

Speakers

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Free Speech: Testing the Limits of the First Amendment

IN THIS WEBINAR Kurt Braddock, Ronald K. Chen, and moderator Perry Dane addressed how the first amendment is being tested. They discussed the far right and violence driven by implicit statements as well as ongoing challenges to define and arbitrate free speech.

KURT BRADDOCK

THE FAR RIGHT IN THE UNITED STATES

- Over the last two to three decades, the far right has been a perpetual threat to domestic security in the United States. The threat posed by the far right waned after the attacks of 11 September 2001 with the United States focused on Islamic terrorism, but the real boost in the threat started when Barack Obama was elected president.
- Over the last 10 years, and particularly with the election of Donald Trump, the threat posed by the far right has been growing. The events of 6 January 2021 were in many ways a culmination of this growing threat.
- Data from the last five to seven years show that attacks carried out by the far right far outpace those carried out by any other ideology: the far left, single-issue terrorists, or Islamic terrorists.
- The National Consortium for the Study of Terrorism and Responses to Terrorism (START) gathers data on attacks and on arrested individuals found to adhere to radical ideologies.
 - Over the last four years, the far right has carried out more than three times as many violent attacks as the far left.
 - Nearly half of START's database of individuals arrested in the United States for extremist or terrorist offenses were related to the far right.
- Extremists on the far right have burgeoned under the Trump administration and are here to stay.

IMPLICIT INCITEMENT OF VIOLENCE

- Individuals now have very large audiences—facilitated by social media. Implicitly violent statements can reach several million people. Implicit statements that offer tacit support for violent acts can result in actual violence and lives lost. This process is known as stochastic terrorism.
- Although you cannot predict when and where the violence will occur, it will reliably occur. When someone with an audience as large as 88 million says something that implicitly advocates violence, at least one will likely take it as a call to engage in violence.
- How do implicit statements drive people to engage in violence? And if they do, who bears responsibility?
- Even if something is legal to say, we need to know if those statements produce violence, and to understand how to contend with that threat. If not through legal means, are there ways to use social leverage to limit the threat posed by stochastic terrorism?

MODERATOR PERRY DANE ASKS . . .

How do you define the far right?

- When referring to the far right, far left, or any ideology, Braddock considers “extreme” or “far” individuals to be those who support or advocate the use of violence. In this country, people have a right to believe in whatever they want to, but it becomes extreme when that ideology supports the use of violence against a perceived enemy for an ideological, religious, or political goal.

How do you counter what the American far right is willing to do?

- Braddock is studying a strategy called attitudinal inoculation to provide people with the tools needed to resist messages that advocate violence. Explain to individuals that you may hold certain beliefs, but there are people who will try to convince you to engage in violence on behalf of those beliefs. It is about trying to affect attitudes surrounding the behavior they are at risk of engaging in, rather than the belief system that may underpin the behavior.

RONALD K. CHEN

A CIVIL LIBERTARIAN APPROACH

- The traditional civil libertarian view is that the law cannot provide a suitable, reliable, or appropriate barometer by which we can measure what speech to permit or not. Many people are questioning this perspective.
- Today, in light of the August 2017 Charlottesville, VA and January 2021 U.S. Capitol riots, we cannot rely on the axiom that all speech is protected so long as it does not cause harm.
- If we were to rely on the law as the primary arbiter of what speech is permissible and what is not, then an enforcement mechanism must be constructed. This usually means a government entity or official who determines whether the speech—be it called hate speech, racist speech, or incitement—falls into a forbidden category.
- However, the remedy can then become worse than the symptoms it is trying to treat. It is unavoidable that whoever is appointed to make these decisions will be affected by personal prejudices, beliefs, and biases.
- Inevitably, as history bore out for African American civil rights protestors in the 1960s, the rules will be applied against the traditionally disempowered and disadvantaged. If we were to develop a system to punish speech that “incites violence,” it would work much more quickly against groups like Black Lives Matter than against the Proud Boys or the Ku Klux Klan.

TRUTH V. FALSEHOOD

- The analogy used by Justice Oliver Wendell Holmes in *U.S. v. Schenck* (1919)—“falsely shouting fire in a theatre and causing a panic”—was an example of how free speech can go too far. The decision determined that the abstract potential for consequences could justify a restriction on speech.
- The task of determining whether any statement is false or not cannot be done reliably. It would entail vesting someone with the power to make

that determination—power that could be abused. People feeling entitled to their own opinions, realities, and set of facts poses additional challenges.

IS IT INCITEMENT?

- The U.S. Supreme Court’s decision in *Brandenburg v. Ohio* (1969) greatly narrowed the definition of what is considered incitement. Speech advocating violence is protected, unless the speech is “directed to inciting or producing imminent lawless action” and the speech is “likely to incite or produce such action.”
- What Trump said on 6 January 2021 does not meet the traditional tests of incitement since *Brandenburg*—despite his speech being deplorable and leading to predictable outcomes.
- These rules of law were developed under a set of facts—someone with a megaphone or microphone at an in-person protest clearly and literally inciting violence—that may not be up to date anymore. These rules have not taken into account the ways speech on social media can incite people. Statistically, it could lead to violence with great reliability, but it might not meet the traditional tests of imminence and likelihood of violence.

MODERATOR PERRY DANE ASKS . . .

Why are we the only advanced Western country that takes the absolutist view of free speech?

- Our nation had to accommodate varying perspectives—unlike other older nations with established social norms, which likely went a long way in preventing speech from becoming too extreme.
- Right now, our own social constraints have somewhat broken down. We are seeing speech that would have otherwise been prohibited by people exercising self-restraint.
- There is no guarantee that views or interpretations that work in another country born of the same Western democratic tradition will work for us.

AUDIENCE QUESTION AND ANSWER TAKEAWAYS

How do we define hate speech?

- Chen: Hate speech is more of a cultural term than a legal one. Hate speech is often defined as speech that is intended to malign or disparage someone based upon race, ethnicity, gender, or some other trait. Attempts by legislatures to define hate speech have not succeeded. The law makes a distinction between hate speech and a hate crime. A hate crime is something that is independently illegal, but the victim is selected because of their race, ethnicity, gender, or some other trait.

How would you characterize speech related to the behaviors of the far right versus the far left? Is there a discernable difference?

- Braddock: Right now, we are very attuned to the far right because of what happened on 6 January. We can identify whether something is promoting violence without considering whether it is in support of the far right, the far left, animal activists, earth activists, or anti-abortion activists. Look at the outcomes of the actual speech and the threat to U.S. security, rather than focusing on the ideology.

Products cannot be sold using false statements. Why can’t that be applied to political speech?

- Chen: The assumption is that political opinions cannot be established as right or wrong, or false or true. Any attempt in trying to adopt that type of mechanism will make matters worse and impinge on freedom. Many of these traditional definitional separations between fact versus opinion and conduct versus speech are being tested in our current reality.

What role does the internet play? Should social media platforms be held responsible?

- Braddock: Pressure from the user base and the threat of losing users—rather than threats of

legal action—prompted social media platforms to start taking action against disinformation. The problem is that these tech giants are hard to change, and it takes time.

Germany has instituted a number of ideological categories that are not allowed as free speech. Do any of the regulations in other countries work to protect free speech while mitigating hate speech?

- Braddock: It takes the permission of the populous for that to work. They still have hate groups, but those regulations work because the government had the permission of the governed.

Is there a way to have a constructive conversation about free speech?

- Braddock: Everyone talks about common ground. We do not need to come to an agreement on ideological issues. However, there needs to be ground rules about the way the discussion takes place. We currently have dual realities, but the debaters on both sides need to agree on a common reality for discussions to start.

FREE SPEECH: TESTING THE LIMITS OF THE FIRST AMENDMENT

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