan Control Act to protect the civil rights of African Americans. The Act authorized then President Ulysses S. Grant to declare martial law, levy penalties against terrorist organizations, and use the military to suppress the KKK. At that time, President Grant stated in relevant part, "Insurgents are in rebellion against the authority of the United States."

Ultimately, Dylann Roof was prosecuted and convicted under the federal Sheppard Byrd Hate Crime statute. And, he was sentenced to death.

Three years later, in October of 2018, eleven parishioners were gunned down at the Tree of Life Synagogue in the worst attack against Jewish Americans in US history. Prior to this deadly rampage, Robert Bowers made several revealing posts on social media. Specifically, his hostility and hatred was directed at the Hebrew Immigrant Aid Society known as HIAS, a nonprofit that serves refugee and immigrant populations. Bowers stated on social media, for instance, "HIAS likes to bring invaders and they kill our people. I can't sit by and watch my people get slaughtered." He also stated, "Why hello there HIAS. You like to bring in hostile invaders to dwell among us." He also stated, "Open your eyes to the filthy evil Jews bringing in the filthy evil Muslims into our country." Indeed, HIAS works tirelessly to bring refugees and other immigrants around the world to our nation.

Like Dylann Roof, Robert Bowers was also a white supremacist as well as a white genocide theorist. He believed that white majority countries, such as America, are being turned into white minority nations via immigration. White genocide theorists, such as Bowers, further believe that Jews are orchestrating this onslaught of immigration in the United States.

In the aftermath of the Tree of Life attack, this discourse about white terrorism ensued. But, this time, there were more specific calls for a counterterrorism infrastructure to address it. Some people wanted to see more intelligence analysts, more social media monitors, and more informants in circles devoted exclusively to combating far-right extremism including white supremacist ideology.

Arguably, however, the tipping point came last August in El Paso, Texas. Another white supremacist perpetrated another mass shooting targeting, this time, the Latinx community. Whereas Dylann Roof attacked a historic Black church, and Robert Bowers attacked a venerable synagogue in the Squirrel Hill section of Pittsburgh, the El Paso attack was not directed at a house of worship. Rather, the attack happened at a much more neutral location familiar to most Americans--a local Walmart. While the shooter may have intended to kill Mexicans, an unsettling realization became abundantly clear across our nation. We are all vulnerable. After all, we all go to Walmart.

The El Paso attack left 22 dead including six victims of Mexican heritage. The attacker -another young, white Christian male - had authored a racist, anti-immigrant manifesto that warned of an America overtaken by Latino immigrants. Here, too, the gunman was characterized as a domestic terrorist, but this time it was law enforcement officials, including prosecutors at the US Attorney's Office, that were describing him in that manner.

[The] Mother Emmanuel, Tree of Life, and El Paso attacks all attracted national and international news media attention. To be sure, there are many more mass shootings that haven't attracted so much attention but remain just as tragic. According to new research funded by the US Department of Justice, there have been more than 30 such mass shootings in the past five years. Approximately 18 percent have been motivated by racism, 15 percent were inspired by religious animus, and 21 percent were misogynistic. It's important to highlight that these figures do not

reflect criminal violence that did not involve a gun or did not actually come to fruition, such as conspiracies or foiled plots.

Just yesterday, authorities arrested a 16-year-old white Christian female in Georgia. She was planning an attack against a local Black church with a weapon other than a gun. She reportedly showed up at a local Black church intent on committing an atrocity but turned back when she realized that no one was there. Classmates at her local high school discovered her manifesto type writings in the notebook she brought to school. They reported her to counselors who then contacted the police. The police arrested her. Apparently the 16-year-old girl idolized Dylann Roof, the white supremacist responsible for the attack against the Mother Emmanuel in 2015.

According to the ADL, the Anti-Defamation League, every single extremist killing last year in 2018 had a link to right-wing extremism and white supremacists were responsible for the great majority of those killings. What is more, according to a recent polling survey from the Public Religion Research Institute, a majority of Americans believe that President Trump encourages white supremacy in our country. It is against this backdrop that the US Department of Homeland Security added white terrorism to its list of threats.

It is against this backdrop that members of Congress sent a letter to the US State Department asking for the designation of white supremacist groups to its list of foreign terror organizations. It is against this backdrop that the FBI Agents Association demanded that members of Congress codify domestic terrorism as a federal crime while warning that the phenomenon poses "a threat to the American people in our democracy." They argue that this would give FBI agents and federal prosecutors more effective tools to fight domestic terrorism. And, it is against this social, political, and racial backdrop that we saw elected officials introduce new laws in August and September 2019 that attached criminal penalties to the existing statutory definition of domestic terrorism.

For instance, New York Governor Andrew Cuomo introduced legislation that would treat mass hate shootings as domestic terrorism. Citing to government data, Governor Cuomo argued that since 9/11 far-right extremists have carried out three times as many attacks on Americans than any self-identifying Muslims. According to his new law, the Hate Crimes Domestic Terrorism Act, anyone who launches a mass attack and kills on the basis of race, nationality, ethnicity, religion, disability, sexual orientation, or gender identity will receive life without parole. New York is the first state to see such a proposed domestic terrorism law.

On a federal level, U.S. Congressman Adam Schiff, a Democrat from California, introduced the Confronting the Threat of Domestic Terrorism Act. The Act creates a federal domestic terrorism crime. In introducing the measure, Congressman Schiff explained that treating white supremacist terrorism differently than international terrorism makes the public take it less seriously. This, even though, he said Americans today are more likely to be killed by far-right extremists than self-identifying Muslims. The proposed law requires the Attorney General to provide a written certification that the act in question meet statutory requirements prior to any charges being brought. Specifically, the suspect must be found to have

intended to intimidate or coerce a civilian population or influence government policy through coercion or intimidation.

In addition to Congressman Schiff's measure, Senator Martha McSally, a Republican, introduced a discussion draft of legislation that would attach criminal penalties to what is currently defined statutorily as domestic terrorism. Essentially, she seeks to criminalize violent and destructive acts with political motives as domestic terrorism. In response to these new legislative initiatives civil libertarians have expressed concerns. Hina Shamsi and Michael German are here with us today to discuss some of their thoughts. We also have the pleasure of being joined by David Schanzer, a professor at Duke University, as an expert speaker as well.

So, let me introduce you first to Professor Schanzer, who will discuss his research about trends in violent extremism while sharing his thoughts about proposed legislation regarding domestic terrorism. Professor Schanzer works at Duke Sanford School of Public Policy University and serves as director of the Triangle Center on Terrorism and Homeland Security. He teaches courses, conducts research, engages in public dialogue on counterterrorism strategy, counterterrorism law, and homeland security. Professor Schanzer is the lead author of two National Institute of Justice studies. He has served as a member of the Countering Violent Extremism Leadership Forum and has been a research fellow for the National Intelligence Council. Prior to his academic appointment, Professor Schanzer was the Democratic staff director for the House of Representatives Committee on Homeland Security from 2003 to 2005. He previously served as a legislative director for Senator Jean Carnahan, counsel to Senator Joseph Biden, and counsel to Senator William Cullen.

Professor Schanzer was also a clerk for US District Judge Norma Shapiro, and in the Office of the Solicitor General of the United States. He is a graduate of Harvard College where he received an A.B. cum laude in government in 1985 and of Harvard Law School where he served as editor of the Harvard Law Review from 1987 to 1989. Professor Schanzer has appeared on international, national, and local radio and television discussing terrorism and homeland security. He is the author of more than 70 op-ed articles on this subject that have appeared in newspapers around the country and online. Welcome to the webinar, Professor Schanzer.

David Schanzer: Thank you so much. I don't know if people are able to see the PowerPoint at this point. Yes. I believe we are. So, I'm going to run through some basic data and tee up the discussion for Mike and Hina. First of all, thank you to the ABA for this kind invitation to participate. And, I'm very glad to be participating with my co-panelists. Mike and I have interacted for many years and I always learn something every time we appear together or have a discussion. And I'm sure today will be no different. I understand that this webinar is about domestic terrorism and do we need new federal laws to combat it? So, let me just run through a couple of basic points here. When we academics talk about terrorism, we have to understand that there is a lot of the disagreement about the vernacular - what we consider terrorism as a social phenomenon - and what terrorism is as defined as under the law. As a social phenomenon, it's pretty well agreed that terrorism involves violence against civilians. It is generally motivated by some sort of political animus and it's

designed to send a psychological message. The violence is supposed to have a psychological message that transcends just the victims to make a wider, broader, more societal message designed to promote fear and also to try to influence and change policy. That's what we think of when we think of terrorism. In my view, America really has two strands of a violent extremism problem. I like to use a term violent extremism instead of terrorism because it's so politically loaded. But, we have this form of Al Qaeda and ISIS inspired violent extremism, which the San Bernardino attack would be one example of.

And this chart is a representation of work my colleague, Charles Kurzman at UNC, and I have been doing for over a decade now. It really charts kind of the prevalence of extremism. It shows Muslim Americans who are associated with violent extremism since 9/11. And, we define Muslim Americans as people who've been in the country for a year or more. And you know it shows actually some interesting trends. There were really two spikes in the number of incidents. And this involves both incidents and arrests both after violence conducted and beforehand, for things like conspiracy, material support, and so on. The first peak was around 2009, when a lot of young people traveled to Somalia to join the civil war there. And, then we saw another peak in 2014 and into 2015 with ISIS declaring its Caliphate at the end of June in 2014. Interestingly, we've really seen a very steep decline. You can see the numbers of perpetrators in 2018 at a very, very low rate from the 9/11 period. I expect 2019 to come in at a similarly low levels.

If we look at the scope of this particular problem over this period that we've studied, we'd count about a hundred and forty-one murders related to Al-Qaeda and ISIS inspired violent extremism inside the United States. During that period, there were a total number of over two hundred seventy-seven thousand murders in the United States during that same time. So, if you divided all the murders over the seventeen point three years over a course of days or so, only three days' worth of those murders over the seventeen point three years would have been attributable to Al-Qaeda and ISIS inspired violent extremism. So, you can see how small a part of the US violence problem is attributed to this form of extremism. And, also, just to put another look at that, if you look at only the incidents that actually occurred—those are the black lines on this chart—the amount of violence. The gray lines represent travel to foreign countries to support terrorist groups that actually occurred. So you can see how small the numbers of incidents we're talking about per year relating to this phenomenon.

The second real strand, a major strand of violent extremist activity in the United States, I would call white supremacist inspired. And, Engy mentioned some of this data. But, I'm going to go through it very quickly. We're really seeing in the last decade a trend towards less Islamist extremism, or what I call Al-Qaeda and ISIS inspired extremism, and white supremacy. So, here, in this chart and this data for the next three charts from the Anti-Defamation League, they calculate four hundred twenty-seven deaths, so pretty much for all forms of extremism. Over the last decade, three-quarters of them come from right-wing extremism. And, only about a quarter from this is Al-Qaeda and ISIS inspired extremism. If we look at just the right-wing extremism, seventy five percent or three-quarters are from white supremacy which is why I emphasize that we have really a white supremacy

problem. The others are different forms, mostly what we call anti-government extremism. That's things like sovereign citizens, patriarchy movements, and militias. They might be white supremacists as well, but the main motivation there is hatred of government and government authority rather than racial animus. But, you can see white supremacy is the bigger part of the problem. And, if we look at just last year, almost all of the murders that were committed related to either one form of right-wing extremism, with still over three-quarters of being white supremacy. And, last year, only 2% from Al-Qaeda and ISIS inspired extremism.

So, why do Americans engage in violent extremism? I think it's really interesting to kind of divide our homegrown extremists. We have found most recently are principally people who are loners [and] they have come to these ideas and the decision to engage in violence either on their own or sometime in pairs. And, that's been true for the most part of both people on the top of the left-hand side of the slide, who were inspired by Al Qaeda and ISIS ideology and people on the bottom who were more inclined towards a white supremacist point of view. And I think this is a very, very different phenomenon [than what] was going on abroad, whether it be the Taliban or Hamas, or other violent extremist movements such as ISIS, Al-Qaeda as well, which are really much more foreign insurgencies against the ruling class, the state in these foreign countries. ISIS and Al-Qaeda especially do target foreigners and they do target Americans, which happened on 9/11. But, if you're looking at the vast majority of terrorism, it's coming from foreign groups who are much more involved in mass political movements rather than individuals.

Of course, what we're seeing with white extremism now is an expansion, especially in Europe, of this mass political movement. Those mass political movements, of course, are also resulting in spin-offs of them of people who want to push these political objectives through the implementation of violence. And, as you all know, the manifestation we saw here in this country is the Charlottesville rally. You know, you can only imagine if this was a rally of individuals who were pledging affiliation to Al-Qaeda or ISIS, chanting slogans relating to ISIS and Al-Qaida's ideology. That would have been broken up very quickly. There would have been a massive amount of surveillance and law enforcement there. But, as a domestic movement, the fear is that, as it becomes a greater and more prevalent domestic movement [it] also spins off more violence, as tragically this rally did the next day. It caused a murder through a car attack on a group of counter protesters.

So, just some attributes of homegrown violent extremists. There's no such thing as a terrorist profile. Scholars and law enforcement have been searching for a long time to try to predict who might become a terrorist by looking at demographic and other kinds of traits. And, they have not been able to. Often, we find that it is some sort of personal experience, whether it be things like social isolation, family trauma, unmet economic expectations, issues relating to identity that often drives people to these ideologies. Usually it's not that they've become highly politicized as the first part of the process of moving towards violence--it's usually something independent that has happened in their life that brought them to this. We know that group dynamics can play a really strong role in radicalization to violence and adoption of violence. So, that's why I'm very concerned when you see it more openly

acceptable to be part of these groups. That group dynamic can then produce more individual violent extremists and more violence.

Now with that background, let me just briefly get to this question about new domestic terrorism laws. I think there are two different issues. One is if we need a new crime, a new criminal law that kind of defines domestic terrorism and some of that was discussed - the proposal from McSally and Schiff and so on in the introduction. A separate but related issue is whether the current laws that outlaw material support to terrorist groups should be applied to domestic terrorism. Currently, they're only applied to international terrorism. There's a subtlety there and we'll get into it in a second. So, there are these two issues out there and it's useful to distinguish them because they have different nuances. I know this is an ABA audience so we'll get a little bit into the nitty-gritty of the law. But, currently, there is a criminal law for terrorism crimes transcending national boundaries. It can be found in §18 U.S.C 2332(b), and while I've shrunk it down, the elements of the crime are either killing or causing serious bodily injury or destroying property to create a substantial risk of serious bodily injury in the commission of a long set of other federal crimes. And, these crimes can only be investigated if the Attorney General determines that the act was—and here's where the terrorism comes in—intended to coerce a civilian population, intended to influence government by intimidation, or intended to affect the conduct of government by mass destruction. And this law has existed since 1996. It is mostly being applied to crimes transcending national boundaries. That's called the International Terrorism Statute. The question before us is whether we need or should have a similar statute that actually would apply to domestic terrorism. And the proposals—the Schiff proposal that was referenced earlier—goes along this exact same pattern from §18 U.S.C 2332(b). It says whether killing and causing serious bodily injury, destroying property, creating substantial risk of serious bodily injury, and here the Attorney General may prosecute only if after the act happens the AG certifies that they believed that there was a mens rea (an intention) to coerce civilians to influence government by intimidation and affect the conduct of government by mass destruction.

Mike has pointed out that especially the second bullet, the property crime element, could be relating to property crimes that take place during protests because protests are often designed to influence government policy. I think he makes a good point that would lead me to want to narrow this proposal if it were to go forward to deal with those problems. Let me just talk about some of the policy reasons why I believe it would be helpful to create a new law along these lines. First I think it really sends a message to the FBI about prioritizing domestic terrorism cases that simply has not transpired. Today, of course, Timothy McVeigh's act was an episode of mass destruction. Of course, it garnered attention. But, we have seen over and over that domestic terrorism has been a lower priority even though the data is suggesting it's a more prevalent problem here inside the United States. And, having this domestic terrorism law—even though there are lots of other laws, as Mike is going to point out, that can be used to criminalize and to punish people who engage in domestic terrorism—the fact of the matter is that the way the FBI works, where the incentive structures are that having a law that's actually labeled domestic terrorism helped to collect data relating to the amount of prosecutions and investigations that are open

to look for violations of this particular statute, will actually help shift attention resources inside the FBI on this.

A second reason is because it would start providing more equivalent treatment for terrorism which is called international terrorism even if it's homegrown. But, if it's related to an international ideology which it is currently, principally the ideology proposed you know fostered by Al Qaeda and ISIS and these domestic terrorism crimes. This is a photo of course in San Bernardino shooters and the El Paso killer as well. And, there's a couple reasons why bringing these kind of moral and legal equivalencies is very important. This is from a study by the ISPU that looked at over a dozen of similar terrorism prosecutions and it found that greater penalties were generally applied to Muslim perpetrators. In 83% of the cases they received the material support for terrorism [charge] and weapons of mass destruction charges, whereas the non-Muslim perpetrators were more usually charged with the smaller penalties relating to possession of a firearm. Possession means to make explosives and so on. And that led to getting less time for their sentences and so on. I believe that if there was the statute that has been proposed along the lines—again I'm open certainly to narrowing the Schiff proposal—a law would provide a more equivalent, fair treatment of similar criminal offenses. I think that's what the law should aspire to.

Similarly situated crimes should be dealt with the same way. And, another reason I think it's important to try to equalize this treatment is this feeling by a lot of Muslim-American communities about unfair targeting, unfair treatment that makes them feel like their citizenship is not valued. But, it also makes them more wary of participating in and cooperating with government anti-terrorism initiatives like CVE programs and so on. I don't think that's helpful to most American communities. Also, I think it's awful that in society as a whole that we have a group that feels so discriminated against. They're very wary about any type of cooperation with the government which can help to prevent terrorism which is beneficial to everyone.

The third reason, for example, I'm from Chapel Hill. So, we had a terrible triple murder that I think it was investigated as such. It could have been prosecuted as a hate crime or domestic terrorism. It was dealt with as a state law charge and they said, 'Well, that's fine, you know let the state governments take care of it under classic murder cases.' And, I really think that a federalization of certain hate crime actions is very appropriate because this white nationalist terrorism sends a very intimidating message - a message that's really contrary to our values of pluralism, diversity, inclusion, and non-discrimination. I think it needs to be attacked as a national issue and on a federal level. So, that is why I'm very comfortable having this law that would federalize in a sense a lot of activity that now would maybe be looked at as a state crime.

Let me turn to, quickly, the second form of possible proposals that are out there to deal with domestic terrorism, [which is to] take the concept of material support to domestic terrorism [that] has been out there for some time and is used very frequently to prosecute international terrorism cases. This becomes complicated because there are two types of material support cases. The first is under §18 U.S.C 2339(a), and in these kinds of cases the perpetrator must know or intend that material support is to be used for some other crime. So, material support is really

providing money, labor, any type of—and it's pretty *de minimis*—kind of help to an act of terrorism. It's really akin to aiding and abetting but it's even easier to approve and use. So, under this law, which is not used all that frequently to prosecute it, you have to show that you provided money or materials or some sort of form of support that is then used by terrorists to engage in other kinds of terrorism-related crimes. Now, this could be used to target white supremacist groups if it was applied to domestic terrorism crimes. But they would have to know that the support they're providing was going to be used for offenses. So somebody who writes a check and says, 'I'm going to support my local Ku Klux Klan branch,' in order for that to be a crime under this law they would have to know that that money was going to go to some sort of violent activity. And that's very hard to prove. And, so, in changing this law to apply to domestic terrorism cases, it actually could be applied to some domestic terrorism cases now. [However], it's probably not going to have much of an effect.

The other idea, and the other form of material support, is structured very differently and it depends on the creation of a list of terrorist organizations. There is something called the foreign terrorist list. [This] is a list of international terrorist organizations that's created by the State and Treasury Department through a very involved process. What this law says is once a group has been placed on the list, if you provide material support (again money, material, labor) in a pretty diminished form, if you provide that support and you know that you are providing the support to that listed organization, it doesn't matter what the organization uses it for. They could use it for buying food, they could use it for charitable activities, they could use it for bomb-making—it doesn't matter.

Just the mere provision of the support becomes a crime punishable by ten years or more in jail. It's been a very powerful tool for prosecutors to go after funders, planners, and other people who are not engaging in the violence—that's what I call left of boom—but people who are essentially making the violence possible through their provision of support. This has been used in many hundreds of domestic cases. So, under current law, an individual provides money to ISIS or an entity that is associated with ISIS, you can easily do a prosecution under §18 U.S.C 2339(b) for material support for terrorism and get a 20-year sentence. Whereas someone who gives the same amount of money to a domestic terrorist group like the Rise from Above Movement, that is right now considered [not criminal] because a lot of these movements have mixed activities. And, the idea we're going to create essentially a Muslim McCarthyite list of groups that are or not good or bad...they're engaged in domestic activities, they have constitutional rights. ISIS has no constitutional rights but domestic members of Rise Above Movement do. And, so, we've never gone down this route to create a list of domestic terrorism organizations and say that you can't give money to them principally because of these constitutional concerns. And, on this one, that's where I kind of fall out in that the constitutional issues are so substantial that it would be very, very difficult to craft this statute. So, currently at least, I'm not really in favor of going down this pathway and criminalizing material support for domestic terrorism although I do support the first kind of statute I talked about.

Engy Abdelkader: Thank you so much for your comprehensive and intellectually engaging presentation. I wanted to mention to our audience members that you will have an opportunity to ask questions of all of our panelists at the conclusion of Hina and Michael's presentation. On your right-hand side, you'll find a question drop-down box where you can actually type in your questions. So, with that said, let me introduce you to both Hina and Michael who will actually be using a tag-team approach here. They share very similar views about the new domestic terrorism legislation and the response to mass acts of violence.

Hina Shamsi is the director of the ACLU National Security Project, which is dedicated to ensuring that US national security policies and practices are consistent with the Constitution, civil liberties, and human rights. She has litigated cases upholding the freedoms of speech and association, challenging targeted killing, torture, unlawful detention post-9/11, and discrimination against racial and religious minorities. Her work includes a focus on the intersection of national security and counterterrorism policies with international human rights and humanitarian law. She previously worked as a staff attorney in the ACLU National Security Project and was the Acting Director of Human Rights First Law and Security Program. She also served as a Senior Adviser to the UN Special Rapporteur on Extrajudicial Executions. Hina appears regularly in the media and has been quoted as a national security expert by numerous outlets including in *New York Times*, *The Washington Post*, *Associated Press*, and *Reuters*. She has appeared on MSNBC, Fox News, CNN and NPR, ABC News, and the BBC. She is the author and co-author of publications on targeted killing, torture, extraordinary rendition and has monitored and reported on the military commissions at Guantanamo Bay. She's also a lecturer in law at Columbia Law School, where she teaches a course on international human rights. Hina is a graduate of Mount Holyoke College and Northwestern University School of Law.

As I mentioned, Hina will be presenting with Michael German. He's a fellow with the Brennan Center for Justice's Liberty and National Security Program, which seeks to ensure that the US government respects human rights and fundamental freedoms in conducting the fight against terrorism. A former special agent with the FBI, his work focuses on law enforcement and intelligence oversight and reform. Prior to joining the Brennan Center, German served as Policy Counsel for National Security and Privacy with the American Civil Liberties Union's Washington legislative office. He is the author of *Disrupt, Discredit, and Divide: How the New FBI Damages Democracy*. The book chronicles how the FBI transformed itself after the 9/11 terrorist attacks from a law enforcement agency famous for prosecuting organized crime and corruption to arguably the most secretive domestic intelligence agency the country has ever seen. A 16-year veteran of federal law enforcement, German served as an FBI special agent where he specialized in domestic terrorism and covert operations. He left the FBI in 2004 after reporting continuing deficiencies in FBI counterterrorism operations to Congress. Germany served as an adjunct professor of law enforcement and terrorism at the National Defense University. He joined the ACLU's Washington legislative office in 2006 and the Brennan Center in 2014. His first book *Thinking Like a Terrorist: Insights of a Former FBI Undercover Agent* was published in 2007. Welcome, Michael and Hina.

Hina Shamsi Thank you so much. I'm going to start us off talking about the concerns around the creation of a federal crime as domestic terrorism. And, Mike and I, as Engy mentioned, are going to go back and forth. We thought that might be more interesting for you all than a longer conversation where each one of us speaks. And, you know, I think one of the fundamental concerns here is that the responses to mass violence, and specifically to white supremacists or white nationalist violence, mustn't harm or cause further harm to communities of color, vulnerable marginalized communities that have borne the brunt of that violence. Many of these communities have also been at the forefront of bearing the brunt of abusive investigations, over-criminalization, and over-prosecution of terrorism-related crimes. And to understand I think where a lot of those concerns come from organizations like mine, like the Brennan Center, like the Leadership Conference, organizations representing American Muslims and other communities where these concerns arise, I am going to start us off with talking about the authorities that exist and have been used to investigate domestic and international terrorism. I am starting with the definition of domestic terrorism which hopefully you will have on the screen now.

So, David mentioned before the international terrorism and domestic terrorism divide. The language in the definition of domestic terrorism which currently exists was passed as part of the Patriot Act. It is really very similar to the language that exists for international terrorism, including the vagueness of aspects of it. That gives rise to concerns about interpretation. A key difference between the definitions of domestic and international terrorism is the jurisdiction. With respect to domestic terrorism, it is primarily within the territorial jurisdiction of the United States. So, this authority has already been used not for criminal prosecution per se, although Mike's going to talk about domestic terrorism statutes that already exist, but to investigate domestically. Another core part of what we need to look at when we think about authorities is the authorities claimed by the Justice Department, the FBI...I'll be talking a little bit less about Homeland Security, but the authorities claimed in the post-9/11 era and how they've been expanded with the Patriot Act, but also more specifically in 2002 with the Attorney General guidelines that governed investigations for general crimes, racketeering, and terrorism. Starting in 2002, then Attorney General John Ashcroft amended those guidelines to give significantly more authority to the FBI in the form of the kinds of investigations that could be conducted, the kinds of tools that could be used to conduct those investigations, and the lengths of time during which those investigations should be open.

It began in 2002. An example of the authority granted to the FBI is to conduct investigations based on mere allegations, less than the kinds of fact-based standards that had existed before in what was called then a preliminary investigation. They were using a broader range of investigative techniques, such as the use and abuse of informants, and these are concerns we hear about all the time from impacted communities, particularly of color, that we work with in this area. Now one of the safeguards that comes up over and over again is the notion of how do we protect First Amendment rights? The standard that has largely been in place is that investigations cannot be based solely on First Amendment protected speech and

activity. That's a very, very permissive standard in terms of what can then come in. Investigations could be based primarily on First Amendment protected speech activities and association. There's a world of what can come in, that can expose entirely innocent people to these investigations, which we started seeing early on when it became clear that the FBI was using even those authorities at the time. This was expanded to spy on political activists, advocacy groups like Greenpeace, peace groups, war dissenters, and protesters. And the guidelines were further expanded by Attorney General Mukasey in 2008 to provide a really new type of investigative authority called assessment which doesn't require a factual predicate for the investigation to be initiated, so long as the purpose is to prevent crime or terrorism or protect national security.

The kind of investigations without factual predicate that can be done can include physical surveillance, data gathering from commercial and other databases, again the recruitment and use of informants, the engagement in pretextual investigations and interviews. And, these are some of the authorities that really explain why there have been concerns from the communities significantly. I'm just going to go through very quickly what the latest version of the authorities are in the latest version that's been made public either through police or other leaks of the domestic intelligence operations guide that was updated in 2016. So, here we have assessments. They don't require a particular factual predicate and you see articulation of sort of a broad set of reasons that an assessment might be conducted. The kinds of surveillance that can be conducted using that authority without an actual factual predicate and the ways in which that gets expanded a bit more into a different kind of investigation ratcheted up is a preliminary investigation.

David Schanzer: Hina, do you want to ... the slide hasn't changed.

Hina Shamsi I'm sorry.

David Schanzer: There we go. Okay, now the slide is synced with what you're saying.

Hina Shamsi Sorry. So, I've just gone through quickly with assessment authorities. We're now at preliminary investigation – which is also a low degree of standard to be able to begin that investigation and can use fairly intrusive techniques ratcheting up to the full investigation, which was more akin to what used to be authorized with greater safeguards pre-2002. Where I wanted to summarize this... which is that with the different kinds of investigative authority and you can have and sorry I just want to make sure is my summary table up?

David Schanzer: Yeah

Hina Shamsi Okay, you can have no factual predicate, [and an] abusive kind of investigative authority. You ratchet up to a preliminary investigation, still far short of a fully factual basis, an articulable factual basis, and with it are intrusive techniques. [Then you have] full investigations, which require more, and then you

can have with full investigations, the FBI claims additional techniques can come in, including court authorized supervision of certain kinds of electronic surveillance. So this is part of where the authorities that exist have resulted in harms and abuses.

And, a third concerning area is what's called the Guidance on Race. So, the Guidance on Race was promulgated in 2003 by the Justice Department or federal law enforcement agencies to ban bias-based profiling for a variety of groups, but created broad exceptions that essentially permit bias-based profiling for national security purposes and at the border. That, again, resulted in the kinds of abuses we'll talk about in a little bit. Groups like mine, the Brennan Center, and multiple civil rights and community groups around the country sought safeguards like banning bias-based profiling outright as well as expanding the categories of groups whom profiling shouldn't apply. Well, in 2014, a good thing happened and a bad thing happened. The good thing is that the Justice Department expanded the categories [where] biased based profiling is barred. It said that those categories should not be used to any degree, but nevertheless carved out the exceptions for national security and the border which has then been used again. So, a combination of broad definitions of domestic terrorism, broad claims of authority to conduct investigations, and then bias based profiling loopholes have resulted in a lot of the harms that we've seen. That feeds into over-criminalization, over-surveillance and over-prosecution of minority communities. So, I'm going to stop there and turn it over to Mike to talk about this more.

Michael German: Thanks Hina, thanks Engy, and David. I appreciate being invited to participate in this webinar. The debate about whether a new law is necessary for domestic terrorism really started about 2015, and it struck me as odd then because I had been an FBI agent in the early 1990s working domestic terrorism cases, including using some of the most intrusive tools and tactics for undercover operations, and nobody suggested we didn't have sufficient legal authority. Essentially, as Engy suggested, the earliest federal laws to address far-right, white supremacist violence were written in the 1800's, and some of the portions of those laws remain on the books. And, in fact, there are numerous laws and so much of this debate is around semantic issues rather than actually looking at the law.

And, of course, that starts with the term 'terrorism,' which of course, as David suggested, can be a politically loaded term. So, I thought it would be helpful to look at the laws that are on the books. I ended up writing a report for the Brennan Center called, "Wrong Priorities on Fighting Terrorism" that goes through these laws. So, that would be an easy place to go to find these. I'll go through the slides quickly because there are so many of them.

Before the 1990's, because terrorism is a politically loaded word, people felt it didn't fit necessarily in law where, of course, we want very specific terms in our statutory framework. So, rather than banning terrorism, the law banned the types of criminal activities terrorists often engage in whether it's hijacking airplanes or assassinating government leaders. These types of crimes were outlawed. It was in 1996, when the government passed the statute that both David and Hina discussed—the material support for terrorism statute—that terrorism was introduced and therefore had to be defined. So, basically the way Congress approached it in enacting

that statute was to look in the code book and circle the laws that would be terrorism, that any material support of would be further criminalized. So, basically, what they did is they took out the code book, circled 57 federal crimes that they defined as federal crimes of terrorism even though those crimes themselves don't necessarily have terrorism in the titles. 52 of these federal crimes of terrorism applied to domestic terrorism, but they're not called domestic terrorism laws because they also apply to international terrorism. And if we're ever attacked by terrorists from Mars, they will apply to interplanetary terrorism. It focuses on the act rather than where it occurs.

So, just quickly, going through these statutes - it's a long list. 52 of these crimes apply to domestic terrorism. So, essentially, Congress has already done its job. They have passed a number of laws to address this kind of violence, and one thing to keep in mind that shows where this is more of a semantic problem than a real problem is that prosecutors who prosecute a specific type of conduct aren't limited to only statutes that have that terminology in their titles. In fact, they have the entire codebook available to them. So, if a prosecutor is investigating somebody for tax fraud and they see that they could actually be more easily charged with mail fraud or a wire fraud or some other statute, of course they can use that statute. Similarly, with terrorism, prosecutors [can do the same.] What we did in doing the research for the "Wrong Priorities" Report is we identified 17 other federal statutes that federal prosecutors have used in domestic terrorism prosecutions, and again these are only some of them. We limited to where there were at least four cases that use these statutes to be over-inclusive, but it's basically the entire statute book that's available. And there really is not much limitation on what a prosecutor ultimately charges, even though the case that was investigated and prosecuted is labeled by the Justice Department as a domestic terrorism prosecution.

The other issue, or interesting thing, about this debate is the proponents of a new law suggest somehow that domestic terrorism prosecutors have less authorities than federal [international] terrorism prosecutors. But, when you look at Justice Department statistics, more than twice as many domestic terrorism prosecutions have occurred than international prosecutions. So, we look just through the 10-year period from fiscal year 2009 to 2018, and there were 870 prosecutions that the Justice Department labeled as domestic terrorism prosecutions even though they did not necessarily involve a domestic terrorism statute, and only 433 international terrorism prosecutions. One of the fascinating parts of this discussion, as well, is that in discussing the need for a domestic terrorism prosecution, proponents of a new law suggest that that white supremacist violence is the driving factor, and that there aren't enough laws to address white supremacist violence. As David amply demonstrated with the evidence that he's collected, they are in fact the biggest perpetrators of violence in this category of violent crimes. But, in the data that the Justice Department releases, it doesn't reveal docket numbers so there's no way to look at those 870 domestic terrorism prosecutions and know how many are actually focused on white nationalist violence. And I think that's intentional.

Of course, the other thing that is odd about the argument focusing on what white supremacist violence is that there's a whole other statutory scheme available to prosecute the types of crimes that white supremacists often commits which, of

course, are hate crimes. And, as Engy suggested, these go back to the 1800s and Congress has, in fact, passed 5 hate crime statutes. And, these come with severe penalties, including the death penalty. So, the idea that prosecutors don't have enough authority to go after these crimes again is specious. And, again, in prosecuting what the government labels as a hate crime case they're not just limited to the 5 hate crime statutes but can use other statutes in the book. And, again, here are other statutes that we document used in cases they labeled it as hate crime investigations.

The problem here isn't a lack of legal authority to target these crimes but lack of a policy that prioritizes them. So, a perfect example of that is that there is a law on the books that's been on the books for decades: the Hate Crime Statistics Act. The Justice Department has never fulfilled its responsibility under this act. Basically it just requires the Justice Department to go out and collect nationwide bias crime data so that we have an idea of the scope of this problem. But instead of going out and collecting the data as required, the Justice Department relies on state and local law enforcement to voluntarily report data from their jurisdictions, and what we know from that is that [this method] has never been as an effective methodology for gathering this type of information. In fact, in the most recent filing only 12.6% of police agents can acknowledge that hate crimes occur within their jurisdictions. And, of course, some of that is because in at least six states there are no hate crime laws and in many other states, those laws are not terribly effective in the way that they're crafted. So, it doesn't focus on what would be a hate crime violation under the federal laws, but, rather the state local laws. We at the Brennan Center wrote a second report called, "Fighting Far-Right Violence and Hate Crimes," and we document all the different hate crimes laws across the 50 states and show how they're basically measuring apples and oranges when they they're left to provide this data.

But, still, with just 12.6% of police agencies reporting data, they find over seven thousand hate crime incidents with eight thousand victims. In fact, these numbers are somewhat matched with Department of Justice victim surveys which report about two hundred and fifty thousand hate crimes per year, acknowledging that that almost 90% of the police agencies aren't reporting. So, if you extrapolate those numbers out, it sort of works. One of the things that the Department of Justice victim surveys reveal is that more than half of victims don't even report their victimization to the police because...that's really part of a bigger part of the issue is that that these police agencies are not necessarily trusted by the communities that are often victims of these crimes. And, the statistic that really jumps out at us when we look at this 250,000 number of hate crimes [is that] even though the Department of Justice has five federal hate crime statutes, they only prosecute about 25 defendants a year. In 2018, they prosecuted 27. So, it shows that the disparity is not a lack of law but rather a lack of interest in actually pursuing these cases. And, Hina, I will pass it back to you at this point.

Hina Shamsi Thank you. So, Mike's been talking about the adequate laws that exist. I think there is also the concern that terrorism itself, in what David started off with, is inherently political. That can be reflected in how the powers are used to investigate, to prosecute, and whether more authority needs to be given. This also

goes back to a sort of central conundrum here: that we look to law enforcement obviously to address crimes like white supremacist violence and other hate crimes but also to safeguard civil liberties and civil rights. So, when we're talking about a focus on resource issues, the resources have been disproportionately allocated. The ways in which they have largely been used with impacts on communities of color include these. The FBI has used its authorities, for example, to map and surveil Muslim communities disproportionately including by infiltrating places of worship. There's an entire infrastructure built around investigative surveillance authorities that include specific activity reporting based on very low standards. This is the "see something, say something" program through which actually a lot of junk data comes in reflecting biases of the public and our institutions as well.

There is a long history of misuse of terrorism related or national security related authorities to target minority communities including Black activists. A recent example is the made-up term of 'Black Identity Extremists' which was withdrawn after outcry by communities and members of Congress. Recently, in the last month or so, we found out that the FBI also has a program that targets resources on spying, surveilling, and investigating Black activists. The FBI, of course, is not the only agency claiming these powers domestically. And, part of the infrastructure includes fusion centers that encourage collecting and sharing of information amongst state, local, tribal law enforcement as well as Joint Terrorism Task Forces that fulfill something of the same kinds of functions. There have been repeated calls for safeguard information about how these authorities and information centers are being used. They're taking into account civil rights and privacy concerns to very little avail, and what we do know is documented instances of improper use such as most recently monitoring family separation protests against the Trump administration, family separation policies and immigration policies.

So, part of the significant concern about a new crime or entrenchment of existing authorities is not only that it's unnecessary, as Mike talked about, but also there have not been put in place the kinds of safeguards against civil rights, civil liberties, and privacy violations that impacted communities of color and civil rights groups have been asking for 18 plus years. Back to you, Mike.

Michael German: Thanks, Hina. So, when we look at what actually is the problem with the FBI and the Justice Department's lack of focus on white supremacist violence versus other kinds of violence, it comes down to policy choices and part of it again is in these definitions where the FBI ranks its counterterrorism mission as its number one priority. That counterterrorism mission is split into international and domestic, even though the FBI doesn't use the statutory definitions of those two terms. They, in fact, have created their own that doesn't focus on the location of the activity as the statutes do, but rather focuses on the perceived ideologies of the subjects. They refer to Muslim Americans who commit a crime entirely here in the United States, who have no direct association with any foreign entities, as international terrorism because the FBI says they are influenced by a foreign ideology in Al Qaeda or ISIS ideology.

Whereas white supremacists are domestic terrorists even if they're actually committing crimes abroad because the FBI argues that white supremacy is a

domestic ideology and of course that really makes no sense. Nazis weren't invented in the United States, they were invented in Germany. White supremacy has been an international phenomenon for as long as it exists. The oddity of this language was exposed in a recent hearing at the House Oversight Committee where the assistant director in charge of terrorism referred to attacks in New Zealand and in Norway as international domestic terrorism. So, by failing to use the actual statutory definitions they create this confusion because of the way that they've prioritized counterterrorism. White supremacist crimes are counted as lesser and, in fact, even though they kill more people according to some counts, the FBI devotes 80 percent of its resources to what it calls international terrorism and only 20 percent to domestic terrorism, which is already a problem. But, it also then divides white supremacist violence into different categories. So, as we talked about, sometimes these are called hate crimes, and if the FBI labels a particular crime a hate crime, it drops down to the number five priority. But most often with white supremacist violence, the FBI treats it as violent crime or organized crime and they call them white supremacist gangs and these drop down to the sixth priority. And, of course, the FBI has ample tools to address organized crime—the Racketeer Influenced Corrupt Organization Act and other conspiracy statutes—so they have powerful tools in these areas that could and frankly are actually very effective in addressing these crimes but it's dropped way down on the priority list.

Moreover, the Justice Department has a policy that defers the investigation and prosecution of hate crimes to state and local police. This would be fine if the FBI actually did an analysis of those crimes to determine whether it met the federal standards, or at least would include it in a database so that they understood the national crime problem better as is required under the Hate Crime Statistics Act. But, instead, those investigations are just, at their onset, left to the police to investigate. As I already suggested, many states don't have hate crime laws and many states that do have hate crime laws on the books don't use them very often because they're ineffective or they're simply not interested.

That policy again leaves the FBI blind to what is the scope of the crime problems to such an extent that today the federal government can't tell you how many people white supremacists kill in the United States each year. The figures that David was referencing come from advocacy organizations and other academic groups that try to go out and collect this information. But, obviously they don't have the resources or the access to investigate information that law enforcement agencies have. So, we've created this huge blind spot that again is not [due to] a lack of authority, but rather a lack of interest and policy choices that are made. One of the major problems I find with the advocates for a new law is that none of those new laws address these policies. So, even if the bills that create broad new domestic terrorism laws went into effect, it wouldn't change how the federal government looks at white supremacist crimes because these policies remain on the books and the proponents of the new laws have not requested that the FBI or Department of Justice change their priorities and change their policies. The FBI could change its mission priorities tomorrow. The Department of Justice could reform its deference policy on hate crimes tomorrow. And, certainly, both of these entities could go out and collect statistics about these crimes as they are required by law but simply haven't done so.

As far as the legislation is concerned, the Brennan Center, the ACLU, and many other advocacy organizations that have been looking at these laws put out a letter that will be available to you. It talks about what is required. And first and foremost is that there should not be new laws created. As we've seen through this presentation, there are plenty of laws on the books that could be used to address these crimes. Also some have talked about increasing penalties, but, again, many of these laws come with very serious penalties, including the death penalty. So, that doesn't seem to be what the problem with a greater enforcement effort to address these crimes is and likely wouldn't be helpful. We also have concerns about how countering violent extremism programs by the Trump administration have not been effective and have been discriminatory in practice. So, the expansion of those programs is not required, not necessary, and essentially problematic.

Instead, what we need to do is focus on getting better data about the scope of this problem because it's really premature for Congress to create new policies when we don't even understand the problem very well. When we get that better data, obviously the Department of Justice can create a strategy for how to address this. That is more coherent though it's interesting right now with this deference policy where they leave it to state and local prosecutions. If you look at the 25 average, 25 cases a year that the FBI or that the Justice Department brings to prosecution with hate crimes they don't fit any pattern.

For instance, charging Dylann Roof for the murder in South Carolina where state law already created death penalty crimes associated with capital crimes - having a second trial doesn't seem to be an effective use of your resources if you only have 25 cases that you can bring. Instead if there was a strategy to focus on the states that don't have hate crime laws, or that don't use the hate crime laws they had, perhaps that could create some interest by the state and local authorities to either write new laws or do more to address the crimes occurring within their jurisdictions. Finally, again that the communities that are often targeted by white supremacist violence and hate crimes are often the same communities that are often ignored when they're victims of other crime. We believe that any effort to become more effective on addressing white nationalist violence requires a broader police reform effort, as David suggested. This is a very tiny fraction of the violence most of these communities see on a far more regular basis. And, we really have to address violent crime more holistically to have an effective impact on this small fraction of crimes.

Engy Abdelkader: Thank you, Michael and Hina. That was extremely informative and very helpful. Before we end the webinar, I do want to give our attendees an opportunity to ask questions. Again, there is a drop-down menu for asking questions on the right-hand side of your screen. Please feel free to input any questions you have and we will try to respond to them. In the meantime, as people are compiling their questions and before we end the webinar, I do have two questions I want to pose to you David as well as to you, Hina and Michael.

David, you just heard from Hina and Michael how the FBI has a record of misusing resources and sometimes disproportionately targeting communities of color. For example, consider revelations from 2017, and more recently, earlier this year, that the FBI prioritized Black Identity Extremists as terrorist threats over AI

Qaeda or even white supremacist groups. So, how would you respond to community groups that have concerns that new laws, such as the one presented by Congressman Schiff, may in fact be misused by federal authorities against minority communities rather than white supremacist groups.

Furthermore, the second question for you, David is: are we asking the wrong questions in this debate? For instance, in the aftermath of the El Paso attack, the Tree of Life shooting and Mother Emanuel Church in South Carolina, should the question that the public be asking is why weren't our law enforcement agencies able to avert such attacks? They have enough authority to actually prioritize white supremacists and far-right extremist groups and to investigate them to prevent these attacks from happening in the first instance. So, why weren't they able to do so as opposed to devoting a disproportionate level of resources and investigatory powers to real or perceived threats from the Muslim American community.

For you, Michael and Hina: there is a special semantic power to the term "terrorist." We recognize this and it is one of the reasons why it's a hotly contested subject not just domestically but around the world. There is no consensus internationally about what constitutes terrorism and that is largely because of its political dimensions. It's a term that is used to delegitimize, stigmatize, and dehumanize whoever it's directed against. With that in mind, we know that over the past two decades almost all terrorist prosecutions in the US - anyone who's actually been charged and convicted of "terrorism" specifically - has been Muslim. So, is there a risk to a multicultural society that values pluralism among various racial, ethnic, and religious groups that the only individuals that are charged with "terrorism" are in fact Muslim and not anyone else engaged in similar acts of violent extremism.

David, do you want to start?

David Schanzer: So, why aren't they stopping these attacks was the second question. And, you know, one thing I think you can look at it is the number of these prosecutions of Al Qaeda and ISIS-related extremists compared to white nationalist extremists. I haven't done this but I'm pretty fairly confident you're going to see a lot more of the pre-violent incident arrests. Now, the FBI calls them preemptive arrests. I know the Brennan Center and the ACLU might think otherwise of [that] category of cases, but they are getting to a lot more of the conduct that might be precursors to an act of violence under the material support prong of these offenses. That means they are able to do more investigative work into prevention than with the white nationalists. So, if you only have the substantive crimes - the 52 that Mike referenced - a lot of them are not the material support. So, it's very hard to get to this. Also, it goes to some of the questions that were asked. It's hard to get to activity like the funding of these violent organizations that are providing the infrastructure for their activities. So, I think this statute would actually help with that. As far as the discrimination is concerned, I think that I was persuaded by some of the materials I read from the Brennan Center—that this idea of a mere property crime that is connected to some sort of political violence in a domestic context is too broad. I would make it limited to instances where explosives or certain weaponry like semi-automatic weapons were used and led to seriously bodily injury. I would like to

narrow this to keep away from mere protest. I don't think this issue about the discriminatory aspect, I think you know that's going to happen. I don't think this statue is going to change the behavior of this particular administration as to who they want to use the tools of law enforcement against. I don't think this is really opening up that much of a new avenue. I think they would do that regardless of what those statutory frameworks are. So, the positive benefits would outweigh the negatives.

Michael German: Thanks, Hina?

Hina Shamsi You go ahead, Michael. I'll jump in at the end.

Michael German: Sure. So, I think that what David said – it was a great question, Engy – on this concept of prevention. And, so much of the problem with our approach has been that we have tried to focus on this concept of preventing crime, rather than investigating crime. One of the things to keep in mind is that 17,000 homicides occur in this country each year. But, we're essentially a fortunate country because that number has come down significantly since the 80s and 90s. What has come down with the number of homicides is the number of homicides that are solved. The clearance rate has fallen as we have built these new tools and focused away from actually investigating violent crime to getting involved in these preventive counterterrorism measures to the point that that almost 40% of the homicides in the United States today are not solved.

More than 64 percent of the rapes in the United States are not solved. Yet, we have evidence of those crimes and rape kits sitting on the shelves of crime labs untested because the police agencies say they don't have the resources to test them. But, I would argue that you're going to solve a lot more crimes if you're actually testing that evidence and you're actually going to keep these communities safer from all violence. And, as David suggested, if we start looking at violence realistically rather than focusing so much on this one, using methods that are not proven to be effective and material support. It is one that I think needs a lot further examination, because when the law was passed in 1996 the idea was by shutting off non-lethal support, these bad organizations will dry out. They won't be able to engage in their lethal activity if the support provided to them is criminalized and dries up. But, what have we seen since 1996? Those organizations have not been weakened. In fact, there's plenty of good argument that they grew more robust, not less robust. So, the idea that that's an effective methodology for stopping the violence hasn't proven true and it's opened the door to all kinds of abuses including a case in Washington DC where a six year investigation involving multiple informants finally coerced an individual to provide a two hundred and fifty dollar gift card to an informant that he thought had gone and joined ISIS even though that person was not associated with ISIS. ISIS never got any benefit from it at all. It was a manufactured case to put an individual in jail that provides actually no security benefit for anybody in the United States. So, I think you have to move away from the framing that these tactics work and actually examine the evidence with whether they do or not.

Hina Shamsi I'm going to start out with the question you had Engy about the racialized dynamic to what gets called terrorism. This is a dynamic we've been calling out for a long time. It's not a dynamic that is new to the Trump administration. It has existed actually throughout the history of this country in terms of who gets seen as other or threats. And, I don't think the answer is to give the state and law enforcement more authority to keep perpetuating the kinds of harms that have occurred without the safeguards that communities of color have been asking for. That just ignores the way that—and I know that you know there have been some progressives calling for this as well—but I think giving more authority, especially unnecessary authority, ignores the way that power, race and law enforcement intersect in this country. I think that there will always be this concern, in related part to another point that David was making, that there is no actual profile of who's going to become a terrorist, whatever we mean by that. Even if we were to agree on that, which we haven't been able to do internationally or domestically, you have within this dynamic constantly this notion of investigating ideology or inspiration by an ideology as opposed to conduct (what Mike has been talking about) and wrongdoing. So, I think my view is: don't expand this label that gets misused, but ensure meaningful investigation and prosecution of actual wrongdoing that occurs or is about to occur.

Engy Abdelkader: And, so, just to follow up, Hina. This is a question that's posed by one of our audience members: what specifically is the solution to addressing the racial disparity and the process of "otherizing" that you've identified? Clearly, you feel strongly that giving more authority and investigatory powers is not the answer. So, what specifically is? Are there specific reforms or measures that that you would like to see implemented to address the disparities that we're seeing?

Hina Shamsi Yes, multiple reforms. We could probably have an hour and a half on that alone. But, I think there are two sort of strands to bring out here. One, is what communities of color in this country have been seeking to do through the decades: to ban biased based profiling. Not to permit it at all and not to permit investigations based on that. Two, is that we're really replicating in the counterintelligence, counterterrorism context a lot of the harm that is being reformed in the regular criminal justice system with respect to racial disparities, mass incarceration, and the biases that have fed into that are not being dealt with at all. There's a multiplicity of reforms and safeguards that are needed to the entire infrastructure that has massively grown post-9/11, starting with the domestic intelligence operations guide reforms to the guidance on race suspicious activity reporting, fusion centers, Joint Terrorism Task Forces. Every single one of those entities and the multiple others that are burgeoning within the Justice Department, in the Department of Homeland Security, involve offices and authorities that have massively expanded in the authority direction without any of the safeguards we've been talking for in the privacy and rights section. So, it's not an easy question, in part, because so much more needs to be done. But, banning bias-based profiling would be a start.

Engy Abdelkader: So, before ending, I do want to give each of our panelists a final opportunity to share any concluding thoughts. Michael, let's start with you.

Michael German: Sure, so actually, I think there is evidence of how these new authorities would be used. Number one, we have the President of the United States. He thinks Antifa should be a designated organization even though there is not a single homicide in the United States that is attributed to anybody who is in Antifa or anti-fascist. When you have white supremacist groups that are actively killing people year after year, that the President of the United States would suggest that the problem is those who resist that violence is an indication of what may happen with any broadened law. But, you don't have to look that far back. I mean, [look at] even the anti-Trump protest after the inauguration, what they call the J20. The Justice Department charged over 230 protesters who appeared at that rally with felony charges. Felony charges resulting from their participation in that protest and, as David suggested, this involved no harm to human life but, in fact, was simply property damage. That was only six months before the Charlottesville rally where you didn't see the same kind of federal response. In fact, it's only a grudging response that resulted in charges against four individuals. Even though there was a significant amount of violence, not just the homicide, but a significant amount of harm to human beings. So, this is part of a bigger problem with our society. It's a reflection of bigger problems of bias in our society. Even if you look at the media, there are studies that show that violence perpetrated by a Muslim suspect received three hundred fifty percent more media coverage than by a white suspect. So, this is a bigger problem that I think requires us to do more, to gather data about the problem. The FBI routinely warns its own agents that there are white supremacist sympathizers in law enforcement and yet we have no strategy for addressing that problem. I guarantee you if the FBI thought that there were ISIS supporters within law enforcement you'd see a national response. So, this is something we have to start taking more seriously. But, we don't do that by giving the government unchecked authority when it's not actually fixing the policy problem that are causing problems.

Engy Abdelkader: Thank you so much. David, do you have any concluding thoughts to share?

David Schanzer: Well, I tend to agree with Mike that a lot of what we've been discussing and the critique are, you know, deeply ingrained problems that not passing the statute are not going to solve. In my view, it won't be largely exacerbated by doing it. If you look at those low numbers of hate crime prosecutions and you talk to prosecutors, one of the reasons that the numbers are so low is that they're very, very hard cases to do because you have to kind of look into the heart of the perpetrator and show some sort of form of intent. So, we don't get those kinds of prosecutions. I still go back to this Chapel Hill case where to me it was 100 percent both a hate crime and some form of domestic terrorism. White supremacy was at play and it didn't get anywhere near the amount of attention for the prosecution. I think the statute would have made it easier to do. I think equalizing the playing field is very important as a symbolic measure to send the message that the moral

equivalency of these crimes done for these different ideological purposes are equally harmful. And, that kind of gets at some of the issues that Mike and I have been discussing. So, I'm sympathetic to much of what has been said by both my fellow panelists. I understand and agree. I think you're placing too much emphasis on how much weight this particular proposal [would have]. But, for me on balance, I think if it was a more narrowly crafted statute I think it would do more good in facilitating stronger prosecutions of white supremacy than it would do harm.

Engy Abdelkader: Wonderful, thank you. Hina, let's end with your observations.

Hina Shamsi: I agree with David about equalizing the playing field. I would equalize a different playing field though which is not to have investigations, surveillance, and prosecution which to my mind a new statute would only engender more of without addressing the harms. In addition, some members of Congress including Chairman Schiff, McSally rushed to put out this legislation without having the data. I think a significant effort needs to be made to address the data gaps that Mike was talking about and also to incentivize the FBI, as David was talking about, not with new laws that I think are unnecessary but with oversight about how investigative authority is being used and why it has not been used with respect to white supremacist violence as it should have been. And, then a sort of a final word on this, Mike had talked about the ways in which international and domestic terrorism have been racialized as well, and the ways in which white supremacy is in Europe and elsewhere. But, there's a particular form of racism and white supremacy that I think is very American, going back to our history of slavery and animus towards other minority groups in this country. It is a deep-seated problem that requires a complex set of responses and focusing solely or primarily on criminalization as a solution. When over-criminalization of minorities is already a problem, I think it is too facile and too dangerous for many reasons.

Engy Abdelkader: On behalf of the ABA Section of Civil Rights and Social Justice, thank you to each of our panelists for joining us and for your wonderfully intellectually engaging presentations. And, thank you to all of you who've joined us for this videoconference. Shortly, you'll be receiving a follow-up email with a video recording of today's webinar as well as supplemental resources that our panelists were kind enough to share. So, again, on behalf of the ABA Section of Civil Rights and Social Justice thank you and we look forward to seeing you on our next webinar.