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A Critical Analysis of the Public Forum Doctrine and Other Limits to Speech¹

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Introduction

In this paper, I aim to touch upon First Amendment theory with a critical perspective. Particularly, the perspective of a latinx, social justice activist with an academic background of political science, law and cultural studies. Although my legal background would advise me otherwise, as long as it is possible, I will try to keep away from the discussion of specific case-law and will base my paper on the academic commentary and debate that has developed through the years around the issues at hand. I choose this methodology as an attempt to appeal to a broader audience than my colleagues in the legal profession. I will work with the discussion of key issues in the constitutional realm of the First Amendment, and cast doubt upon some of the traditional understandings of free speech theory.

The first of those understandings relates to what has come to be called the public forum doctrine. This doctrine is the body of law that regulates the public forums, understood as governmental-owned properties that the government is (at least in theory) constitutionally obligated to make available for speech (Chemerinsky, 2011, p. 1167). I will briefly examine the history of this doctrine, and point to some of the criticism to which it has been subject. As we will see, even though spatial and geographical limitations to speech might seem reasonable in the balancing of various interests, in reality, supposedly content-neutral provisions in public ordinances that curtail free speech, rarely are content-neutral. Although I do not exhaust the academic criticisms directed at the public forum doctrine, and concede not to have the solution to all the problems posed by my critique, my proposition is that we must think deeper, as to what the First Amendment really means for this generation.

An example of ways in which the First Amendment has led to meaningful discussion for this generation can be seen on contemporary debates regarding the regulation of hate speech. Hate speech can be defined as “the use of words which are deliberately abusive and/or insulting and/or threatening and/or demeaning directed at members of vulnerable minorities, calculated to stir up hatred against them” (Chemerinsky and Gillman, 2017, p. 83). Racial tensions have risen in the United States, bringing these issues to the forefront once again. The rise of an alt-right government, the resurgence of neo-nazi activism, and the organization of grassroots resistance groups like the #blacklivesmatter movement can be taken as a hint of the uncured fractures in the United States today.

As these tensions rise, one must think of ways in which to ease them. In a second paper, titled “Easing the tensions: civic engagement and participation as avenues of social conciliation”, I will address some ways to do so. Here, I will discuss how in early 90’s, critical race theorists like Mari Matsuda, Charles Lawrence and Richard Delgado, proposed various ways to regulate “hate-speech”. First Amendment defenders think, and some within the academic community agree, that the debate is done with. The general narrative is that critical race theorists tried but ultimately failed in their attempts to regulate hate speech as codes enacted by universities at their urging were struck down by courts. I think the debate is far from over. A closer look at the issue might convince us that critical race theorists were actually onto something, and current developments seem to show that they somehow got their point across. We will examine some ways in which one could argue the Office of Civil Rights of the Department of Education, through the enforcement of federal laws, has adopted the position proposed by the school of critical legal thought.

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The origins and short-comings of the Public Forum Doctrine

In *Creating the Public Forum*, Samantha Barbas (2011), explains the public forum protects a right of access to streets and parks and other traditional places for public expression. The concept was developed by a series of Supreme Court cases in the 1930's and the 1940's (p. 809). She describes the historical circumstances onto which the public forum doctrine was born:

In a modern world where the mass media dominated public discourse, critics expressed deep anxieties that mass communications had undermined the possibility of widespread participation in politics, public life and democratic discussion. (p. 810)

The rise of mass media empires in the United States posed a communications crisis, and the public forum was one of the solutions proposed. Barbas states the doctrine of the public forum in physical space was to be governed by the principle of viewpoint neutrality and that forum managers should allow speakers a free hand in expression, subject to reasonable time place and manner restrictions (p. 851). In the past, the State had the rights of a private owner over public property³, the State was allowed to close off all public spaces for speech, and public officials could be awarded discretion in the concession of permits. In *Haugue v. CIO*, 307 US 496 (1939), everything changed. The court transformed the State, from the owner of the streets and parks, to a sort of trustee. The State would have to provide minimum access on an equal and nondiscriminatory basis regardless of viewpoint (p. 852).

Justice Roberts in this case issued his famous *dicta*: “the use of streets and parks, immemorially held in trust for the use of the public for the purpose of assembly, communicating thoughts between citizens, and discussing public questions”. State could not entirely close the public forum, nor use permitting systems as a guise for content-based discrimination (p. 853). It has been noted that Robert’s dictum didn’t specify its lineage, and “provided no analytical guide on the criteria for determining the application of the principle future occasions” (BeVier, 1992, p. 83).

Barbas explains that through a series of cases, the Court built upon the idea of the public forum as the platform of the poor, and of the marketplace of ideas, not only as a metaphor, but a physical space:

It suggested in person speech in the public forum, in contrast to disembodied mass communication, provokes personal relationships and deep engagement with other citizens and critical issues in a way that mass communications cannot. (p. 858)

The forms and contexts of speech were known to have a communicative impact which should be taken into consideration when determining the validity of any regulation of speech. The court recognized that the medium was the message before Marshal McLuhan coined the phrase in 1964 (Barbas, 2011).

With regards to exceptions to content neutrality, before the 1960's, the Court wasn't able to define clear categories of punishable speech. It came to use the “clear and present danger test” as an attempt to define a type of speech that could be legitimately censored from society. This attempt failed and “became a rationalization for suppressing dangerous ideas” (Nowak and Farber, 1984, p. 1227).

The Court debate in the 1960's, was over the definition of the categories of punishable speech. By the 1970's the understanding was that government had no general authority to prohibit speech simply because its content interfered with societal or governmental goals. The government could proscribe, and as a matter of exception, speech falling into precise categories like incitation of illegal behavior, obscenity, defamation, false or misleading commercial speech and child pornography (Nowak and Farber, 1984). The analysis of time, place and manner complimented the categorical approach to prohibitions on certain messages.

Nowak and Farber noted that “[...]content neutrality must be the touchstone for first amendment analysis” (p. 1236). The requirement that government be content neutral in its regulation of speech means that the government must both be viewpoint neutral and subject matter neutral. Viewpoint neutrality means that the government cannot regulate speech based on the ideology of the message, and subject matter neutrality means that the government

³ In *Davis v. Massachusetts*, the Court declared that “laws that prohibited public speaking in a public park were no more an infringement of the rights of the public than for the owner of a private house to forbid it in his house”.

cannot regulate speech based on its topic (Chemerinsky, 2011, p. 962-963). It is precisely this touchstone concept of neutrality, what we are calling into question.

According to Barbas, the 1970's marked the beginning of the end of the public form. She concludes:

[...]the doctrine crystallized into a complex set of rules that granted the government substantial authority to control the expressive uses of its own property and to declare sites off-limits for public speech. Outside traditional public forums, such as streets and parks, whether or not government property can be classified as a public forum depends on government intent. Speech can be banned in sites the government deems non-public. The earlier view of a state obligation to provide citizens with minimum communication opportunities in the public forum, was replaced by a strict rule of equal access that allowed flat bans on access to the forum as long as it was done even handedly. (p. 864)

When we say the concept of neutrality as understood in relation to the public forum doctrine has a totalitarian feel to it, we mean exactly this. Think about it: what's more content neutral than total silence? During a 2010-2011 student strike at the University of Puerto Rico, the administration prohibited all non-academic student activities on campus. As students, we argued in Court that the scope of the measure was overbroad, meaning it could be read to prohibit even expression that should be protected under the First Amendment. Nonetheless, the regulation was at least on its face, content-neutral. The courts ignored our argument and instead said we had other outlets of expression. Free speech "zones" were set outside of campus grounds. We could protest, we could march, we could picket. Elsewhere.

About the balancing of interests at stake, Argentinian constitutionalist, Roberto Gargarella (2006), warns against the dangers of reducing fundamental rights for the sake of generalities like economic efficiency (p. 19), the broad concept of the public interest or, to mention an example within US jurisprudence, preserving the attractiveness of parks⁴.

Daniel Farber and John E. Nowak went in-depth into the public forum doctrine's shortcomings in their article *The misleading nature of the public forum analysis*. Notwithstanding the arguments made for content neutrality, the authors stated, it is clear today that content regulation is allowed and that governmental regulatory power does not stop at the categories of speech that have been found to lie outside the protection of the first amendment. They argued that the public forum analysis distracts attention from the first amendment values at stake in a given case:

Classifying a medium of communication as a public forum may cause legitimate government interests to be brushed aside; classifying it as something other than a public forum may lead courts to ignore the incompatibility of the challenged regulations with first amendment values. (p. 1224)

In making their case against the public forum doctrine, they stated: "[t]he first amendment protects people not places. And protection should not depend on the labeling of physical location but on the first amendment values and governmental interests involved" (p. 1234). In their demolishing critic, they conclude that "[u]nless the Supreme Court transcends its geographical approach to the first amendment and abandon formal public forum analysis, it will continue to hand down decisions that fail to analyze thoughtfully the nature and role of first amendment principles in our society" (p. 1266).

Further analysis may lead to the conclusion that if anything was left of the public forum doctrine's guarantee of content neutrality, this guarantee has evaporated. Chemerinsky (2011) explains "[f]acial content-based restrictions will be deemed content neutral if they are motivated by a permissible content neutral purpose" (p. 965). This is effectively a loophole of the content-neutrality principle that has been frowned upon by constitutional scholars like Lawrence Tribe. With regards to the categorization of public forums, no clear set of criteria has been articulated to determine how a particular property is to be categorized (Chemerinsky, p. 1167).

Although[...] recent cases indicate a strong presumption for finding government property to be a non-public forum, the criteria established in jurisprudence could be applied in a more speech protective manner to safeguard expression in public property. (p. 1186)

⁴ *Clark v. CCNV*. 468 US 288 (1984).

Chemerinsky seems to urge jurists to not be strict cookie-cutters about the public forum categories when he states that “some incompatibility with the usual functioning of the place can be tolerated as to accommodate first amendment values” (p. 1187). In practice, this is rarely the case. Most of the times, the case is we find many functionality interests to which the First Amendment has to concede. Gargarella (2006), in addressing how the public forum doctrine has been used internationally, presents the problem in explicit terms: “[t]ime place and manner restrictions are understandable and acceptable as a matter of principle, only if they are not used, as it is commonplace, as an excuse to suppress a particular kind of expression that is disliked by power” (p. 34).

In the end, to sum it up in a couple of sentences. Content neutrality is a myth. The current state of the law permits the regulation of many speech categories because of their content. Supposedly content neutral provisions in laws and public ordinances that curtail free speech, rarely are content-neutral. Law and regulation do not operate on a social vacuum but in a historical context. There is always someone who wants to prevent the “other” from talking or engaging in expressive action somewhere, in some way, in some manner, about some subject-matter, and for some reason. Unclear standards as to what is or is not to be considered a public forum are not a proper check on a government that is eager to suppress speech in public property. Legal concepts that are full of holes, like we have seen is the case of content neutrality, are constantly rallied in the face of calls for regulation of some kinds of particular expressions. This is the case of racist hate speech. As we will see in the following pages, history and current events are proof positive that in the United States, groups that have been disliked and disenfranchised by power keep paying the price for expression to remain free.

First Amendment and equality: the debate on hate speech and other ways in which freedom isn't free.

A. Early writings of the critical race theorists

In the 1980's and 1990's, critical race theorists like Mari Matsuda, Charles Lawrence and Richard Delgado proposed different ways in which hate speech could be regulated in the landmark book *Words that Wound* (1993). I intend to revisit some of the main propositions put forth by these authors and then discuss some of the main arguments of the case against regulation. Finally, I will

explain how a closer look at the issue might convince us that critical race theorists were actually onto something and got their point across in the debate, having their proposals implemented by the Office of Civil Rights of the Department of Education.

Matsuda (1993), for instance, argued that formal criminal and administrative actions were an appropriate response to hate speech. She rejected the absolutist First Amendment position, and explained that tolerance of hate speech is not tolerance borne by the community at large, but a psychic tax imposed on the least able to pay. Law in the United States, as she proposed it, is tied to racism and is both a product and a promoter of racism. She told stories of the victims of hate speech and about how the institutions have failed them. Matsuda, who is a professor at the William S. Richardson School of Law at the University of Hawaii, stated that the claim that the need for a legal response to racist speech stemmed from a recognition of the structural reality of racism in the United States. A holistic approach to the problem should lead to the conclusion that hate speech itself is discrimination, as it is an essential part of the implements of white supremacy which include violence and genocide, overt disparate treatment, covert disparate treatment and sanitized racist comments (p. 23). Matsuda explained how the law of international human rights required regulation of racist speech, a requirement that the United States has forever ignored. In the end, Professor Matsuda proposed an explicit and narrow definition of racist hate messages could allow for restrictions consistent with First Amendment values.

Charles Lawrence III (1993), proposed the hate speech debate involved tensions between the First Amendment and the Equal Protection clause. He urged us to look at the case *Brown v. Board of Education*. 347 US 483 (1954), as the case for the regulation of hate speech. Lawrence, who also teaches at the William S. Richardson School of Law, argued that hate speech was a functional equivalent of fighting words. Considering the harms involved in hate speech, and the resurgence of racial violence in campuses across the United States, he called for the enactment of hate speech regulations on college campuses. He urged for the prohibition of face to face vilification and for the protection of captive audiences from racist hate speech. Professor Lawrence analogized the proposed regulations with the Title VII of the Civil Rights Act requirement that

employers maintain a non-discriminatory, non-hostile work environment and with prohibitions of sexual harassment in the workplace.

In analyzing the balance of interests between free speech and equality, from the racial point of view, Lawrence explained:

Most blacks- unlike many white civil libertarians- do not have faith in free speech as the most important vehicle for liberation. The first amendment coexisted with slavery, and we still are not sure it will protect us to the same extent in protects whites. It often is argued that minorities have benefited greatly from first amendment protection and therefore should guard it jealously. We are aware that the struggle for racial equality has relied heavily on the persuasion of peaceful protest protected by the first amendment, but experience also teaches us that our petitions often go unanswered until protests disrupt business as usual and require the self-interested attention of those persons in power. Paradoxically, the disruption that renders protest speech effective usually causes it to be considered undeserving of first amendment protection. (p. 76)

Lawrence's argument was enlightening. He pointed out the unequal treatment of racial minorities with regards to First Amendment protections. On his view, it is not that the First Amendment values were not thoroughly understood by groups who proposed reform. The First Amendment had in fact failed these groups who have historically paid the price in the First Amendment equation. Lawrence explained:

Blacks and other people of color are equally skeptical about the absolutist argument that even the most injurious speech must remain unregulated because in an unregulated marketplace of ideas the best ideas will rise to the top and gain acceptance. Our experience tells us the opposite. We have seen too many demagogues elected by appealing to U.S. racism. (p. 77)

It seems like Lawrence predicted the outcome of the 2016 elections twenty-three years before they happened. Today, studies show that racism, more than other factors, actually led to Donald Trump's political rise, and finally to his election as president (Mc Elwee and McDaniel, 2017;

López, 2017). For a more specific account of how the use of coded racial appeals and inciting racial animus has worked in American electoral politics see *Dog Whistle Politics: How Coded Racial Appeals Have Reinvented Racism and Wrecked the Middle Class*, by Ian Haney López (2015). The marketplace of ideas has always and ultimately failed blacks and other people of color in the United States.

Richard Delgado, on his part, after recognizing the harms caused by hate speech and its low value with relation to the interests and values protected by the First Amendment, insisted on the recognition of a tort action for racial insults, epithets and name calling. Delgado explained how treatment of hate speech under labels as assault, intentional infliction of emotional harm and defamation was not enough to redress the harms produced by this sort of expressions.

B. An ongoing debate.

Resistance to the critical legal theorist's proposals came primarily from the civil-libertarian establishment. Although there seems to be a consensus of both liberals and conservatives on First Amendment issues, the consensus is not absolute, and the debate is not over. In their 2018 book, *Must we defend Nazis: why the first Amendment should not protect hate speech and white supremacy*, Richard Delgado and Jean Stefancic provide comprehensive answers to the arguments posed by the classic First Amendment absolutist position that completely rejects regulation of hate speech. In a sharp criticism to the theoretical framework used by civil libertarians in defense of their position, they state "mechanical jurisprudence has seemingly paralyzed the thinking of many first amendment absolutists" and that "it is imperative to put aside tired maxims and conversation closing clichés that formerly cluttered first amendment thinking and case law". They point out most of the arguments put forth in the case against regulation have a paternalistic tone, in which academics and civil libertarians invoke the interests of political and racial minorities as justifications to for the protection of hate speech. In the next pages we explore some of the overtones of this continuing debate.

Anthony Lewis (2007) in *Freedom for the Thought that we Hate: A Biography of the First Amendment*, echoes the famous Holmes dissent in *US v. Schwimmer*. 279 US 644 (1929), while criticizing a decision in which the majority of

the Supreme Court upheld the State's denial of citizenship to a pacifist, for refusing to swear she would take up arms to defend the US. Holmes argued:

[...] if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought- not thought for those who agree with us but freedom for the thought we hate.

This is precisely one of the tired maxims that cloud the development of a constructive debate on First Amendment issues, according to Delgado and Stefancic. It is curious how this statement, originally put forth in defense of a pacifist, has been turned around and used to defend the rights of racists. In asking if hate speech should be banned, Lewis argued it shouldn't. He noted the cases of UMASS Amherst's and Stanford Universities' failed hate speech codes as examples and explained "lengthening list of characteristics to be protected from harassing speech brought ridicule on the speech code campaign" (p. 163). In his view, as courts found both codes unconstitutional, and the campaign to regulate hate speech was done with.

Former ACLU President, Nadine Strossen (2018), in *Hate: why we should resist it with free speech, not censorship*, sums up the arguments for the case against regulation of hate speech. Here, I reproduce her most compelling arguments. She begins by admitting hate speech is neither absolutely protected nor completely unprotected. Strossen concedes there are situations where hate speech is not protected, among those situations are cases of true threats, expression in the private sector, viewpoint neutral regulations, special purpose facilities like schools, fighting words, harassment, facilitating criminal conduct and bias crimes. She then argues hate speech laws inevitably endanger views across the political spectrum.

As she understands it, hate speech laws share various first amendment flaws: they violate the cardinal viewpoint neutrality, emergency principles, and are unduly vague, impermissibly overbroad or under-inclusive. We will examine these objections.

We saw earlier how viewpoint neutrality is a myth and a guise for totalitarianism. Delgado and Stefancic (2018) explain how our legal system has made dozens

of exceptions to the principle of neutrality, each of those, responding to the interest of powerful groups. Nonetheless, a proposal for a new exception to protect oppressed groups produces consternation within the legal and academic community. Laws on obscenity have been drafted and implemented to appease religious and conservative groups, copyright laws have been drafted to protect Disney's economic interests, laws for holding disrespectful parties in contempt in court have been drafted to protect the judiciary's interest in being respected. If today minorities believe they would be better off without these verbal aggressions, the least the legal system could do, is listen.

About the emergency principle, which echoes the "clear and present danger test", we briefly mentioned earlier that this approach has been used as a guise for the suppression of political dissent. I argue that it is still being used this way today. As to principles of vagueness and overbreadth, Chemerinsky and Gillman (2017) explain this creates a Catch 22:

[w]hen it comes to the regulation of so-called fighting words: a law punishing fighting words in general will be struck down as too broad and vague (that is, it covers too much), but a narrower law, focusing just on certain kinds of fighting words, will be struck down as an illegitimate content-based distinction (that is, it covers too little). (p. 95)

Vagueness and overbreadth concerns have plagued jurisprudence of fighting words forever. In fact, in more than half a century since *Chaplinsky*, the case upholding fighting word statute under constitutional challenge, the Supreme Court has never again upheld a fighting words conviction (Chemerinsky, 2011, p. 1034). In Puerto Rico, a court challenge to the validity of an obscenity statute didn't go too far⁵, but I'm thoroughly convinced that overbreadth and vagueness might also deem many states' obscenity statutes unconstitutional. If objections to hate speech are to be upheld as the law of the land, at least some of the categories of unprotected speech under First Amendment jurisprudence should also crumble down.

It is within the under-inclusiveness question that we ask what groups should be protected. What kind of hateful

5 *Pueblo v. Stephanie Monserrate*. KLCE-2014-01459 (2014).

investive should these regulation address? Should people be protected against age discrimination, racism, xenophobia, homophobia, ableism, discrimination on the basis of sex, anti-Semitism, islamophobia, and other kinds of hate? Should the list just keep going and going? I would have to say, yes. Yes, it should. This goes to the heart of the value of constitutional law as a tool for social justice and change. Who is *We the people*? What suspect classifications should award what people, what kind of protection? We have seen both developments and setbacks in constitutional law as to recognition of civil rights, women's rights, rights of the LGBBTQI community and rights of immigrants, just to name a few. As progressives, we must always bet on the amplification of those developments. The law has recognized groups that have historically suffered from oppression, groups that have been disenfranchised and discriminated against. The law has also moved to make it right and redress those harms caused by inequality. It is the community, activists and agents of social change, with or without the aid of lawmakers and courts, who should take a stand, make the calls, and rally the whole of the American people around these movements for change, as they have done in the past, and they continue to do today.

Another argument posed by Strossen (2018) is that hate speech laws are predictably enforced to suppress unpopular speakers and ideas, and too often enforced to stifle speech of the vulnerable, marginalized minority groups they are designed to protect. Delgado and Stefancic (2018) call this the reverse enforcement argument. They concede this is a plausible argument, as certain authorities are indeed racist and in fact, incidents of people of color charged with hate speech have occurred in countries where these kinds of regulations have been enacted. Nonetheless, they argue empirical evidence suggest that this not common, or the rule and that likelihood that officials in the United States would turn hate-speech laws into weapons against minorities seems remote. Statistics, they argue, show it is white people who generally commit hate crimes against minorities, and not the other way around. (Delgado and Stefancic, 2018)

After accepting the Supreme Court has recognized some kinds of speech, defined by their content, that don't warrant first amendment protection due to their low value, Strossen (2018) argues that hate speech can't be considered of low value, as such speech not only

addresses policy issues but also conveys specific policy issues. Here I have to disagree: Not all hate speech conveys specific policy issues. Telling a Puerto Rican to his face he is a "Fucking Spik", telling a Mexican to "go back to Mexico", or telling a black person "Niggers should hang from trees" are not messages that convey legitimate policy proposals. Hate speakers are criticizing not the government, but someone weaker than themselves. This type of speech, most of the times, is far from the core of political expression (Delgado and Stefancic, 2018).

A more complicated case comes to light when racist animus and xenophobic expressions comes enmeshed with public policy proposals. I would argue that Trump's building of a wall across the border, or his Muslim Ban, should not be considered legitimate policy proposals. Although *Plessy v. Ferguson*, the case that upheld racial segregation, hasn't been expressly revoked, *Brown v. Board* implicitly has done so. *Korematsu v. US*, the case that upheld the displacement of Japanese Americans into internment camps, has also been revoked, although it was done so via *dictum*, and in the course of upholding Trump's islamophobic policies in *Trump v. Hawaii*. 585 US ____ (2018). It is the ideology of white supremacy what is separating families at the border and letting Latinx children die in detention facilities. Racism and hate speech are not only not cool, they are dangerous, they put diversity in a choke-hold, and should not be legal, not even when they come in the guise of legitimate state policies.

Strossen, at some point, seems to victimize the aggressors, when she states "if anyone is marginalized by hateful discriminatory speech these days is those who express hateful opinions" (p.131). This particular argument is also difficult to swallow today. It is true that racism and white supremacy in the United States are frowned upon sometimes and by some people, but others, they are rewarded with the highest office of the land. There should be an honest discussion about racism and white supremacy in the United States, but I would not hesitate to argue that expressions of hate speech today are not marginal, but mainstream.

Delgado and Stefancic (2018) describe what they call the pressure valve argument, according to which racists should be allowed to vent, or they will bottle their hate up and become more violent. They should be allowed to express their views, or their repression will make them more

popular. These arguments also don't hold today. Delgado and Stefancic explain that allowing one person to distill hate, increases, rather than decreases the chances that they will do so again. This also sends a message to others, who may believe this behavior is socially accepted, and they will proceed accordingly, allowing persons to demean others makes them more aggressive, not less. Many accounts of the current situation of racism in the United States agree on the fact that racist individuals and groups have been emboldened by Trump's racist rhetoric.

Erwin Chemerinsky and Howard Gillman (2017), on *Free Speech on Campus*, basically agree with Strossens propositions regarding non-regulation of hate speech. They recognize this generation's urge for first amendment reform:

This generation has a strong and persistent urge to protect others against hateful, discriminatory, or intolerant speech, especially in educational settings. This is the first generation of students educated, from a young age, not to bully. (p. 10)

They point out that arguments about the social value of freedom of speech are abstract to this generation, because we did not grow up at a time when the act of punishing speech was associated with undermining other worthwhile values. They go on to mention the civil rights movement, and anti-vietnam war protests, and that they saw first-hand how officials attempted to stifle or punish protesters. They seem to imply that our generation calls for special protection against hateful, discriminatory or intolerant speech because we don't know better, or that we are lacking of experience in struggles for social justice and on the nature of state repression. I beg to differ.

This explanation overlooks impact of the Occupy movement and its spread through the United States, the UC Davis pepper spray incident, the Black Lives Matter movement, and the environmental struggle to stop the Keystone XL Pipeline at Standing Rock. In Puerto Rico the youth has struggled for the right to an affordable higher public education, against the imposition of an unelected oversight board that imposes neoliberal measures like the reduction of pension benefits and the closing of public schools. We have led environmental struggles, the struggle for independence, and for liberation of political prisoners like Oscar López Rivera. Oscar spent more than thirty years in prison under seditious conspiracy charges for his pro-independence advocacy and was pardoned by

Barack Obama during his last week of his presidency. This generation has championed many struggles that have also been intensively surveilled by the government and brutally repressed, in open disregard of the promises of the First Amendment. I wouldn't dare to say that this generation is inexperienced and thus fails to recognize the value of the First Amendment. I would rather argue, as has happened with racial minorities, that the First Amendment has failed this generation. Its understandings do not reflect the common understandings of the world today, and that should warrant some thought.

Delgado and Stefancic (2018) explain that in regards to hate speech, there is a divergence with society at large believing one thing and the legal system standing for another and that the law should respond quicker to the needs of a changing society: "The frozen in time quality of American free speech is ironic since it is said to be the principal legal tool our system uses to evaluate and facilitate change".

In researching on the contemporary overtones of the debate about the desirability of hate speech regulations, I found different ways in which academics in the United States seem to distort the country's history and current events to justify non-regulatory goals, and ultimately, to defend racist and other hateful speech. Chemerinsky and Gilman (2017) argue that there is no evidence that the presence or absence of hate-speech laws results in more tolerant attitudes towards vulnerable groups or in less discrimination. They point out that in the United States, without hate speech laws, approval of interracial marriages and actual marriages of this type have grown exponentially, that without punishing anti-gay sentiment, acceptance of same sex marriage has also dramatically increased (p. 109). This account seems to be at odds with a more recent narrative of the current situation in the United States, proposed by Chemerinsky (2018) in his latest book *We the People: A Progressive Reading of the Constitution for the Twenty-first Century*:

I am concerned that his [Trump's] ugly rhetoric has legitimized the expression of racism in a way that has not been seen for decades. Until the white supremacist demonstration in Charlottesville in August 2017, I never had seen someone in public carrying a sign saying, KIKES BELONG IN THE OVEN. President Trump did not even condemn this, though every prior president since the 1930s has found it

easy to denounce Nazism and white supremacy.

[...]

Over the course of American history, there have been great gains in individual freedom and enormous advances in equality for racial minorities, women, and gays and lesbians, though obviously much remains to be done. Now we are at a moment with a president who is not committed to these values and face the reality of a Supreme Court that will likely be more hostile to them for the foreseeable future. (p. xv-xvi)

Despite this characterization of the present situation in the United States, Chemerinsky seems to stand firm on his strong defense of mainstream First Amendment thought. He explains that “there is more agreement between conservatives and liberals on free speech than in many other areas of constitutional law. It is why many of the recent cases have been unanimous in favor of freedom of speech” (p. 165). He seems to be saying: “No progressive reading of the Constitution seems warranted in this arena. We have already realized it, and you should too, if you knew what’s best for you. The first amendment has gone where it had to go. Goodbye”.

If this goodbye was our point of departure, minorities wouldn’t have much work to do with regards to freedom of speech in the United States, but to stand behind its current understandings. This objection to hate speech regulation is what Delgado and Stefancic (2018) call the best friend objection. They explain this approach ignores the history of the relationship between racial minorities and the First Amendment. As we have seen, minorities have made the greatest progress when in defiance of the First Amendment straitjacket. Civil rights activists in the United States found that this constitutional provision did not protect them from arrest and conviction. Their speech was deemed too forceful or disruptive. Most convictions were reversed on appeal years later, but the First Amendment served was more like an obstacle than minorities best friend. In First Amendment history it has been demonstrated that this constitutional provision has been more useful for confining change than propelling it (Delgado and Stefancic, 2018). There’s a reason Dr. King wrote from the Birmingham jail. Pure legalists would say he was later released, and civil rights activists convictions were reversed, that no harm was done. That First Amendment values triumphed. Most people who think this way have not spent a couple of hours under custody, and therefore ignore the intense emotional

harm even a temporary arrest can have on a human being.

Another example of distortion of current events can be seen in the work of Anthony Lewis (2007). The book begins with this statement: “Americans are freer to think what we will and say what we think than any other people, and freer today than in the past[...] We can denounce our rulers, and each other, with little fear of the consequences” (p. ix.).

Unfortunately, a simple look at the news, or at the 2017 Annual Report of the Office of the Special Rapporteur for Freedom of Expression of the Inter American Commission on Human Rights of the Organization of American States (OAS), could suggest the contrary position. The 2017 Annual Report denounces government attacks on media in the Trump era, and the fact that that during that year, criminalization of criminal protest and the escalation of penalties regarding felonies associated to various forms of protest through legal forms has been a trend in many states. The report states between November 2016 and December 2017, 51 legislative initiatives were introduced in different states around the country, seeking to disproportionately restrict or criminalize activities inherent to the exercise of the rights to freedom of expression and assembly. These bills were introduced after the intensification of protests in the country led by social movements involving some of the most vulnerable groups, such as the Black Lives Matter movement and the indigenous movement against the Dakota Access Pipeline. More than 200 people were detained during protests held on the day of President Trump’s inauguration. It was estimated some 700 people were arrested since protest against the Dakota Access Pipeline began in 2016. Trump also revoked Executive Order 13688 of January 16, 2015, which had prohibited the acquisition of certain types of military equipment by the country’s police. With the revocation of this Order, police departments today can once again receive armored vehicles, high-caliber weapons and ammunition, grenades, camouflage uniforms, and other military grade equipment that can be used in response to protests. (OAS, 2017)

In Puerto Rico, according to a fact sheet by *Brigada Legal Solidaria*, a group of lawyers that aid in the criminal defense of social justice activists, states that 177 protestors have been arrested from 2013 to 2018, under various criminal accounts, but in acts related to social

protests. Protests have been stopped in the middle of the street, and brutally repressed (Brigada Legal Solidaria, 2018). The state police and the federal government are in an active campaign to surveil and suppress political dissent. An old Spanish proverb says: “*Para muestra, con un botón basta*”. This translates to: “If you’re looking for a sample, one button should be enough”. I’m sorry to break it to you, but Americans are not freer than everybody else, and there is much work to do. A progressive reading of the First Amendment might as well be warranted.

One of the main arguments against hate speech regulation is that it would lead to curtailment of political dissent and to its application against the same groups it is said to protect. This argument ignores the fact that political dissent is already being suppressed in practice under current First Amendment understandings. Activists today have been charged and convicted over all kinds of crimes from disruption, to obstruction of justice, material support of terrorism, seditious conspiracy, and so on. The same treatment hasn’t been given to cases of white supremacist terror groups. This unequal treatment is an issue that has barely received attention by legal scholars. This being so, the defense of hate speech and racism cannot be understood as a defense of political dissent. It should be stripped of its legitimating aura of justice for all, and left standing as it is, a mere defense of racism, xenophobia, homophobia, and other kinds of hate. Although most would agree that the civil libertarian position has come to be recognized the law of the land, recent developments have called this assumption into question.

Critical legal theory and the Office of Civil Rights of the Department of Education.

In addressing the treatment of hate speech on campuses Delgado and Stefancic (2018) explain that although defenders of free speech against campus codes have prevailed in most of the court challenges, campuses continue to search for means to protect their students from in language that demeans minorities, making it more difficult for them to get an education. Demands such as the removal of Confederate names and statues have followed this course with success. A recent example of this was the name change of the Law School I attend, from Boalt Law to Berkeley Law, due to racist remarks discovered to have been made by John Boalt against people of Chinese descent, African Americans and

Native Americans.

On campuses, in direct opposition of Lewis (2007), Strossen (2018), Chemerinsky and Gillman (2017), Delgado and Stefancic (2018) continue to argue that case law and scholarly commentary suggest that carefully drafted hate speech restrictions may comply with First Amendment. The authors propose a two-step approach to prohibit expressions of hatred and contempt. The direct approach would prohibit face to face invective calculated to seriously to disrupt the victim’s ability to function in a campus setting. This approach would be race neutral, and would capture the essence of any recognized First Amendment exception such as fighting words or workplace harassment. The other approach would provide enhanced punishment for any campus offense which was proven to have been committed with a racial motivation.

In a surprising turn of events, one could argue that Office of Civil Rights of the US Department of Education (OCR) in the last years, might have been enforcing the views proposed by the critical race theorists. This has been criticized by the civil libertarian front. Title VI of the Civil Rights Act of 1964 protects people from discrimination based on race, color or national origin in programs or activities that receive Federal financial assistance. Title IX of the Education Amendments of 1972 protects people from discrimination based on sex in education programs or activities that receive federal financial assistance.

Chemerinsky and Gillman (2017) explain the way the Office of Civil Rights of the US Department of Education campuses’ obligations under Title VI and Title IX has been a game changer in the debate. Alarmed by recent actions by the OCR, Chemerinsky and Gillman state “[i]ts recent actual and threatened investigations certainly add to the concern over free speech on college campuses” (p. 17). They argue the OCR should update its guidelines to ensure that no investigations can be triggered merely by an allegation that someone was upset by the expression of ideas or views expressed by another. They propose, complaining parties should be required to identify a pattern of discriminatory conduct that falls within the legal definitions of harassment. They believe that it should require “more than words” or a pattern that creates a hostile environment situation to even warrant investigation. Under OCR standards, the alleged discriminatory conduct must be considered sufficiently

serious to deny or limit a student's ability to participate or benefits from the educational programs. Conduct would be evaluated using the standard of a reasonable person of the alleged victims age and position, not simply the compliant's subjective view. At least in paper, the OCR's position, as it stated in the resolution of a 2015 case⁶ is:

[p]rotections of the First Amendment to the United States Constitution must be considered if issues of speech or expression are involved. OCR has made it clear that the laws and regulations it enforces protect students from prohibited discrimination, and are not intended to restrict the exercise of any constitutionally protected expressive activities or speech. As explained in OCR guidance documents, the regulations enforced by OCR are not intended to restrict the exercise of any expressive activities protected under the U.S. Constitution. (Wood, 2015)

In practice, prohibition of hateful speech in the learning environment can even extend to employees remotely related to the University, and to statements not directly made to the face of the victim. If it is ultimately found that there has been in effect discriminatory words, and that these words have been accompanied by discriminatory conduct, the universities and schools have a responsibility of investigating and redressing these situations in a timely manner. Institutions must also be active in providing students with information as to what their rights are in the University setting.

In a recent case at the University of California San Francisco (UCSF), a student was allegedly subject to racist comments by the Assistant Dental Director, who was employed not by the University, but by an externship site. The student, who was born in the United States from Egyptian parents, spoke Arabic with a patient. She allegedly heard two externship site staff members, including the Assistant Dental Director, speaking to each other and one said, "Do you know what language she was speaking to that patient?" The other responded, "I think it was Arabic, I didn't know she was Arab." The Assistant Dental Director said, "I don't particularly like her. There are too many Muslims in the world." Apart from this comment, the Assistant Dental Director seemed to want to blame her for everything in the site, and he went to the University's Course Director and presented a series of

complaints regarding the student's performance that got her removed from the site. The University's Office for the Prevention of Discrimination and Harassment apparently told her it didn't have jurisdiction over employees of externship sites (Pelchat, 2016).

The OCR noted its concerns that the student was harassed on the basis of her perceived national origin and the University failed to respond appropriately to notice of harassment. This harassment, coupled with the disparaging comments about the student based on her perceived national origin were enough to warrant OCR's involvement. The University was found to have an obligation to act under Title VI, even though the alleged conduct in question was carried out by a third party, comments were not said to the student's face, and the most disparaging comments directly referred to the student's perceived religion, not her race or nationality. As happens in most cases, UCSF, prior to completing the investigation, expressed its interest in entering into a resolution agreement without admitting violation of law. These agreements allow the OCR to resolve the concerns identified, without going into the merits of the particular cases. In this case, the University agreed to address the complaint of national origin harassment, to review its policies to ensure they prohibit discrimination even by third parties, to revise those policies as needed, to provide training and guidance to responsible staff, and to provide the OCR documentation of completion of all requirements (Pelchat, 2016).

Although Title VI complaints managed by the OCR could be used as a platform to attempt to censor unpopular or ideas which some find offensive, this is nothing new. The same has happened through the years with all of the legal resources the State has wielded in its historic crusade against political dissent. Palestinian advocacy groups have denounced Israel advocates have initiated lawsuits, administrative civil rights complaints, and other threats to hamper and intimidate them. They have described at least six complaints with the Department of Education asserting that by tolerating campus events and protests that criticize Israeli policies, universities violate Title VI. These complaints have been ultimately dismissed, but in some cases even the threat of a complaint has made universities pull out from endorsement or support of

⁶ In this case a student filed a complaint in which he claimed discriminatory treatment because a professor used the N word in the context of a classroom discussion. After the investigation, the OCR found no preponderance of evidence about the use of the N-word in the classroom y the city college professor.

particular events. Given the fact that the OCR is an office within the Department of Education, belonging to the executive branch, we'll have to see how that goes with the political winds of the times⁷. The fact is that until today, many other government-led legal initiatives have had great success in their persecution of the Palestinian cause in the United States. Grand jury subpoenas have been issued, search warrants have been executed, activists have been charged with material support to terrorists, with conspiracy to disrupt and for actual disruption of pro-Israeli public speaking events. This has led advocacy groups to denounce what they call the Palestine Exception to Free Speech⁸. The Palestine exception has not outraged the legal academic community as a whole, as the calls for hate speech regulation has.

Conclusion

I have discussed how developments in First Amendment thought in the United States have questioned the effectiveness of tools of analysis like the Public Forum Doctrine, and the concept of content neutrality in addressing free speech issues. I have explained how the public forum doctrine and the concept of content neutrality have an authoritarian feel to them, justifying government efforts in the imposition by force of the neutrality of silence. There are always figures of authority that wants to tell someone: "please protest here". Having questioned these concepts so central to First Amendment thought, I argued that legal concepts that are full of holes are constantly rallied in the face of calls for regulation of some kinds of particular expressions. This is the case of racist hate speech. History and current events are proof positive that in the United States, groups that have been disliked and disenfranchised by power keep paying the price for expression to remain free.

Criticism of the prison industrial-complex makes me skeptical about punitive approaches to hate speech and generally about the effects of the legal system over human behavior. This is another way in which the case of hate speech makes us question traditions deeply engrained in legal thought and practice. In finding ways to deal with

this issue, alternate approximations and legal advances in the field of therapeutic jurisprudence⁹ must be explored.

As I write today, conservatives might be moving the boundaries of First Amendment understandings, we are yet to see if and how the new Supreme Court majority will address these issues. As history takes its course, and whatever the government response or lack thereof, communities must keep speaking out against hate. If racist speech is shielded from government regulation, people are forced to combat it as a community (Lawrence, 1993). My point is not that legislators and administrators should now jump and regulate hate speech, rather that they should listen to what communities and to what this generation has to say about it. As to the legal and academic community, my proposition is the following: wherever it might take us, a progressive reading of the First Amendment and its current understandings is always warranted.

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7 UC Berkeley's own, Kenneth L. Marcus, who had before helped file Title VI complaints in the name of pro-Israeli organizations, is the current head of the OCR. He has opened cases that were closed related to University's stances within the Israel-Palestine conflict. See (Green, E., 2018). This might be calling into question the conservative's supposed commitment to the consensus on traditional First Amendment understandings.

8 Palestine Legal (2015). *The Palestine Exception*. <https://palestinelegal.org/the-palestine-exception/>

9 "Therapeutic Jurisprudence is an interdisciplinary study of the law's effect on the physical and psychological wellbeing (Slobogin, 1995; Wexler and Winick, 1996b, p. xviii). It proposes law reform directed, here appropriate, at minimizing negative effects and promoting positive effects on wellbeing." King, Michael; Freiberg, Arie; Batagol, Becky; Hyams, Ross. (2009).

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EASING THE TENSIONS

Civic Engagement and Participation as Avenues of Social Conciliation¹

by Gamelyn F. Oduardo-Sierra²

Introduction

Is there a relation between the lack of participation in institutional decision making and protests? If so, how can we subvert that equation? In this paper, I will explore the relationship between civic engagement and the exercise of First Amendment rights. I'll also explain how some institutions have dealt with tensions associated with the intensive exercise of these rights. I'll focus on the particular experience of the University of Puerto Rico (UPR), where after years of violent conflict, a *Política de No-Confrontación* (i.e., non-confrontation policy or PNC) engaged members of every sector of the campus community in the prevention of violent incidents in protests. I'll also comment on how recent student movements in the island have implemented radical democratic governance as an alternative to models of representative democracy that limit participation and discussion about issues of public concern. I call for co-governance of institutions as a way of building inclusive, vibrant, active and civically engaged communities.

The case of the UPR. From the top down.

There are approaches to social conflict that help ease the tensions associated with the intensive exercise of First Amendment rights. There are also other approaches that exacerbate those tensions. After brutal clashes in the 1970s and 1980s between students and police forces (which had resulted in the burning of the ROTC headquarters in Río Piedras and in casualties on both sides), a policy of non-confrontation was put into place in the UPR. It followed the Latin-American tradition of autonomous universities and barred uniformed ROTC cadets and state police from campuses (except in extraordinary circumstances, when the university's chancellor could ask for state intervention). Internal UPR

security personnel was allowed on campus, but unarmed (Oduardo-Sierra, 2014).

This Policy of Non-confrontation was the institutional product through which the University made a commitment for advancing freedom of speech, respect, tolerance and peaceful coexistence (Ramos Rodríguez, 2008, p. 14). The four fundamental principles of the Policy of Non-Confrontation (PNC) were the following:

1. Dialogue is the substance of University coexistence;
2. Trust is the key to establish a mutual relationship of security, honest communication, and interaction;
3. Respect implies deference for difference; and
4. Organizations are successful in the measure that they can establish a culture of peace (p. 17-18).

Bravo Vick and Ramos Rodríguez (2008) explain how the PNC has worked in situations of institutional crisis. They provide strategies, within the principles of the PNC, used by the Administration to face institutional crisis. In promoting dialogue as the substance of University coexistence, they emphasize in the importance of promoting rational dialogue within all sectors of the campus community, the importance of basing arguments in empirical facts, the importance of listening to dissent, showing openness to negotiation, giving the opportunity to opposing parties to obtain some benefits, invoking mutual responsibility and the creation of rules of coexistence even in times of institutional crisis (p. 200). In promoting trust as a way to establish a situation of mutual security, communication, honesty and interaction, Bravo Vick and Ramos Rodríguez stress the importance of acting with honesty, showing availability, facing the situations directly, and promoting the flow of information

1 This is the second of a series of two academic papers drafted as Fellowship Projects for University of California's National Center for Free Speech and Civic Engagement.

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(p. 207-210). The University Administration must be an active promoter of mutual respect among individuals and sectors on campus, it should show deference for difference, dissidence, and diversity within campus groups. It should perceive the conflict as a learning experience and understand its social function (p. 211-213).

In explaining how organizations are successful in the measure that they can establish a culture of peace, the authors explain, that many of the strategies used within the PNC are directed to promoting peace within campus and with the final goal of promoting the University's academic objectives (p. 213). Some of the strategies employed by the administration in promoting peace include showing restraint in the exercise of authority, promoting participative democracy, the strengthening of representative organizations and the promotion of multi-sectorial organisms, like the *Junta Coordinadora de Seguridad* (Security Coordinating Board). This Board had members of every sector of the university's community; workers, students, faculty, security, and administration were given the task to prevent violent incidents in protests, and to enforce the rules of coexistence agreed upon by different groups, in times of institutional conflict. The PNC principles also advised against the intervention of external agents in University affairs, this meant keeping the police off campus (p. 219-220).

It was in 1985, amidst a strike that disrupted campus activity, that then Chancellor, Dr. Juan Fernández, was asked if he would call on the police to intervene. He said "No, in this campus we have implemented what I call a Policy of Non-Confrontation" (p. 144). The Policy of Non Confrontation was thoroughly discussed in the deliberative forums of the university and was unanimously endorsed by the Academic Senate in 1992. The Policy was ratified by the Academic Senate in 2003 and has been accepted by Chancellors throughout the years. Although it is true that the University of Puerto Rico has not always adhered to this Policy³, the guiding principles of the Policy of Non-Confrontation have served as a guide for the Institution since the early 80's. During the last student strike of 2017, the Administration opted for negotiation and adhered to the policy of non-confrontation to the extent that it was almost found in contempt of court

for not acting on a Court Injunction that required police intervention with students that were occupying campus. No disciplinary action was imposed to striking students. No blood was shed.

Critics of the PNC might argue that policies like this promote disruptive action among labor and student groups that from time to time find themselves at odds with the University Administration. That these policies promote doing nothing in the face of disruption of Campus activity. Facing these criticisms, José Jiménez Oxios, former Director of the Office of Security and Risk Management of the UPR stated:

Of course, the PNC...does not mean... as many people are saying, that nothing is to be done, it's the other way around. It is not that nothing is to be done, in fact, a lot more is done[...] one has to do a lot, you have to go to meetings, you have to be aware to prevent confrontation, I mean, you have to work for real. (Bravo Vick, 2008, p. 107)

Amidst various free-speech controversies that have affected UC Campuses and other universities throughout the United States, institutions must find their voice. The University of Puerto Rico in Río Piedras has found hers in the Policy of Non Confrontation. I am also very interested in studying how communities find theirs. Minorities, including latinxs, blacks, women, Native Americans, and others; students, labor groups, environmental groups and the LGBTTTQI community, have found their voices and turned their indignation and anger into organizations, cultural agency, education programs, online debates, votes, protests, performance arts, and the likes. They have spoken out, denounced, and put their bodies upon the wheels. Racism, patriarchy, sex discrimination, homophobia, xenophobia, ableism, and other forms of discrimination can all be fought in ways yet to be discovered. We saw earlier how groups that have made leaps against inequality, have been denied First Amendment protection. Their expression has been deemed too disruptive to be protected.

3 I have discussed elsewhere the case of backlash to student expression in the University. Oduardo-Sierra, G. (2014). Neoliberalism, Partial Democracy, and Resistance in the Colonial Context. *Berkeley Journal of Sociology*. <http://berkeleyjournal.org/2014/12/the-puerto-rican-student-movement-resistance-to-neoliberalism-and-partial-democracy-in-the-colonial-context/>

From the bottom, up.

I will now turn to discuss a process that occurred in the outskirts of first amendment protection: the disruption of academic activities during the UPR student strikes. I will explain how disruptive conflicts can be seen as signs of democratic maturity, and how today's social movements have potential to dream and act upon the possibility of a more democratic society. In the next pages, I intend to elaborate on ways in which democracy can and should be radically transformed, from the bottom, up.

Contemporary debates about democracy seem to reject the representative models that have predominated in political systems around the world. The discussion seems to have tilted to more inclusive models of participation and better processes of collective decision-making. Social movements have played a pivotal role in this new balance. The case of Puerto Rico has not been the exception.

In their groundbreaking book, *Democratizing Democracy: Beyond the Liberal Democratic Canon*, Boaventura de Sousa Santos and Leonardo Avritzer (2005) explain that representative democracy inevitably leads to stages of "low democratic intensity". They explain:

[t]he global expansion of liberal democracy coincided with a serious crisis in the core countries where it had been most consolidated, a crisis that became known as the crisis of double pathology: the pathology of participation, especially in view of the dramatic increase in levels of abstention; and the pathology of representation- the fact that citizens feel themselves less and less represented by those they have elected. (p. xxxvi)

While citizens abstain from the political process, and economic forces strengthen their hold on democracy, we risk entering a period in which our society could be considered politically democratic, but socially fascist (p. lxvi).

Within the colonial context, Puerto Ricans in the island are subject to what constitutional law Professor, Efrén Rivera Ramos has called "partial democracy", under which American Hegemony holds sway through an interplay of coercive and persuasive mechanisms (Rivera Ramos, 2007, pp. 195-199) (Oduardo-Sierra, 2014). The scope of this partial democracy has been seriously undermined by

the recent PROMESA Law that creates a Fiscal Oversight Board. This is a board of unelected officials that oversees and even has the power to veto, economic and social laws and regulations passed by the local government, and the financial budgets of all of the government institutions. The Board has imposed economic austerity measures, in order to guarantee the payment a public debt that many argue is odious and was illegally acquired (Medina Fuentes, 2017). This democratic deficit has serious implications on the rights and liberties of society in general. Puerto Ricans have been alienated from their own political process. This concept is the key to understanding the relationship between lack of participation and the proliferation of social conflicts such as protests.

In the case of the University of Puerto Rico, *legal alienation* meant that if before management decisions like tuition-fee hikes fell upon the hands of its administration, which included at least a nominal participation by students in governance, now all of the decisions were taken by an unelected board that responded to exogenous ultra-conservative economic interests. As tuition fee hikes were announced, services to students were undercut, professor's salaries were reduced, and pension funds were put at risk, the community would inevitably take a stand.

In *El derecho de Resistencia en situaciones de carencia extrema*, Roberto Gargarella (2007) described legal alienation as a situation in which law serves objectives that run contrary to those that justified its existence (p. 7). Alienated groups have serious difficulties to satisfy their most basic needs, to get their points across, to successfully demand changes in the laws or to make their representatives accountable for their actions (p. 17). If this is so, Gargarella argues, these alienated groups do not have a duty to adhere to strict legality, because it is precisely the legal system that causes them harm. Certain forms of resistance should be seen as morally permissible for them (p. 20).

This idea is rejected by traditional understandings of legal thought, as it is a direct challenge to the rule of law. Jürgen Habermas (2002), on his part, has given some clues about how the state should address these situations of conflict keeping in mind that civil disobedience could be the cornerstone of democracy:

Civil disobedience derives its dignity from the high aspirations of legitimacy in the democratic state. When prosecutors and judges do not respect this dignity, when they persecute people who break the rules as if they were common criminals, when they impose penalties as if these were common crimes, they incur in authoritarian legalism[...] they ignore the moral foundations of a fully developed democratic community. (p. 90)

Habermas stresses the importance of speech that might be deemed too disruptive or incompatible with First Amendment principles as a measure of a country's democratic maturity. If the State prosecutes disruption, for example, as it does any other criminal offense, it is clear that even though the state may call itself a political democracy, its legal tradition reflects its totalitarian tendencies. This approach is an approach that will most likely exacerbate the tensions underlying the conflict at hand. Elsewhere I have argued for the implementation of a therapeutic law enforcement approach, that includes the adoption of an orientation based, non-confrontational law enforcement policy that avoids the use or show of excessive force by all means in these situations (Oduardo-Sierra, 2009).

In the past I have also described in detail the democratic values that have inspired student movements in Puerto Rico. The movement today, even when faced with a greater democratic deficit in the island, has taken these values to heart. In my 2014 article for the *Berkeley Journal of Sociology*, I described the democratic potential developed within the student movement:

Students saw their participation in the movement through a uniquely postcolonial lens: They attempted to enact a prefigurative politics within the university, and thus outside the constraints and practices of Puerto Rican partial democracy. The student movement practiced radical democracy internally and in its interactions with the rest of the student body, for example through general assemblies where collective actions were discussed and decided upon. As professor James Seale

Collazo, who stood in solidarity with the student movement during the whole of the strike, points out: "Students developed and implemented an entire theory of *horizontalidad* (horizontality), with issues discussed at Action Committee meetings (usually some twenty to fifty participants) before being brought to campus-wide plenary sessions."(Seale-collazo, year, p.) There was an explicit attempt to go beyond the liberal-democratic model of representative democracy, and to practice participative democracy by placing the emphasis on the deliberative process. There was, too, an overall conscience of the importance of this new democratic paradigm for the development of future radical political actions in the island: The practices of the student movement directly challenged the existing "partial democracy" of Puerto Rico.

My experiences as a social justice activist has led to the conclusion that only opening our institutions to governance methods that promote mutual respect and respect of diversity, that only through collective processes of dialogue and deliberative discussion, can we overcome the political stagnation that affects discussions and decision-making with regards to our island's public affairs. I have come to the same conclusion as to institutions in the United States.

It is true that traditional legal thought in the United States does not recognize a right to community co-governance in public institutions⁴. Nonetheless, current debates on democracy assure us that deliberative democracy can be incorporated structurally through progressive constitutional and institutional changes that shake our countries out of the low democratic intensity they experience. Lucas Arrimada (2008) explains that participation and deliberation should be enforced in social institutions that provide public services, in order to promote civic engagement within the community and a more democratic political culture. Universities are a great place to start.

4 "Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society -- by their power, immediate or remote, over those who make the rule[...] There must be a limit to individual argument in regard to matters affecting communities if government is to go on". *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915).

Conclusion

In this paper, we have seen both top down, and bottom up approaches to ease the tensions associated with the intensive exercise of first amendment rights. The top down approaches are grounded in the importance of the preservation of a culture of peace for the self-preservation of institutions. The bottom-up approaches have a more structural focus, that calls into question traditional legal thinking, imposing the idea of legitimacy over the authoritarian legalism that is common to current First Amendment understandings. In both cases, the tensions related to the intensive use of First Amendment rights have been used as opportunities for empowerment and change.

In the context of Puerto Rico, the colonial situation has led to a context of partial democracy and legal alienation. Through radical democratic governance, students in the University of Puerto Rico have gone from being mere spectators of administrative action, to civically engaged citizens who are active in University and state-wide politics. Their radical democratic governance directly challenged the understandings about liberal democracy that have caused the island's democratic deficit. Following the lead of the Puerto Rican student movement, young activists around the United States some years later, were

involved in the rise and development of the Occupy movement. In their public discussion sessions and decision-making processes, they had a call to order. "Mic-check!", activists would say. "Mic-check", the crowd around them would answer, assuring the speakers that they had everyone's attention. From then on, all of the phrases in the activist's message were repeated by the crowd. This was a way of going around public ordinances that prohibited the use of megaphones, and also a way of illustrating the magic of validating the voice of "the other" in the course of public discussion. Radical democracy and deliberation are the best ways to ensure valuable collective dynamics of discussion, understanding, and respect of difference. The full recognition of diversity is the first step towards easing the tensions inherent to a fractured society. Social movements championed by this generation have had the courage to dream and act upon the infinite possibilities of a more democratic society. I can only hope that we dare to take the next steps in the reform of institutions so these possibilities can take their course. I call for co-governance of institutions as a way of building inclusive, vibrant, active and civically engaged communities. Only through the widening of our democratic expectations can we find true avenues of social conciliation.

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