

A More Representative First Amendment?

January 6, 2021

>> KENDRA ALBERT: Awesome. After waiting the required two minutes, we'll get started. I'm so -- just so thrilled and excited to be here today and to be part of this conversation and I think that's probably going to come across in a variety of different ways. But my name is Kendra Albert, I'm the director of the Initiative For Representative First Amendment which is a joint project of the Cyberlaw Clinic and the Berkman Klein Center for Internet & Society and this is the first of what we hope

will be many conversations about the first amendment, critical race theory and how we can better understand free expression as something that's in the US at least intimately connected with race and other axes of oppression. For that, I'm super excited to have Justin and Khaled here. I'll introduce them by reading their bios and we'll dive into it. I'll ask them questions about their work and thinking.

Hopefully they'll riff on each other and say brilliant things and partway through we'll turn over to questions that you might have about either their work or thinking in this space more generally. I would be remiss if I didn't mention now, as I will again at the end, that applications for our Initiative For Representative First Amendment Fellowship where we provide law students underrepresented in first amendment law with money to spend a summer at a law school clinic are open now

until next Monday, January 11. So if you're a law student interested in the work we're talking about here, please apply. We'd love to get to know you. So without further ado, Justin Hans Ford is a Howard University school of law professor of law and executive director of the Thurgood Marshall Civil Rights Center. Professor Hansford was previously a fellow at Harvard University which I believe I've heard of.

a visiting professor of law at Georgetown University Law Center and associate professor of law at St. Louis University. He has a BA from Howard University and a J.D. from Georgetown University law center where he was founder of the Georgetown Journal of Law and modern critical race perspectives.

I'm also thrilled to be joined by Khaled Beydoun, a leading thinker on national security and civil rights and constitutional law. I didn't just steal that off his bio on his website, I also believe that. He has published a series of books, including the critically acclaimed "American Islamophobia, understanding the roots and rise of fear" and his insights have been featured in the "New York Times" and the "Washington Post".

He serves as a law professor at the University of Arkansas Fayetteville school of law and senior affiliated faculty at U.C. Berkeley. So incredible thinkers, a great topic and me your humble moderator. So let's start with sort of your work, Justin. My introduction to your work in this space was your incredible piece on the first amendment and freedom of assembly as a racial project.

In it you argue -- I'm going to quote you -- that the first amendment's past and present has proven it is a racial project that restricts the freedom of assembly to whites and away from Blacks. Can you tell us about how you came to write that article and what that investigation of the first amendment's past taught you?

>> JUSTIN HANSFORD: Certainly, thank you for inviting me. I'm excited to have this conversation with you all scholars I respect a great deal and my friend Khaled. For me, this entrance into the exploration of how the first amendment has been interrelated to the question of race throughout history came first with me happening to live 10 minutes away from where Mike Brown was killed in Ferguson while I was a professor at St. Louis University.

I showed up and tried to help the people there. I was a member of the Maryland bar but not the Missouri bar so I was stuck trying to find ways to think about how the law could be helpful outside of filing a lawsuit or representing someone and I started to have conversations with people who considered themselves movement lawyers who try to find ways to uphold the power of movements and specifically protestors

using the law and doing so in a way that involves integrated advocacy as a term we use, different types of understanding of how the law can be helpful. I started to learn more about the First Amendment. I was mad at how horribly the protestors in Ferguson were treated. I'm sure everybody remembers the tanks on the street, the tear gas from 2014. In 2020 we saw this piece you referenced, the First Amendment as -- freedom of assembly as a racial project was written before

What happened year. But you saw in the headlines, you might have seen it on Twitter people again were outraged by the treatment of the protestors and even more recently in December of 2020 you might have seen -- in November of 2020 you might have seen the response to how -- how much of a contrast there was between the way that the white supremacist groups, the Proud Boys and other groups -- were treated by police. They came out,

exercised their freedom of speech. So that narrative is one that is prevalent right now as we're talking before the event. Right now we have Proud Boys assembling here in Washington, D.C. they've made very clear that they that they plan to carry firearms and break law but we haven't seen the same types of responses.

So that caused me to think about this idea of the freedom of assembly as a racial project, understanding a racial project basically to mean any endeavor that creates a hierarchy on the grounds of race in the tradition of enslavement and Jim Crow and other types of ugly parts of our constitutional history, in fact, that have allowed that type of hierarchy to endure.

It's really almost an empirical project, if you will. You can just take a look at the different outcomes and as a critical race theorist, we don't -- we try to understand the law from the legal realist position of looking at the outcomes and then thinking backwards, right? So there's a lot of rhetoric about American

exceptionalism and how the First Amendment is the crown jewel of that exceptionalism. How it applies equally to everybody and all these things.

But when we start looking at the outcomes and reasoning backwards from the outcomes as legal realists, we see the clear distinction there. It's interesting because race has been -- particularly the Black liberation struggle has been central to the construction of First Amendment law in many ways. One of my mentors, Cheryl Harris, is always talking about the mutually constitutive nature of race in the law.

meaning that questions of race are impacted by legal decisions and statutes and legal power being used against communities of color. But also the actions of people fighting for racial justice has over time helped to shape different elements of the law.

The First Amendment is actually a core example of that. Think of some of the most important cases in the First Amendment, of course ""New York Times" V. Sullivan" is the one people think of, Martin Luther King Jr. And the freedom of the press, but even if you think about the important cases around the First Amendment freedom of association and, of course, you could even go to the First Amendment freedom of assembly,

all of these areas of law were impacted by what happened during the civil rights movement and the Supreme Court opinions that regulate these areas of law were written in response to civil rights protests. That fact notwithstanding, we've seen this application has not been one that has upheld racial justice or been used consistently to even be on the equal footing of neo-Nazi protestors, let alone uplifting the movements that would seem to be

providing an avenue for more speech.

One of the things I talk about in my work is that this understanding that specifically for communities that are locked out of the political process historically, you know, we've seen that also by Laura, one of your Harvard Law School scholars who wrote about the taming of free speech and over groups that have been locked out of the political discussion who have been able to only get their voice out there through using the freedom of assembly First Amendment tool to do so

and civil rights activists and racial justice protestors are another prime example of a group that is locked out of democracy. As a result of that, they've had to take to the streets to get their political point across.

So you would think if the First Amendment was what we thought it was then that would be one of the groups we'd want to have their speech amplified. But the empirical evidence suggests that that has not -- they've met with fierce, fierce physical opposition. So much so if you sit down and you do the research and you look at president trajectory of that fierce opposition you will see that there is enough evidence to argue that it is indeed a racial project in the sense that

it is upholding racial hierarchy. Because it is locking the voice of racial justice protestors, locking them out of the political discussion, at least through the avenue of protests as political speech.

Whereas other groups that want to use protests as political speech are actually protected by the police and by these other avenues of law. And they've been protected on those grounds. Think about the Nazis in Skokie all the way to the Proud Boys of, "well, they deserve to have their voices heard." But we didn't see that in Ferguson, we didn't see that in 2020.

I want to throw this link into the chat. There's a group that has put together a protest law tracker. The international center for not for profit law. If you track the protest laws around the country you will see that as opposed to there being a movement to make it easier for people to engage in their protest rights in the aftermath of 2020, there's been an effort to push back, as you might expect, by political groups that oppose that particular type of speech.

There's been an effort to push back and create more laws to make it even harder for those groups to advocate. We filed an Amicus brief this past year on behalf of the Black Lives Matter protestor who was threatened with a negligence claim based on actions of people who threw rocks during a protest and because he tweeted about the protest, they tried to make it the case that he would be found liable. So my work -- I don't want to -- as you can tell, I can talk about this all day. But my work

between race and the First Amendment with the understanding that although racial justice movements have been central to the construction of the First Amendment freedom of assembly, yet and still even today in 2020, 2021, you've seen it happen in such a racially unjust way that you can make the argument and defend the argument that it is a racial project. It is applied in the way to uphold racial hierarchy.

And the ability for people to engage in their free speech rights and as a result their ability to be part of the American political project.

>> KENDRA ALBERT: Thank you. I love so many parts of that so it's difficult to sort of figure out which thread to pull but I want to -- I just really love, I think both the way you talked about that scholarship -- that empirical scholarship about the First Amendment as a racial project came out of watching and seeing your own experiences and the experiences that -- on the ground of wait, how does -- do my experiences at these protests and what I'm seeing at protests

for racial justice map on to or not map on to the claims that we're making about what the First Amendment is doing and the value of speech and political participation.

There's this quote I really love from Julia Hernandez who where she sort of, I think for me, summarizes that critical race theory legal realist perspective when she says the law means what it means to those subject to it. I love that idea of focusing -- it's awesome to hear how you are able to turn from your own experience to doing that -- having the time and space to work that into scholarship and producing more empirical work. So thank you for that. That was incredible.

To change gears in direct substantive focus -- but I don't think thematically -- Khaled, I'd love to hear a little bit about your work kind of in this space. More specifically, I know one of the things you focused on is surveillance of Muslim communities in the US. And I'd be remiss if I didn't mention the first amendment also calls for freedom of religion. I don't want to throw that to the side as we talk about speech and assembly although to be honest the focus tends to be more on the speech

So I want to own what I know and don't know. Khaled, I'd love to hear you talk about both your work sort of on the First Amendment as racial or anti-Muslim project, I guess -- my words, not yours -- but how that relates to the broader conversations that have happened about surveillance and specifically countering violent extremism programs.

>> KHALED BEYDOUN: Thanks, Kendra, and thanks to the initiative for holding this event. It's always great joy to be in conversation with Professor Hansford on issues he focuses on and issues that intersect with my work.

The genesis of my work really rises from the post-9/11 moment in the war on terror becoming, you know, this really transformative catalyst in racializing Muslim identity in very dynamic and nefarious way for the first time in the United States in this rising legal but also political moderation of free exercise of religion of Muslim populations that really converges and clashes with speech.

Those of us who study the First Amendment, we know that the tension and the dialectic between free exercise of religion, the religion clauses at large, assembly and free speech, converge and have an intimate relationship and often times communities of color and clearly Muslims even when not speaking speech is imputed upon them based on the way they exercise their religion.

So to put that simply in theoretical terms, a Muslim subject who maximizes her or his religious identity in ways that are conservative or that, you know, sort of align with ams now caricatures of terrorist identity, the state presumes specific political speech coming from them even when they aren't speaking. So a Muslim woman who wears the Islamic face covering, the nick cab or a Muslim man who dons a long beard, traditional clothing without uttering a single word onlookers, specifically s

and Kendra, you mentioned policing which I'm happy to talk about more specifically in a bit -- informants, FBI, local law enforcement, by virtue of viewing the individual in that light will presume that he or she is engaging in specific forms of political speech that are sort of aligned with state perceptions and presumption of terrorism. So the connection between free exercise of religion and speech are really key.

And they commenced after the 9/11 moment in this sort of new grand American narrative of good and bad Muslims. Texas law professor wrote an article in the Colorado law review called "good Muslims/bad Muslims" where the post-9/11 moment sort of became -- you saw the rise of this new sort of speech binary where Muslims who engage in specific forms of political speech, speech, for instance, that endorse the war on terror or sort of endorse or confirm racial profiling

and religious profiling in Muslim communities, Muslims who engage in patriotic acts like putting a flag on their porch, rising for the national anthem, that kind of thing, that kind of political speech and expression would essentially temper the state's perception that those individuals would -- could be or -- could be terrorists, right? So that political performance and speech allayed the state's fears that individuals who engaged in that kind of expression were terrorists.

However on the other side, if you were somebody like me or like Justin who was engaged in sort of critical advocacy, activism that was questioning state policy, individuals who were demonstrating the religious piety through visible signals or symbols like the hijab or beard, so on and so forth, that kind of activity would quote/unquote be dubbed bad Muslim identity that would invite a very robust and pernicious forms of surveillance into that individual's life.

So you saw the rise of -- post-9/11 you saw the establishment of the modern surveillance state with the creation of the Department of Homeland Security, the Patriot Act, other policies that went alongside the Patriot Act but you saw the rise of the most nefarious form of surveillance in modern American history with counterradicalization policing which, ironically enough was established by the Obama Administration and is based off two things.

So a connection with what Justin was mentioning earlier, even before the NYPD spying on Muslims program that was seeded in 2002, COINTELPRO, the program that was established by J. Edgar Hoover in the '60s which seeded informants not only to surveil -- and this is a misnomer where we look at counterradicalization in myopic terms. The objective is in the short term to surveil Black, Muslim and dissident communities.

But the ultimate objective is far more devastating than that. The real clear objective of the state is to destroy these communities and we saw the destruction through surveillance of organizations like the Black Panther party, different segments of the nation of Islam, Brown Berets, Puerto Rican and Latinx movements in places like New York City, that was the ultimate objective of counterradicalization was to bring down segments of the Muslim community that the state believed

to be too conservative, too dissident, too activist in nature as a way to fight and counter terror. So I don't want to rain on anybody's political parade, but this happened under a democratic administration and in my estimation is going to happen again with the coming of the Biden administration. So we'll see a shift from explicit Islamophobia to more structural Islamophobia which is advanced by these sorts of surveillance programs

that the democratic party has been keen and effective in spearheading. So I'll close with this note: When Justin says very incisively that the First Amendment is a racial project, that definitely echoes for the broader Muslim population.

And one thing I talk about often in my work is not to think about the Muslim and Black communities as distinct populations, there's really intimate overlap. Obviously the biggest plurality of the Muslim population remains Black. Justin and I have talked about how distinct surveillance programs today, Black identity, counterradicalization actually worked symbiotically to police Black and Muslim populations.

So the reason I'm happy to have Justin is that his work doesn't stand alongside my work only, they converge to victimize our communities in very destructive ways. They're both racial projects that work in synchrony.

>> KENDRA ALBERT: Thank you. Again, so many different threads to pull on. Two things I'm struck by about your comments, Khaled, one is the way in which good Muslim/bad Muslim dichotomy that you're describing sort of aligns -- I've been reading a lot of Foucault lately so you have to forgive me for one second.

Which is to say that -- you know, Foucault talks about surveillance with the core goal of being internalized discipline rather than sort of surveillance -- like the idea of surveillance eventually resulting in the subject disciplining themselves. And when you talk about the way in which anti-Muslim surveillance operates within the US and that good Muslim/bad Muslim dichotomy, what I'm hearing is also the ways in which particular acts of surveillance may

end up with communities both surveilling themselves but also disciplining themselves, right? And how that can be in some ways -- it's a scary long-term development because you may no longer need the full external surveillance apparatus once people start engaging in self-discipline. Okay, brief side note about Foucault. We'll now go back to the law which is to say I think the other point, Khaled, that you brought up that is important to talk about is the way in which sometimes we talk about

surveillance as if that was the end goal. Like, oh, they're engaged in surveillance of these communities. Well, that's not the end goal, right? Destruction of the community or suppression of particular forms of speech or even thinking, right, is much more the actual end result of the surveillance. The surveillance is a means to an end. Justin, I saw you were unmuted so if you want to jump in and correct my misunderstandings of Foucault.

>> JUSTIN HANSFORD: No, I had ideas filling my head when you were talking about that. In Ferguson and even now in 2020 in the Floyd protests you've seen arrests and charges and the desire to -- as you may see in the protest law tracker, the desire to create a felony regime and often times what ends up happening is in the plea bargaining stage there's an agreement that will -- we're going to let you stay out of jail as long as you agree not to protest anymore.

That has been a very explicit use of the law to stifle speech. But as you said, there's also the implicit use of the law as intimidation to keep people from engaging in this type of speech which has always been the case. I think -- my earlier work on Marcus Garvey and coin tell pro and all these different processes that it was the FBI and J. Edgar Hoover at that time, all those processes were made

usable on the ground that these people were dangerous. So whether it's political speech that is not favored because it's dangerous, whether it's racial identities and political identities that are made to be seen as dangerous, once you allow the government through whatever mechanisms it's trying to use, surveillance or charges, felony charges or even just aggressive policing in tanks and tear gas

the threat of physically harming a person or their family if they're out there with their kids. Whatever tools the law uses to try to stifle this speech, it never says that we're trying to stifle speech. It's always saying that we have some other justifiable reason for that and it's really not just justifiable but an urgent reason like we're going to be in danger. These Muslims are going to be terrorists. These Black people, they're caught up with socialism.

Dr. King was part of that. But the Garvey movement even at that point was accused of socialism and you see that even now. Black Lives Matter is seen as socialist. So there's always a -- another justification that is used. So in that sense it's interesting to think about the First Amendment's role and how easy it is to create a fig leaf to make people ignore the fact that the First Amendment is being suppressed and just look the other way. That's one of the problems

with the First Amendment is how strongly are we going to stand up for it? Often times it's juxtaposed with this idea that, well, we have to balance public safety with the right to engage in free speech, freedom of assembly. It's an intricate balance. Like these two things are separate and you have to balance one or the other. You have to sacrifice a bit of one to get the other.

Maybe that dichotomy itself is one of the false dichotomies we need to interrogate.

>> KENDRA ALBERT: Two things strike me there. One is the question of who have is safe in public under the existing regime, right? Like -- and the answer is not usually the people who are protesting in the first place. But the other thing that strikes me there is the way in which theoretically, to your point Justin earlier, theoretically we do have First Amendment tools that are meant to deal with laws that incidentally burden speech, right?

We can have this whole conversation about burning draft cards and those First Amendment tests but somehow much like we only recognize prior restraint if it literally comes labelled as prior restraint. Like -- don't get me started. You know, labels even like something like "countering violent extremism" which I used and I shouldn't have. Or the black identity extremist label that you two have written about are sort of deployed to move things that would otherwise

clearly be government suppression of speech or government interference with people's speech rights into a different category, that of anti-terrorism or public safety. And I think it's really -- it's valuable to reflect on how the language is used to describe these programs is in some ways endemic of our particular viewpoint about what they're doing. It's not necessarily evidence-based but forecloses the possibility of First Amendment challenges.

So Khaled, do you have any thoughts on this before we jump to -- because I want to talk about hate speech for a hot second because it's not going to be a conversation about race and the First Amendment unless you have to at least answer one question about hate speech but I hope it's a good one. Khaled, any thoughts on the sort of extremist language or this kind of issue of kind of accidental suppression of speech before we move on?

>> KHALED BEYDOUN: I'm glad you brought up Foucault. He calls it the disciplinary society that we're in. So the subject becomes a principal of her own subjugation which highlights a third level of speech regulation that we seldom talk about. We talk about legal regulation and moderation, we talk about political moderation. But there's a third dimension that's really salient with Muslim and Black populations which is self-moderation. The idea that should I put up this tweet? Should I go to this Black Lives Matter movement?

Should I wear my hair in this way? Should I don the hijab? This perpetual negotiation of identity performance and expression which scholars have written about for years is sort of this unseen third dimension of speech regulation that is more than chilling. We talk about it often times very narrowly as chilling effect but to me it's a lot more intrusive than just chilling effect because it's burdening these stigmatized communities to have to entirely redo their identities

and perpetually moderate their genuine routine daily expression in activity. Which can be really difficult.

So you said Foucault as if he were separate from the law, but in this respect he lives within the law.

>> KENDRA ALBERT: I'm going to take and bank the one person who has ever said "I'm so glad you brought up Foucault" and just put that aside for later. If we get nothing else out of this, know that I am reassured. Justin, go ahead. Justin, you Unmuted.

>> JUSTIN HANSFORD: No, just laughing there.

>> KENDRA ALBERT: So I'm going to pose a hate speech question which is something I struggle with so I'm curious as to your thoughts and for people who are mystified by my joking reference to talking about hate speech, part of what I'm drawing on is the history of critical race theorists engaging very -- in thoughtful ways with the First Amendment sort of protection of hate speech -- I don't want to say starting with but prominently with words that wound, which is a collection of essays by

authors, including Kimberly Crenshaw who sort of engaged with this question of, like, okay, should the First Amendment protect hate speech and how does that work and what's missing here from these stories? Mary mat sue da, there are others, I could pull the full list and others that would be as amazing as Kimberly Crenshaw.

But I bring this up to say that there have been robust critiques of the idea of protecting -- removing hate speech from First Amendment protections from those on the left who would also probably consider themselves quite engaged with critical race theory based on the idea that potential criminalization of hate speech might increase the tools available to, like, a racist carceral system.

So this critique has been made and this one particular focus is on the context of hate crime legislation but I think the critique holds. So I'd be curious as to how either of you think about sort of how we might think about increased regulation of hate speech or anti-racist or anti- -- Islamophobic slurs in the context of sort of racist carceral system that historically has been an oppressive force in the lives of Black folks, Muslim folks, Black Muslim folks and all kinds of folks

from marginalized background. So that's the small question I'll tee up for which ever one of you wants to tackle it first.

>> JUSTIN HANSFORD: I can start off. There was a case -- and I'm going to put another link in the chat - - there's a case that the lawyers' Committee For Civil Rights was involved in recently that was a case where there was a young Black woman who was a student at American University, she won the election for student body president and then there was a campaign led by the Daily Stormer, a white supremacist website, to harass her and threaten her and they actually were able to

in some way, shape, or form create this -- I forget what the term is but they were able to get more and more people to troll her on social media and threaten her. So it wasn't just that organization itself but more people as well. So it was a classic example of hate speech on the grounds of race really reaching a fever point to the extent that she didn't feel safe on her campus.

A lawsuit was brought by the lawyers committee on the grounds that online trolling constitutes interference with her opportunity for equal enjoyment of public accommodations. And they were able to obtain \$700,000 in damages and were able to really harm the Daily Stormer to the point where I'm not even sure it still exists on the grounds that hate speech made her feel unsafe because of the specific threats, made her feel unsafe in her attempt to use the campus.

So I thought it was very interesting because it did show that certainly there are non-carceral ways to move forward. Some of the scholarship has proposed in the past a possible tort for hate speech as opposed to thinking about increased hate crime legislation which was -- a tort or a process like this would be something that would be in line with abolitionist politics.

I think it's an interesting way to approach the issue. We get confused because there's this whole narrative around political correctness right now. It's been a hard poisoning of the discourse where people create this marketplace of ideas narrative and sort of -- have tried to create more space for hate speech online and we've all seen it and we've seen it grow. That's just in the comments section. But we see it everywhere.

This idea that -- and words that wound is something that's a great book and then there was a follow-up called "Understanding Words That Wound." But there's been scholarship that which has shown the physical toll, the psychological toll, all of the different harms that accrue from hate speech on communities of color and it's always been a problematic element of discourse. And I have to shout out the ACLU, even though they do great work,

historically they've taken the position that we have to have this. In order for the First Amendment to continue to protect us and do these great things for us to take to the streets we have to suck it up and be willing to endure hate speech at the same time because that's the deal we're making. That's sort of the exchange that has to happen.

Unfortunately, that First Amendment fundamentalism is still the normative understanding of the First Amendment in liberal circles and I think that it's important for us to start to interrogate that thinking about it from a legal realist outcome-based perspective understanding the harms taking place and understanding that -- as scholarship will tell you, there are other countries around the world that take different

approaches to free speech and hate speech and those societies have not fallen into authoritarianism. You could probably make the argument that we are closer to authoritarianism than most other countries that regulate hate speech in many parts of the world.

Regulated through fines and other types of tools that don't rely specifically on carceral options. So there's a long way for us to go on the hate speech question. I think we're just beginning to use these other tools. I'm excited about the lawyers' committee's engagement here and I think it does move us a little bit closer to the possibility of a tort against hate speech.

>> KENDRA ALBERT: I think it's such a good point, the presentment of kind of it as an either/or. Either this sort of false dichotomy of either hate speech is criminalized or hate speech is entirely protected under the First Amendment is a good thing to push back on. I also, Justin, want to tell a brief anecdote about your point about other countries.

I've taught a couple of First Amendment -- new issues in First Amendments classes and every time I teach it there's at least one L. L.M. -- international students often at Harvard law school -- who is like, yeah, we ban hate speech in my country and it seems to be going fine.

I think that's very useful, especially for United States J.D. students to hear because Justin to your point about that First Amendment fundamentalism. Khaled, I want to make sure you have a chance to share thoughts on this question or push back on the framing of this question, always appreciated, before before I hop to the next topic.

>> KHALED BEYDOUN: I'll talk briefly about it. When the question was posed I thought about speech on campus. So you had this big -- this hysteria around the invitation of really radical right speakers a couple years ago. People like Milo Yiannopoulos and -- people like Bill Maher, for instance, and a whole wide

range of different speakers were invited to campuses and movements on the left but also student movements on the right pushing hate speech as a way to sort of

preempt them from speaking. And I think that what you and Justin talked about, this idea of free speech fundamentalism that often times misses the mark is with regard to institutional power. So often times when it's elements on the right that want to engage in political speech that feels like hate speech and speech that is imminently tied to the prospect of violence against Black p undocumented, sexual minority group students and so on and so forth,

being analogized or likened to hate speech from leftist-based movements is -- the right overwhelmingly with -- especially with regard to the university space Haas a real history and presence of institutional power backing them. Which isn't the case for student movements on the left, especially student movements of color on the left.

So when I think about speech broadly and also political speech, which obviously is intimately tied to hate speeches, I try to gauge how much power is behind the speech and often times that variable can determine the likelihood of violence. I'll give you a quick example. I thought at the University of Arkansas for a couple years which has a very big Greek element.

some of the Greek fraternity/sorority element has interesting ties to former slavery racist traditions in the deep south. Many of them tend to be conservative or libertarian. So when they put on events that lean toward the right, in a place like Arkansas where students of color are very few and far between, especially Muslim and immigrant students, there's a real history and institutional backing of power behind those events that can stir up different factions of the student body,

that can make life very scary for the handful of black, Muslim, Latinx and sexual minority students on those campuses. So I really appreciate the theoretical conversation about sort of maintaining and the difficulty of finding a bright-line rule for moderating political speech but, like Justin says, it's important to have the real politic conversation with how protecting speech symmetrically on both sides often times only leads to victimization of vulnerable communities

that don't have that institutional backing of power that elements on the right typically have.

>> KENDRA ALBERT: I love -- I'm so glad you made that point because I think one thing that historically First Amendment doctrine is not good at doing at all is considering those kinds of power differential questions. We often don't -- doctrinally lawyers or philosophy students or judges are encouraged to think about those as questions about really who holds power and who holds alternate access to alternate means of speech.

All of that have is considered beside the point unless maybe you're in time, place, and manner restrictions maybe. So I think Khaled the point about okay, wait, hold on, what's the actual power structure like? What is the actual situation like is so important and it speaks to the question of looking at what's happening on

the ground of critical race theory, that critical race theory does as we were going to earlier, rather than just imagining that this is a process of articulating those beautiful, bright line rule of what constitutes

hate speech and what doesn't that we can possibly imagine and much more of our question is about what is this doing in the world in so I promised I'd take questions from the audience and I have so many questions. So we're going to -- I'm going to engage in a balancing test of those two different issues.

I'm going to combine one question and one of mine which is I'd be curious to think about either -- it's asked how has the pandemic changed your assembly about freedom of assembly or state surveillance, I'm going to assume it has at least a little but maybe it hasn't. But I'd be curious, if I can combine this question, with what are y'all thinking about now? What's on your mind?

what are the questions you're wrangling with or the things you're focusing on or paying attention to?

>> JUSTIN HANSFORD: One thing that is on my mind is the -- well, there are a couple of cases. There's a case in California recently where a Black Lives Matter sign -- mural, excuse me, a Black Lives Matter mural was defaced and it was done on video and there was a hate crime enhancement brought against this couple and their defense has been that -- well, what they were doing by defacing this Black Lives Matter sign was not -- it was not a race-based

action, it was about the political position of Black Lives Matter as a political organization and so this would be a political action and should be protected. And we've also -- this has also come up around the country in situations where people are being -- often times protestors are being tried for trespass or even more serious sort of protest-related charges

and there have been efforts to strike jurors who acknowledge that they support Black Lives Matter. And the question at hand is well is your affiliation with Black Lives Matter a racial affiliation or a political affiliation? In other words, should Babson involved if you're striking jurors for saying they support Black Lives Matter. Is it a race-based elimination of the juror from the pool or is it based on political views?

Same thing with this couple in California. Is their opposition to Black Lives Matter political or is it racial? With this idea that if it's political it should be more protected and they should be able to speak out against anything Black Lives Matter related as violent as they want to and it should not be seen as a racist hate speech action, it's just a political difference.

And I think that's one of those slippery slope arguments because if you do allow opposition to people to be seen as a political -- to be framed as political and therefore always -- never to be framed as any sort of racially related outburst, then why not just ascribe political views to -- and I'm sure people do that, they say well, I don't oppose Muslims because of their religion, I oppose them because of terrorism or something ridiculous like that.

So it's laughable when it's in the discourse, when it's on the media, but unfortunately these are now becoming arguments that are being made in the court and we don't know what the courts are going to say to this yet. We don't know yet where courts are coming down on this question of whether opposition to Black Lives Matter signage or anything is race-based hate speech or purely political in nature.

So I'm interested. I'm a bit worried about how that's going to play out and my anticipation is that it's going to be different in different jurisdictions. But we do need to start to think about how that seems to be the current framing of folks who are opposing these movements to say that we're not really -- opposing you on your identity, we're opposing you on our understanding or stereotype of the political positions that people of your identity hold.

So that's one thing that's on my mind right now.

>> KENDRA ALBERT: Khaled, before I turn to you, one brief reaction, Justin, which is deeply reminds me of conversations around religious freedom and queerness and the use of religious freedom excuses to justify discrimination against queer and trans folks.

One thing I always think about in that context is -- I'm forgetting the name of the case, this is embarrassing. You know, you actually see historically in opposition to the civil rights act claims that treating Black folks equally to white folks was against folks religion. I think the case is "Piggy Park Enterprises" and the Supreme Court was like nope, we're not going to engage with that question. There's a lot going on and we don't want to deal with that.

so in some ways to your question how are courts going to answer this question, one of the things I think about is how seriously do courts take those kinds of -- these kinds of claims? And how much are judges persuaded by this attempt at drawing distinctions between racist speech and certain kinds of political speech.

honestly, I have to admit given the current makeup of the judiciary, that doesn't feel like a good thing to reach for but it's one of those interesting questions about how do judges engage with this.

>> JUSTIN HANSFORD: And briefly, one thing that's interesting, I think this may be over the Christmas holiday, there was a judge in Virginia who took down the pictures of the former judges. There's an article about this in the "New York Times". A Virginia courtroom, state courtroom, all these judges, white judges and the -- one of the litigants was arguing that this was racially biased and intimidating because it sent this message that this was a white court for white people.

And the judge actually took down the paintings and said that, you know, in the cost/benefit analysis, there's not a benefit to justify the cost and that this did have this message and he used as a basis for that his reading of this novel by this -- now I'm going to be embarrassed, I can't remember the name of this book, but this guy who was wrongfully incarcerated and wrote this book talking about how when he was a defendant

he saw all these white judges' pictures in the courtroom and he knew he was going to lose. It may not be it's just the whiteness of the judges, this is Virginia, most of those judges going back to the 18th century, more of them were enslavers or slave owners or segregationists as well. But the acknowledgment of the messages that are being sent by some of the elements that are

present in the courtroom, I thought that was fascinating that the judge was actually listening to that. I'm going to find the name of the book the judge referenced.

>> KENDRA ALBERT: The Yale law school people, I don't know if you've ever been into classrooms at Yale law school but it's just white dudes' portraits on every wall. We have 100 questions, I still haven't let Khaled speak to what he is thinking about these days which is just clearly a sign we need to do another follow-up conversation on this. But Khaled we have three more minutes so please feel free to sort of talk about what you're thinking about, what's on your mind these days and bring us

with any final thoughts you might have then I'll turn back to Justin and close us off about I'm sorry to everyone who asked great questions in the chat. Fodder for a future conversation to be sure.

>> KHALED BEYDOUN: This has been a great conversation and so much to comment on. Really quick I want to comment on a point you made, Kendra, it's about how the state and proxies to the state weaponize First Amendment liberties in ways that bludgeon the rights of identity -- minority identity-based groups. So you talked about the many religious freedom statutes being used to suppress sexual minority populations across the country.

So there's a reciprocal discussion with regard to how the state has been clever in weaponizing First Amendment liberties in ways to suppress groups. What I'm working on and one of the reasons why I'm excited to be working with the initiative which is tied to the pandemic, right? So now activists and individuals can go to public squares and engage in political speech and assembly on line and typically in online platforms, which are privately held where

rights and liberties that were theoretically afforded in places like parks, sidewalks, roads, aren't afforded on places like Twitter, Facebook, Instagram, so forth and so on which is really concerning because obviously we have this prevailing era of surveillance capitalism where you have huge corporations like Google, Twitter, Facebook collecting our data, consuming our data in ways that maximize their economic interests but then transfer that data to nefarious actors like the state.

These corporations are a lot more efficient, a lot more effective in surveilancing us and often times we're surrendering information in ways that hasn't been the case before that makes this new era and age of surveillance far more frightening in many ways than eras before, even though we're living in this moment of presumed racial progress in harmony.

So I'm thinking a lot about how algorithmic policing, predictive policing, social media platforms are becoming the lead actors in surveilling our speech, assembly and free exercise of religion rights online which -- and obviously there's a monopoly online now because of the pandemic and its egg in negotiation of being able to engage in traditional forms of activism.

>> KENDRA ALBERT: So I see we're at 1:00 PM and I want to be respectful of our panelists' time, of our attendees' time, our ASL and captioners' time. So join me in thanking Colin and Justin, professor Beydoun and professor Hansford in joining me in this conversation. I know I've had a blast, I hope that y'all have found it interesting and clearly judging based on the number of open questions in chat, much to return to.

So thank you everyone for joining us and just a reminder, Justin, did you want to mention you're recruiting for an attorney?

>> JUSTIN HANSFORD: I'm looking for attorneys interested in doing First Amendment defense of protestors on freedom of assembly grounds. We have the Thurgood Marshall center at Howard law school that we're hiring as soon as possible. We received a grant to hire someone interested in doing First Amendment and environmental justice as well as First Amendment litigation.

So I'm going to put my e-mail in the chat. Feel free to give me a shout or reach out to the university to find out more about this.

>> KENDRA ALBERT: Awesome. Thank you. And one more time, I'll close by saying we're recruiting for our current IfRFA cohort. If you want to have -- Justin, I think that just went to panelists. If you want to have more conversations like this one, be part of sort of thinking about what the sort of cutting-edge future of this work looks like and answer some of the hard questions that people posed in chat,