RECLAIMING FREE SPEECH

for Democracy and Human Rights in a Digitally Networked World

by ***Rebecca MacKinnon***[1]

Introduction

As I write in mid-2020, the United States faces a high-stakes election in the midst of a global pandemic. Democracies around the world are struggling with the question of how to stem the flow of online disinformation and extremism without compromising citizens' freedom of expression and other human rights. While few institutions are completely un-affected by our society's growing political polarization, those that serve in some manner as conduits, incubators, and amplifiers of information, ideas, opinions, civic participation, and activism have become the focal points not only of heated policy arguments, but some of the country's most intense political and ideological battles.

Social media platforms and universities are two such spaces for discourse and engagement, albeit with very different purposes, roles, and histories. Yet both are at the center of heated debates over the relationship between free speech, social justice, diversity and inclusion. On university campuses, conservatives complain that they are discouraged from voicing opinions inconsistent with majority liberal views.[2] At the same time public university administrators, bound to respect the First Amendment, are powerless to stop student groups from inviting speakers who advocate racist ideologies. Amidst campus protest and upheaval over the invitation of white supremacist speakers in 2017, UC Berkeley professor john a. powell wrote of the implications: "The more we recognize that certain kinds of speech can not only offend but can cause mental and physical harm, and that the harm can be lasting, the more we will be able to properly protect the rights of all — not just of people to speak, but also of their very existence and right to survive and thrive."[3] Yet at the same time human rights, and democracy cannot be achieved or maintained – let alone expanded and

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[2] Sean Stevens, "Spirals of silence: Expressing a minority political view on some campuses is difficult," *FIRE*, May 20, 2020, https://www.thefire.org/spirals-of-silence-expressing-a-minority-political-view-on-some-campuses-is-difficult/

[3] john a. powell, "On speech and belonging," *Berkeley blog*, September 18, 2017, https://blogs.berkeley.edu/2017/09/18/on-speech-and-belonging/

improved – without robust free speech protections, including tolerance of ideas and opinions that many find upsetting and repugnant.[4]

Parallel debates are also raging over how to balance free speech and social justice online. Social media companies have pledged to crack down on extremist groups, hate speech, disinformation about voting, and false information related to COVID-19. Yet such content remains widespread.[5] The political right accuses social media platforms of political bias and censorship, with President Trump threatening legal retaliation and regulation.[6] On the left, progressives complain that right-wing extremists have weaponized the cause of free speech online, using social media to drive political outcomes that perpetuate socio-economic inequality and disenfranchisement of minorities. Civil rights advocates condemn Facebook in particular for enabling the spread of hate speech and violent extremist organizations that threaten the safety of Black Lives Matter activists and members of other vulnerable groups.[7] In response to an advertising boycott by major brands, Facebook has made repeated pledges to tighten its rules and strengthen enforcement. But the political arguments over whether, and to what extent, social media companies should police hate speech and disinformation have only intensified. In Congress, draft bills with support from both sides of the aisle seek to rescind or drastically reform Section 230 of the Communications Decency Act, which shields internet platforms from liability for users' speech. Yet there is no consensus on the fundamental underlying question: How should a democracy hold commercial social media platforms accountable to the public interest – and if so, to whose vision of the public interest?[8]

"At what point may, or must, the tolerant stop tolerating the intolerant?" asked educator, cyberlaw scholar, and MacArthur Foundation president John Palfrey in his 2017 book *Safe Spaces, Brave Spaces*.[9] When faced with speech that pushes boundaries, democratic governments seeking to regulate social media platforms in the public interest, and university administrations tasked with providing an environment for learning and research that serves all of society (not just its elites) are faced with the same basic problem, even though the contexts are very different. Palfrey suggests that lessons learned in one domain can be helpful in the other: "getting it right in the intentional community of a campus can be instructive," he suggests, as we grapple with

[4] Suzanne Nossel, "Op-Ed: Those who exercise free speech should also defend it — even when it's offensive," *Los Angeles Times*, June 19, 2020, https://www.latimes.com/opinion/story/2020-06-19/protests-free-speech-first-amendment

[5] Sydney Fussell, "An Audit Slams Facebook as a Home for Misinformation and Hate," *WIRED*, July 8, 2020, https://www.wired.com/story/audit-slams-facebook-home-misinformation-hate/

[6] Tyler Sonnemaker, "President Trump suggested that Twitter's trending topics are 'illegal' because they make him look bad," July 27, 2020, https://www.businessinsider.com/trump-twitter-trending-topics-are-illegal-and-unfair-2020-7

[7] David Cohen, "Civil Rights Groups Urge Large Facebook Advertisers to Boycott the Platform in July," *Adweek*, June 17, 2020, https://www.adweek.com/programmatic/civil-rights-groups-facebook-advertiser-boycott-stophateforprofit/

[8] Matt Bailey, "Three and a half ways not to fix the internet," *Pen America*, July 1, 2020, https://pen.org/three-and-a-half-ways-not-to-fix-the-internet/

[9] John Palfrey, *Safe Spaces, Brave Spaces*, (The MIT Press, 2017), "1. Introduction," Open access, https://bravespaces.org/1-introduction/

how social media platforms should protect free speech while also upholding values of social justice, inclusion, and tolerance.[10]

Taking up Palfrey's suggestion, my focus as a 2019-2020 Fellow with the UC National Center for Free Speech and Civic Engagement has been to examine the inter-connections between campus, national, and global debates about the relationship between free speech, social justice and democracy. I have used insights gained during the fellowship year to inform an analysis of how U.S. policy related to online speech – domestically and internationally – needs to evolve in service of democracy and human rights.

I am neither an educator nor expert on campus speech. I have approached the subject as a student of the intersection of technology and human rights, and advocate for the governance, design, and deployment of technology for the advancement of democracy. During the course of my work over the past several years, I have been increasingly struck by the absence of a clear, progressive vision for how robust free speech protections can also support the advancement of democratic, open, inclusive, and just societies. The absence of such a vision has helped to empower and exacerbate attacks against free speech across the globe, in all types of political systems. Authoritarian politicians and governments use the label "fake news" as an excuse to censor critics and deny facts. China offers an attractive model of "internet sovereignty" to governments seeking to assert greater control over internet platforms and citizens' online activities. At the same time, many democratic governments are responding to the serious public safety and social justice problems caused by online disinformation and hate speech with regulations that are too broad and blunt. In democracies in Europe and elsewhere, laws are being proposed and passed that require companies to proactively police users' speech without sufficient safeguards to prevent the silencing of speech such as journalism, activism, and peaceful albeit uncomfortable and controversial debates, all of which are vital to democracy's survival.[11]

While basic domestic consensus around how to sustain democracy and also protect citizens' First Amendment rights has broken down, the U.S. no longer even tries to offer the world a coherent or credible vision or strategy for advancing a free and open global internet. Ten years ago, the U.S. Government launched an agenda for advancing freedom online based on the idea that human rights standards apply to the online world as much as they do to our analog, physical world. While the U.S. did not live up to this ideal any better (or worse) than it has generally lived up to its international human rights commitments, at least there was a commitment despite its flawed and often contradictory implementation.[12] Today, as President Trump threatens to ban the video-sharing app TikTok due to its Chinese ownership, the U.S. Government is unable to make a coherent case for why a free and open global internet is even desirable.[13]

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[10] Ibid., "7. Why the Diversity and Free Expression Debate Matters," https://bravespaces.org/7-why-the-diversity-and-free-expression-debate-matters/

[11] David Kaye, *Speech Police: The Global Struggle to Govern the Internet*, (Columbia Global Reports, 2019), pp. 76-81.

[12] Rebecca MacKinnon, "Rebooting Internet Freedom," *New America Weekly*, January 23, 2020, https://www.newamerica.org/weekly/rebooting-internet-freedom/

[13] Brian Fung, "Trump says he will ban TikTok," *CNN Business*, August 1, 2020, https://www.cnn.com/2020/07/31/tech/tiktok-trump-bytedance-sale/index.html

The time has come for a reboot of U.S. internet policy in support of democracy and human rights, at home and around the world. The process begins with some basic questions: What policies affecting online speech, data and information flows are needed to make democracy work for all members of society? What are the necessary actions and circumstances that can help inoculate an open and democratic society from being vulnerable to threats like disinformation?

The next step towards a renewed vision for free speech and democracy is to identify the key factors that make it possible for virtual or physical institutions and platforms to support free speech, tolerance, and social justice as complementary and mutually reinforcing values. Frustratingly, in my search for insights I have found that scholarship, advocacy, and policy conversations about campus speech and online speech are generally conducted in different siloes by different groups of experts who seldom interact (with the notable exceptions of people like Palfrey who have worked across all of these domains). Furthermore, conversations about social media governance in the U.S. policy context tend to be disconnected from conversations about online freedom of expression and human rights in the global context.

This paper thus attempts to connect insights and lessons from three different silos: campus free speech debates; debates about social media governance in the U.S.; and debates about how social media affects global flows of information and opinion. It draws from a range of activities across the fellowship year.

To better understand the issues and debates around free speech, diversity and inclusion on campus, I reviewed key works of scholarship and journalism on the topic. During the Spring semester I worked with students from the International Justice Clinic at the UC Irvine School of Law who interviewed students, faculty, and administrators at UC Irvine, UC San Diego, UC Riverside, and UCLA about the overlap and interplay between campus speech and online speech.[14] I also interviewed most of this year's UC National Center for Free Speech and Civic Engagement fellows, all experts on different aspects of free speech and civic engagement on university campuses.[15]

Regarding how online speech should be governed and designed to support human rights and democratic discourse, this paper draws from commissioned research and convenings that I organized or attended. A faculty workshop at UC San Diego's School of Global Policy and Strategy and a workshop of policy practitioners hosted by New America in Washington DC, both focused on the question of how the U.S. global internet freedom policy agenda could be rebooted by a new Administration in support of democracy and human rights at home and around the world. UC Irvine Law clinic student Houston Davidson produced an internet freedom policy literature review,[16] and internet governance scholar Andrea Hackl conducted a mapping of global civil

[14] Correy Miller, Isabel Steinmetz, and Zhiyan Li, "Memorandum for Rebecca MacKinnon: Intersection of Campus and Online Speech," UC Irvine School of Law, International Justice Clinic unpublished student paper, May 2020.

[15] 2019-2020 Class of Fellows, *University of California National Center for Free Speech and Civic Engagement*, https://freespeechcenter.universityofcalifornia.edu/fellows-19-20/

[16] Davidson, Houston "Internet Freedom Literature Review," (UC Irvine School of Law, International Justice Clinic, unpublished student paper, December 2019.

society and multi-stakeholder internet policy consensus documents.[17] This paper's conclusions were further informed by attendance at an annual meeting of the Freedom Online Coalition, an alliance of governance committed to advancing a free and open internet, held in Accra, Ghana in February 2020.[18] Finally, insights about how the major U.S. social media platforms and other tech companies function and implement their policies domestically and around the world are drawn from my work as director of the Ranking Digital Rights research program at New America.[19]

Synthesizing insights from research, interviews, and meetings over the course of the fellowship year, this discussion paper lays a foundation for future work, including possibly an academic article and several shorter articles for mainstream publication. It may also point to projects in which some of the ideas can be further explored and applied.

The first section offers an analysis of how international human rights standards apply to U.S. campuses as well as social media platforms, primarily in relation to free speech issues. I build on the arguments of UC Irvine Law professor David Kaye, outgoing UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, that international human rights standards should be applied domestically in the U.S. and that U.S.-headquartered internet companies should be held to human rights standards in relation to their domestic impact as well as their global operations.[20] I discuss why international human rights standards and frameworks complement the First Amendment and discuss why leaders of U.S. companies, universities, and communities should use them more proactively to govern venues and platforms for speech in a manner that takes the full range of human rights into account.

This paper's second section draws from the research and conversations conducted during the course of my fellowship year. It addresses three challenges common to universities and internet platforms, if the goal is to protect free speech alongside other fundamental human rights including non-discrimination:

Challenge 1:

In an inequitable and unjust world, "neutral" platforms and institutions will perpetuate and even exacerbate inequities and power imbalances unless they understand and adjust for those inequities and imbalances. This fundamental civil rights concept is better understood by major universities than by those who lead commercial social media platforms that have clear impact on public discourse and civic engagement.

[17] Andrea Hackl, "Internet policy stakeholder consensus documents," unpublished research memo and spreadsheet, completed May 2020.

[18] Program, *Freedom Online Accra* 2020, February 6-7, 2020, last accessed August 3, 2020, https://freedomonlineconference.com/program/program-overview/

[19] *Ranking Digital Rights*, https://rankingdigitalrights.org

[20] United Nations Office of the High Commissioner for Human Rights, "Governments and Internet companies fail to meet challenges of online hate – UN expert," press release, October 21, 2019, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx

Challenge 2:

Rules governing speech, and their enforcement, can be ineffective and even counter-productive unless they are accompanied by values-based leadership and institutional cultures that take context and circumstances of unique situations, individuals, and communities into account.

Challenge 3:

Different types of discourse that serve different purposes require differently designed spaces – be they physical or digital. It is important for communities to be able to negotiate and set their own rules of engagement, design and define their spaces for different types of discourse.

In light of these challenges, the paper's third and final section then addresses the question: what types of policies affecting how people can access and use the internet – at home and around the world – are needed to make democracy work for all members of society? In the paper's remaining sections I discuss proposals for policy frameworks that can better protect human rights and strengthen democracy at home and around the world. I conclude with suggestions for how the University of California system can contribute to the creation of a more diverse and robust information ecosystem supported by a policy environment that protections human rights and strengthens democracy.

I. Applying universal human rights standards[21]

Universal human rights standards complement the First Amendment in ways that can help leaders and communities protect free speech in tandem with other human rights enshrined in international human rights law including privacy, non-discrimination, assembly, and political participation. U.S. institutions and civil rights advocates rarely invoke or refer to the human rights standards enshrined in the Universal Declaration of Human Rights (UDHR) and other international human rights covenants and frameworks in the domestic context. In this section, I will describe how human rights standards and frameworks can help institutions and activists address speech-related policy issues that bump up against the imperatives of dismantling racism and advancing social justice.

Human rights have been integrated into U.S. foreign policy (with varying degrees of emphasis under different administrations) since the creation of the United Nations human rights system, and Congressional ratification of the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination. But as UCI's David Kaye reminds us, Congress worked to ensure that these commitments could not be applicable in U.S. courts without further legislation. "Racism and white supremacy drove the American refusal to enforce human rights at home," he writes, "and that legacy of

[21] This section draws heavily upon the unpublished student memo written by UC Irvine Law International Justice clinic students Correy Miller, Isabel Steinmetz, and Zhiyan Li, advised by David Kaye and Sofia Jaramillo Otoya.

hypocrisy shapes human rights policy today."[22] The executive and legislative branches should act to apply international human rights frameworks to U.S. governance.[23]

Yet even in the absence of government action, American institutions, communities, and advocates can and should use human rights standards and frameworks to advocate for rights, advance social justice, and protect free speech. This paper focuses on two very different types of speech venues: university campuses and social media platforms. They are very different animals, with very different relationships both to the First Amendment and to international human rights standards. The First Amendment applies directly to public universities, which can only restrict the content of speech in narrow situations including inciting imminent lawless action,[24] true threats,[25] obscenity,[26] and defamation.[27] Public universities do, however, have the right to restrict the time, place, and manner in which speech takes place, as long as such restrictions are content-neutral, narrowly tailored to a significant governmental interest, and leave open alternative channels for communication.[28] Private universities are not bound by the First Amendment; they can and do regulate the speech of their members based on their own rules.

Social media platforms, operated by private corporations (or non-profit entities in the case of platforms like Wikipedia which is maintained by a community of volunteers), are free to set rules governing speech within their platforms as they see fit. Section 230 of the Communications Decency Act shields social media companies from liability for user-generated content.[29] A range of politicians, advocates, and legal scholars across the political spectrum have called for rescinding or revising Section 230 for various reasons: some seek to hold companies directly responsible for certain types of illegal activity by users of their services; some aim to prohibit political bias in the way that companies enforce their rules; some seek to force companies to be more aggressive about blocking or removing speech that causes significant social harm, such as disinformation and hate speech, even if it is otherwise protected by the First Amendment.[30] However defenders of Section 230 argue that shielding internet intermediaries from liability for third-party speech is essential to protecting freedom of expression online. Without it, start-up companies and non-profit organizations seeking to create

[22] David Kaye, "America the Unexceptional," *Foreign Policy*, June 10, 2020, https://foreignpolicy.com/2020/06/10/american-exceptionalism-human-rights-democracy-unexceptional/

[23] David Kaye, prepared testimony, *Human Rights at Home: Media, Politics, and the Safety of Journalists*, U.S. Helsinki Commission, July 23, 2020, https://www.csce.gov/sites/helsinkicommission.house.gov/files/Helsinki%20Commission%20Testimony%20David%20Kaye%20230720.pdf

[24] *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

[25] *Virginia v. Black*, 538 U.S. 343 (2003).

[26] *Miller v. California*, 413 U.S. 15 (1973).

[27] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

[28] *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

[29] Daisuke Wakabayashi, "Legal Shield for Social Media Is Targeted by Trump," *The New York Times*, May 28, 2020, https://www.nytimes.com/2020/05/28/business/section-230-internet-speech.html

[30] Matt Bailey, *Op. cit.*

alternatives to the dominant commercial behemoths like Facebook, Google and Twitter would face prohibitive legal risks as well as costs of proactively monitoring and policing users.[31]

Intermediary liability also has serious implications for human rights across the globe. Experts in human rights law, and human rights groups from across the world, have long argued that immunity from liability for internet intermediaries, including social media platforms, is essential for the protection of freedom of expression online.[32] The Ranking Digital Rights program at New America, which I founded in 2013 to evaluate and track internet companies' respect for users' rights, recently published a series of papers arguing that lawmakers can more constructively advance corporate accountability without altering Section 230. Instead of imposing liability on platforms for users' speech, legislation should address platforms' abusive data practices, targeted advertising business models, and anti-competitive behavior that has made it possible for too few platforms to have too much power over information flows and public discourse.[33]

While the First Amendment does not apply to social media platforms, some (though by no means all) U.S.-based internet companies including Facebook, Google, Microsoft, and Twitter have made public commitments to respect users' freedom of expression. Facebook, Google, and Microsoft are members of the Global Network Initiative (GNI), whose members commit to protect and respect users' privacy and freedom of expression when faced with government demands that conflict with international human rights standards.[34] Twitter is not a GNI member but it adheres to a policy framework similar to that articulated by GNI's implementation guidelines.[35] In addressing censorship demands by most governments around the world, these companies have grounded their policies and actions to varying degrees on their users' freedom of expression rights as articulated in Article 19 of the UDHR. Also laudably, these same companies have sometimes stood up for users' privacy rights (as articulated in Article 12 of the UDHR) against government surveillance demands that violate or have the potential to cause violations of users' human rights — including by U.S. government agencies.[36] But they have failed to address the impact of their own business practices on users' human rights. With billions of users around the world they have largely failed to acknowledge and address the human rights implications of their own private content moderation rules and enforcement

[31] Emma Llansó, "Clearing Up Misinformation about Section 230," *Center for Democracy and Technology*, July 11, 2019, https://cdt.org/insights/clearing-up-misinformation-about-section-230/

[32] David Kaye, *Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression*, para 40, A/HRC/32/38.

[33] "It's the Business Model: How Big Tech's Profit Machine is Distorting the Public Sphere and Threatening Democracy," *Ranking Digital Rights*, June 2020, https://rankingdigitalrights.org/its-the-business-model

[34] "Core Commitments," *Global Network Initiative*, https://globalnetworkinitiative.org/core-commitments-2/

[35] "Twitter, Inc.," 2019 Ranking Digital Rights Corporate Accountability Index, Ranking Digital Rights, May 2019, https://rankingdigitalrights.org/index2019/companies/twitter/index/

[36] Justin Sherman, "Russia orders tech platforms to remove coronavirus "fake news"," *New Atlanticist*, Atlantic Council, March 27, 2020, https://www.atlanticcouncil.org/blogs/new-atlanticist/russia-orders-tech-platforms-remove-coronavirus-fake-news/

processes. Nor do they acknowledge or address the full range of human rights harms caused by targeted advertising business models and commercial exploitation of users' personal data.[37]

While private companies are not bound by international treaty law in the same way that governments are, they and other non-governmental entities nonetheless bear human rights responsibilities. The UN Guiding Principles for Business and Human Rights (UNGPs) offer a framework for businesses to respect human rights. Under the UNGPs, the private sector—including all private universities and private online platforms—must address human rights issues and abuses by publishing policy commitments identifying their human rights risks and processes for mitigating them, in addition to implementing an adequate due diligence framework and a grievance process for any abuses. Policy commitments must be approved at the most senior level of the business and communicated publicly so employees can act accordingly.[38] Appropriate due diligence requires a recurring process of assessing potential and actual human rights impacts, tracking responses, and communicating how impacts are mitigated.[39] People whose human rights have been violated by governments or private companies are entitled to an appropriate remedy.[40]

The UNGPs expect companies to take appropriate responsibility for the full range of human rights covered by the UDHR and associated covenants, as further clarified and elaborated as societies and technologies have evolved over the past half century by subsequent human rights council resolutions and guidance by special rapporteurs. For social media platforms, the fundamental rights to free expression (UDHR Article 19) and privacy (UDHR Article 12) must be protected and respected so that people can use technology effectively to exercise and defend other political, religious, economic, and social rights. How social media platforms govern speech and manage personal data has implications for other rights including the right to life, liberty, and security of person (UDHR Article 3), the right to non-discrimination (UDHR Article 7, Article 23); freedom of thought (UDHR Article 18); freedom of association (UDHR Article 20); and the right to take part in the government of one's country, directly or through freely chosen representatives (UDHR Article 21).[41]

It is also notable that Article 19 of both the UDHR and ICCPR take a broader approach to speech and information flows than the First Amendment. In addition to spelling out the right to freedom of opinion and expression, Article 19 includes the right to "seek, receive and impart information and ideas," thereby placing greater emphasis on the right to *receive* information. The UDHR also includes the right to "freedom to hold

[37] Jessica Dheere, "RDR pilot study underscores the need for rights-based standards in targeted advertising and algorithmic systems," *Ranking Digital Rights*, March 16, 2020, https://rankingdigitalrights.org/2020/03/16/rdr-pilot-study-underscores-the-need-for-rights-based-standards-in-targeted-advertising-and-algorithmic-systems/

[38] OHCHR, *Guiding Principles on Business and Human Rights*, HR/PUB/11/04 (2011), note 29, principle 16.

[39] *Id.*, principle 17.

[40] *Id.*, principle 22.

[41] See Nathalie Maréchal, Rebecca MacKinnon, and Jessica Dheere, "Human Rights: Our Best Toolbox for Platform Accountability," in "Getting to the Source of Infodemics: It's the Business Model, A Report from Ranking Digital Rights," New America, May 2020, https://www.newamerica.org/oti/reports/getting-to-the-source-of-infodemics-its-the-business-model/human-rights-our-best-toolbox-for-platform-accountability/ and "CONSULTATION DRAFT Human Rights Risk Scenarios: Targeted Advertising," *Ranking Digital Rights*, February 2019, https://rankingdigitalrights.org/wp-content/uploads/2019/02/Human-Rights-Risk-Scenarios-targeted-advertising.pdf

opinions without interference." Scholars of human rights law point out that this aspect of Article 19, articulated in more detail by the ICCPR, has been largely overlooked because, until the advent of social media platforms, it was unclear how a person's ability to think and form opinions could be directly interfered with.[42] That has changed with the advent of targeted advertising business models that rely on the collection and monetization of personal information, enabling paying customers to target specific people with tailored messages, using algorithmic amplification to maximize the reach of paid content and to capture more people's attention. Legal scholar Evelyn Aswad argues that such business models "undermine individual autonomy"[43] because they involve "disclosure of one's opinions, manipulation in the forming and holding of opinions, and penalization for one's opinions," all of which constitute interference in the right to hold opinions.[44]

The right to non-discrimination is also clearly implicated when such interference targets categories of people who share the same socioeconomic status, religious belief, or ethnicity.[45] Social media platforms have failed to fully respect human rights by failing even to fully recognize — let alone prevent or counter — discrimination and bias.

II. Three challenges common to universities and internet platforms

There is much that people who design and manage social media platforms can learn from American universities' experiences over more than half a century as they have evolved and responded to society's changing expectations of them. There is also much that social media platforms can learn from ongoing campus debates over how to address social injustices while also protecting free speech. While universities and social media represent very different types of spaces for human discourse, they face three common challenges.

Challenge 1:
The pretense of neutrality amplifies bias in an unjust world

In their 2020 book #HashtagActivism, authors Sarah Jackson, Moya Bailey and Brooke Foucault Welles tell the story of how Twitter has been used successfully over the past decade by historically disenfranchised populations to advance grassroots social justice movements. They document how movements such as #blacklivesmatter and #metoo have succeeded in creating "counterpublics," — networks of solidarity that are not possible through mainstream, dominant group media. Yet the authors observe that despite the company's claims of neutrality, "decisions on whether and how to curate content are not neutral." Rather, Twitter's content moderation rules and enforcement processes play out in ways that are "mired in the same racism and

[42] Evelyn Aswad, "Losing the Freedom to Be Human," *Columbia Human Rights Law Review*, Vol. 52, 2020, (February 29, 2020), Available at SSRN: https://ssrn.com/abstract=3635701

[43] Aswad p. 3

[44] Aswad p. 1

[45] "Summary of revisions to the final 2020 Ranking Digital Rights Corporate Accountability Index methodology," *Ranking Digital Rights*, June 2020, pp. 6-7 https://rankingdigitalrights.org/wp-content/uploads/2020/06/2020-methodology-revision-final-summary.pdf

sexism that hashtag activists are addressing in society." [46]

At a time of intense social and political division in American society, fierce debates are raging on university campuses about how to address the ongoing effects of racism throughout all institutions. The most powerful Silicon Valley CEO's have not yet learned the lesson that major American universities have internalized from a half century of battles over their roles and responsibilities in advancing civil rights in this country – not least the University of California, home to the Free Speech Movement launched from Berkeley in 1964.

In an inequitable and unjust world, "neutral" platforms and institutions (that is, perceived to be neutral by those who create and manage them) will perpetuate and even exacerbate injustice if they fail to compensate for society's power dynamics and inequities.

While public university administrators are required to uphold the first amendment rights of faculty and students, they are acutely aware of how society's injustices and power dynamics shape all students' ability to learn and thrive, and affect whether faculty of all backgrounds are genuinely free to pursue independent and sometimes controversial research. Awareness of these dynamics has by no means resolved contentious debates about how to address the power dynamics surrounding campus speech.[47] But at least there is broad understanding that the faculty, students, and staff within educational institutions cannot be managed in a "neutral" generic fashion that fails to recognize and react to who these people are - as individuals and as members of groups who hold varying degrees of power, privilege, vulnerability, or disadvantage. Public universities, and many of the major private universities that take seriously their role in shaping society, also recognize that diversity among those who manage and lead institutions is critical to prevent the perpetuation of society's historic and ongoing injustices by institutions of higher education. The absence of censorship by government officials or university authorities does not automatically result in an environment in which all people feel equally free to speak, or able to be heard. The ease with which people are able to speak without fear is shaped by the power dynamics of the specific context in which they are speaking. Some people are freer, and more empowered, to speak than others. Many have reasons to fear the consequences of speaking; not everybody's speech is equally likely to receive positive affirmation, or amplification, by the communities and institutions within which they speak.[48]

The contexts and roles of universities and social media platforms are obviously very different. Universities are intentional communities that curate their members – faculty hiring and advancement system, staff hiring, student recruitment and admissions. They serve an inherently public interest purpose, and public universities are beholden to taxpayers, not shareholders. Social media platforms, by contrast, are run by corporations driven by the need to maximize profits for shareholders. Platforms like Facebook, Twitter and YouTube have profited from scaling quickly and admitting as much of the world as possible, kicking people out if they break

[46] Sarah J. Jackson, Moya Bailey and Brooke Foucault Welles, *#HashtagActivism: Networks of Race and Gender Justice*, (MIT, 2020) p.191, open access, https://direct.mit.edu/books/book/4597/chapter/211099/Conclusion-HashtagActivism-Here-to-Stay

[47] "Chasm in the Classroom: Campus Free Speech in a Divided America," *Pen America*, April 2, 2019, https://pen.org/wp-content/uploads/2019/04/2019-PEN-Chasm-in-the-Classroom-04.25.pdf

[48] Carlos E. Cortés, "Diversity and Speech Part 5: Interculturalism," *American Diversity Report*, August 29, 2019, https://americandiversityreport.com/category/diversity-and-speech-part-5-interculturalism-by-carlos-e-cortes/

rules that are enforced unevenly. Yet because the leaders of globally ubiquitous and politically influential social media companies also make frequent public claims to be facilitators of public discourse for democracy, they fail to understand — let alone take responsibility for — the human rights harms caused by their business operations.

Leaders of companies that operate the world's most powerful social media platforms have long claimed that their products and services are neutral conduits for human activity. In a 2013 book, The New Digital Age, Google's Eric Schmidt and Jared Cohen (who has worked for both Google and the U.S. State Department as an advisor on internet freedom and counter-terrorism) declared what they saw as the "central truth of the technology industry — that technology is neutral but people are not." Problems arise, they argued, when people blame technology for human shortcomings.[49] Facebook's CEO and founder Mark Zuckerberg repeatedly takes similar positions in his public statements, insisting that Facebook is just a "technology company" that builds tools for people to connect with each other.[50] In 2017, in response to concerns about how his platform had been weaponized for disinformation campaigns in the 2016 presidential election, he insisted that Facebook aims to be a "platform for all ideas and a force for good in democracy."[51] Nick Clegg, Facebook's Senior Vice President of Global Affairs and Communications (and a former UK Deputy Prime Minister) put it in 2019 takes the argument further: "our role is to make sure there is a level playing field…How the players play the game is up to them, not us."[52] More recently, Clegg argued that Facebook merely holds a "mirror to society" and that Facebook's users are ultimately responsible for hate speech and extremism on the platform.[53]

Such claims, as media scholar Jathan Sadowski has astutely pointed out, follow a similar logic to the National Rifle Association's slogan: "guns don't kill people, people kill people."[54] Ironically, the NRA's use of Facebook is a classic example of how Facebook's design and business model privilege the speech of some people over others. Those with superior resources, organization and online marketing acumen can achieve greater visibility by purchasing advertising and boosting organic posts to target messages at specific individuals and groups. The result is anything but a neutral conduit for speech and attention in the American national discourse. Case in point: In September 2019 *The Intercept* reported that for three weeks after mass shootings in El Paso, Texas, and Dayton, Ohio, the NRA's lobbying arm, the Institute for Legislative Action, nearly doubled

[49] Eric Schmidt and Jared Cohen, *The New Digital Age: Transforming Nations, Businesses, and Our Lives*, Vintage; Reprint edition (March 4, 2014) p. 66

[50] Giulia Segreti, "Facebook CEO says group will not become a media company," *Reuters*, August 29, 2016, https://www.reuters.com/article/us-facebook-zuckerberg-idUSKCN1141WN

[51] Mark Zuckerberg, "I want to respond to President Trump's tweet," Facebook Story, September 27, 2017, https://m.facebook.com/story.php?story_fbid=10104067130714241&id=4

[52] Nick Clegg, "Facebook, Elections and Political Speech" Facebook Newsroom, September 24, 2019, https://about.fb.com/news/2019/09/elections-and-political-speech/

[53] Nick Clegg, "Facebook's Open Letter to the Ad World: We Don't Profit From Hate," *Ad Age*, July 1, 2020, https://adage.com/article/digital/facebooks-open-letter-ad-world-we-dont-profit-hate/2265331

[54] Jathan Sadowski, "Google-Eye View: Eric Schmidt and Jared Cohen's "The New Digital Age"," *Los Angeles Review of Books*, July 5, 2013, https://lareviewofbooks.org/article/google-eye-view-eric-schmidt-and-jared-cohens-the-new-digital-age/

its spending on pro-gun advertising on Facebook.[55] Victims of gun violence across the country lack the same marketing and lobbying budget. Under such circumstances, to argue that Facebook serves as a neutral arbiter in a marketplace of ideas about America's most contentious and consequential public policy issues could not be more specious. A business model based on targeted advertising, which prioritizes content that is most likely to go viral and thereby maximize engagement, now shapes the operation and design of one of society's most widely used information platforms. The implications for democracy and human rights are clear.[56]

In July 2020, the final report from a two-year civil rights audit further underscored the toxic consequences of Facebook's pretense of neutrality. While the report's lead author Laura W. Murphy commended the company for agreeing to undertake the audit in response to calls from members of Congress and civil rights groups, she pointed to decisions made by company leadership that have resulted in "significant setbacks for civil rights." Zuckerberg's "selective view of free expression" justified policies that exempt politicians from content moderation rules applied to all other users, in addition to a further policy decision not to fact-check political advertisements. While the company has repeatedly invoked its commitment to protect freedom of speech as justification such decisions (even though the First Amendment does not apply to Facebook and its rules ban many types of content that is protected under both the First Amendment and arguably Article 19 of the UDHR), Zuckerberg has effectively granted broader freedom of speech to privileged and powerful people than to ordinary citizens who must abide by community guidelines or risk having their postings deleted or accounts deactivated. In particular, the company's decision to allow posts by President Trump that violated the company's policies against the propagation of hate speech and facilitation of voter suppression "exposed a major hole in the company's understanding of civil rights." In making these decisions, Zuckerberg made no meaningful efforts to seek out civil rights expertise, with results that Murphy described as "devastating" and a "terrible precedent."[57]

Facebook has failed to conduct a thorough assessment, in accordance with the UN Guiding Principles, of the full range of ways that the company's policies and practices affect human rights. Murphy's civil rights audit concludes that Facebook's failure to elevate a commitment to non-discrimination to the same level as its commitment to freedom of speech must have been a deliberate choice:

> *For a 21st century American corporation, and for Facebook, a social media company that has so much influence over our daily lives, the lack of clarity about the relationship between those two values is devastating. It will require hard balancing, but that kind of balancing of rights and interests has been part of the American dialogue since its founding and there is no reason that Facebook cannot harmonize those values, if it really wants to do so.*[58]

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[55] Sam Biddle, "NRA ramped up Facebook advertising immediately after mass shootings in El Paso and Dayton," *The Intercept*, September 16, 2019, https://theintercept.com/2019/09/16/nra-facebook-ads-mass-shootings/

[56] Alexis C. Madrigal, "The False Dream of a Neutral Facebook," *The Atlantic*, September 28, 2017, https://www.theatlantic.com/technology/archive/2017/09/the-false-dream-of-a-neutral-facebook/541404/

[57] Laura W. Murphy, "Facebook's Civil Rights Audit – Final Report," published by Facebook, p. 9, https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf

[58] *Ibid.*, p.12

In any community, platform, or institution, disputes around the relationship between freedom of speech, diversity and inclusion — and where the ideal balancing point should be — are longstanding and inevitable. Indeed, the tension between these values comes most sharply to the fore when non-discrimination is elevated to the same level of importance as freedom of speech. The challenge for those who design spaces for discourse, as well as those who manage and lead them, is to embrace the tension and work in good faith to prevent one value from overwhelming others in ways that infringe upon peoples' rights.[59]

A 2019 Knight-College Pulse study of attitudes toward free expression on college campuses identified precisely such tensions over the extent to which free speech should be protected at the expense of inclusivity. While more than half of students surveyed believed that "hate speech" should be protected under the First Amendment, "students who belong to historically marginalized groups — African American students, gender nonconforming students, and gay and lesbian students — are far more sensitive to unrestricted free speech, particularly hate speech" [60] Interviews conducted in March and April 2020 on four UC campuses by UCI Law clinic students found a similar dynamic at play. "Despite widespread agreement that the university should not overly restrict speech either on campus or online," the interviewers found, "there appears to be a trend of ensuring all speech is respectful toward fellow members of the campus community."[61] One professor "acknowledged the importance of creating safe spaces for some groups but also advocated for brave spaces—spaces that respectfully bring people together in order to challenge their beliefs and critical thinking skills."[62] Interviews described campus environments in which norms and ground rules for speech in different contexts are subject to constant debate, negotiation, and adjustment.

Social media platforms must also expect perpetual tension and negotiation over how and where to set the balancing point between freedom of expression and other human rights including non-discrimination. But as Murphy pointed out, harms result when there is no negotiation because the institution or platform is designed and operated in accordance with an interpretation of free speech formulated by leaders who by all measures do not represent or actively seek input from a diverse range of communities and lived experiences — and who are willfully and arrogantly blind to how their purported neutral platform affect society, in ways that are far from neutral.

Such blind spots are exacerbated by attempts to apply and enforce rules without sufficient leadership around values and norms that enable communities to take specific circumstances of situations and individuals into account when trying to ensure that the intent of rules does not fall victim to unintended consequences. Interviews with students, faculty and administrators across four UC campuses, and with most of the UC National Center for Free Speech and Civic Engagement fellows point to the dangers of excessive focus on rules and their enforcement.

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[59] Suzanne Nossel, *Dare to Speak: Defending Free Speech for All* (HarperCollins, 2020)

[60] "Free Expression on College Campuses: A College Pulse Study Commissioned by the Knight Foundation," *College Pulse*, May 2019, p. 3, https://kf-site-production.s3.amazonaws.com/media_elements/files/000/000/351/original/Knight-CP-Report-FINAL.pdf

[61] Miller, Steinmetz, and Li, *Op. cit.* pp 1-2.

[62] *Ibid.*, p. 12

The next two challenges discussed in this section examine how lessons learned from university campuses can inform efforts to envision, design, and govern digital spaces for human discourse that are more likely to support outcomes that advance human rights, social justice, and democracy.

Challenge 2:
Rules and enforcement are inadequate without strong leadership and cultural norms

UC Berkeley professor john a. powell reminds us that law and rules are necessary but insufficient: "Because we are moral beings, our actions cannot stand solely on legal footing. We must operate, teach, and practice from a set of shared beliefs that honor our commitment to a society built on belonging."[63] In her 2020 book Dare to Speak, PEN America CEO Suzanne Nossel similarly argues that the "affirmative right to speak out" is "a liberty that cannot be fully guaranteed in law and must be enabled by society through education and opportunity." Leaders and institutions committed to free speech must make efforts to maximize open discourse, lowering obstacles and broadening participation.[64] This includes addressing harassment, disinformation, and other types of speech can chill and deter participation. But measures to address such problems can be counterproductive without an overall "climate that protects open discourse writ large."[65]

UC National Fellows interviewed for this project all agreed that universities are struggling to set, implement, and enforce appropriate rules that protect the First Amendment rights of students and faculty while also ensuring that members of vulnerable and minority groups can learn and live in an environment that is not hostile and traumatizing. Universities' experience with campus speech issues suggests that while rules and guidelines are needed, particularly in relation to the appropriate time, place, and manner for certain types of speech, it can be dangerous to focus too heavily on rules and enforcement in addressing problems of discrimination and injustice. More than one fellow observed that while members of vulnerable groups are demanding rules and procedures to establish and protect safe spaces, enforcement can have unintended consequences for students who depend on financial aid and work-study jobs, staff, and even faculty who are economically insecure. Furthermore, UC National Fellows were not surprised to learn that interviews conducted by UCI Law clinic students on the four UC campuses identified a pattern whereby senior tenured faculty are much more comfortable exercising their First Amendment right to make controversial and even offensive statements in the classroom or on social media, while non-tenured faculty and adjuncts are much more careful about what they say due to job insecurity.[66]

Certain types of comments by instructors or fellow students can create an environment in which some students feel targeted or triggered, making it more difficult for them to learn and engage in classroom discussion. But how does a university constructively address this discrimination problem without infringing on freedom of speech? PEN America's program director for Campus Free Speech Jonathan Friedman has cautioned that campus "bias response systems" through which students can report incidents of bias or hate in

[63] powell, *Op. cit.*

[64] Nossel, *Op. cit.* p. 6

[65] Nossel, *Op. cit* p. 8

[66] Miller, Steinmetz, and Li, *Op. cit.* p. 18

the classroom can chill genuinely good-faith discussions of controversial issues and incidents if they are implemented without great sensitivity to the complex socioeconomic power dynamics at play on a campus.[67] Universities' enforcement of social media policies can also be problematic even when they are created with the intention of fostering an inclusive and supportive campus environment for all students. While constituencies from the left of the political spectrum are more likely to support the creation of social media policies, UC National Fellow John Wilson, co-editor of Academeblog.org, who has tracked university enforcement of social media use policies for faculty, "the victims are overwhelmingly on the left and attacked by right-wing critics."[68] Another fellow observed in an interview that "the moment you start to regulate even if out of benevolent intent, it can be abused."

In interviews, other UC National Fellows agreed with Friedman who said he is concerned that "ways of thinking and speaking are not only being criticized, but penalized" on some campuses, when what is really needed in many cases is "forgiveness, understanding, and empathy."[69] UCLA's Nikita Gupta, whose fellowship focused on helping student affairs staff respond appropriately to polarizing incidents on campus, observed that when staff apply rules and generic guidelines about what to do in response to different types of situations, the result can chill participation and discourse by students who feel unsupported. "This is not about rules and knowing what to do when it happens," Gupta said. "It's about leadership. How do you protect and speak up for the people you're trying to serve?" The key is for campus leaders to actively foster conversations about the impact of speech, educating people about how their speech affects others.[70] As Emerson Sykes of the ACLU put it, "you may have a First Amendment right to say something racist but people also have a right to call you a jerk" – and for leaders committed to civil rights, an obligation to do so if the speech in question has made others feel demeaned or silenced.[71] Fellows all agree that better guidance and training is needed to help campus leaders encourage productive discourse about tough issues. Spoma Jovanovic, Professor of Communication Studies at University of North Carolina, Greensboro, believes that leadership is key. "When somebody goes out on a limb to assert or counter an incident of harassment, have their back. Jump in." Students and faculty need better education on "very intentional" tactics for "how to speak up and support one another."[72]

Thus while rules have their place, experts on campus speech issues agree that excessive focus on rules and enforcement is counterproductive if one's goal is to protect free speech while also fostering inclusive and respectful discourse on campus. Yet public debates about speech-related issues on social media platforms

[67] Jonathan Friedman, "When Diversity and Inclusion Clash with Free Speech—and Why they Don't Have To," *Higher Ed Connects*, February 15, 2020, https://higheredconnects.com/diversity-and-free-speech

[68] John K. Wilson, "The Right to Social Media," in Foundation for Individual Right in Education (FIRE) Faculty Conference Papers 2019 (forthcoming, 2020 at https://www.thefire.org/resources/free-speech-resources-for-faculty/)

[69] Jonathan Friedman (Director of PEN America's Campus Free Speech Project), in conversation with the author via Zoom, April 24, 2020.

[70] Nikita Gupta (Director of the GRIT Coaching Program at UCLA), in conversation with the author via Zoom, April 24, 2020.

[71] Emerson Sykes (Staff Attorney for the American Civil Liberties Union), in conversation with the author via Zoom, May 1, 2020.

[72] Spoma Jovanovic (Professor of Communication Studies at the University of North Carolina, Greensboro), in conversation with the author via Zoom, April, 24, 2020.

have focused heavily on the need for better rules, and stronger, more consistent and thorough enforcement. For example, the "Change the Terms" coalition, comprised of many of the same groups behind the *#stophateforprofit* advertising boycott, has published a detailed set of recommendations for companies should amend their policies in order to curb "hateful activities" on their platforms [73] Others are calling on Facebook and others to devote a much larger proportion of their resources to hire and train more effective content moderators.[74] A range of bipartisan and partisan proposals are mounting in Congress to reform the law to hold companies liable to varying degrees for harmful content appearing on their platforms.[75]

Yet there is little evidence that Facebook is capable of enforcing rules – no matter how they are improved or sharpened – without making mistakes that will silence civic engagement, particularly speech that is edgy and whose context requires understanding of complex subcultures, or obscure and fast-evolving dialects and slang. Events of June 2020 illustrate the problem. In response to a boycott by advertisers concerned about having their brands appear alongside hate speech on the platform, combined with mounting bipartisan threats of regulation, Facebook announced a host of new measures to address their concerns. Measures included flagging false and hateful content posted by public figures as "newsworthy" and applying its rules against hate speech to advertising content – measures that civil liberties groups in the coalition of civil rights groups who organized the boycott deemed insufficient.[76] The company also announced it was redoubling efforts to enforce its existing policies against hate speech: in late June it shut down hundreds of groups, pages, and accounts associated with the extremist white supremacist "boogaloo" movement, although journalists continued to identify content that remained online.[77]

But while Facebook has failed to enforce its rules consistently and comprehensively, its efforts to ramp up enforcement have been rife with errors and collateral damage. A classic example played out shortly after Facebook reported with fanfare that it had deleted hundreds of accounts linked to white supremacist hate groups.[78] Many Facebook users who identify as being part of an anti-racist skinhead subculture, including that of Jamaican-born Neville Staple of The Specials, a well-known UK ska band, suddenly found themselves unable to log in, their accounts deactivated for having allegedly violated community standards. After Staple's and other cases were reported in the media, Facebook acknowledged that it had made an error, apologized,

[73] "Adopt the Terms," *Change the Terms*, https://www.changetheterms.org/terms, accessed August 3, 2020.

[74] Gilad Edelman, "Stop Saying Facebook Is 'Too Big to Moderate'," *WIRED*, July 28, 2020, https://www.wired.com/story/stop-saying-facebook-too-big-to-moderate/

[75] Zoe Bedell and John Major, "What's Next for Section 230? A Roundup of Proposals," *Lawfare*, July 29, 2020, https://www.lawfareblog.com/whats-next-section-230-roundup-proposals

[76] "Stop Hate for Profit Update to Advertisers," *Stop Hate For Profit*, June 29, 2020, https://www.stophateforprofit.org/update-to-advertisers

[77] Dara Kerr, "Facebook bans boogaloo groups, but some smaller groups remain," CNet, June 30, 2020, https://www.cnet.com/news/facebook-bans-boogaloo-groups-but-some-smaller-groups-remain/

[78] David Klepper, "Facebook removes nearly 200 accounts tied to hate groups," *AP News*, June 5, 2020, https://apnews.com/91c1868557ba6e88e32b2607b26724d6

and restored the accounts.[79] The algorithms designed to flag problematic accounts were too blunt and too broad to take into account the wide variety of people and views that skinhead culture contains.

Facebook's response to concerns about how the platform enforces its rules has been to establish a Content Moderation Oversight Board, filled with distinguished international experts on free speech and human rights, whose mandate is to make independent rulings about how Facebook's terms of service should be applied in specific difficult cases. The Oversight Board will also make recommendations for how the rules should be amended and enforcement improved.[80] It remains to be seen, however, whether this newly-established body will accomplish much more than confirm a frustrating reality: no matter how many people are employed to review content or how sophisticated its algorithms become, Facebook's content moderation systems and processes are simply not capable of handling the endless complexities and geographies of the entire world's cultures and languages.[81] Be that as it may, companies like Facebook actually have an incentive to keep civil rights advocates and policymakers focused on questions of speech-related rules and their enforcement. Such a focus distracts from the more fundamental conversation about why the American public is so dependent on a handful of platforms whose business models are not particularly compatible with civil rights, or with thoughtful approaches to expanding civic participation.

Many activists believe that better solutions lie in digital spaces beyond Facebook and the other commercially dominant social media platforms. The authors of *#HashtagActivism* suggest that the answer lies in designing and organizing a better future by "expanding the public sphere" beyond a few commercial platforms and developing "critical interventions and guidelines for responding to the weaponization of networks."[82] As university leaders need better tools to support those affected by harmful speech, leaders who engage in online communities need better tools to support those who have been affected by online harassment, hate speech, and disinformation — and to fight back against those who are able to weaponize such content with the help of commercial platforms' algorithms and behavioral targeting systems. More fundamentally, the public sphere must be expanded — society must find a way to support the creation and development of a much more diverse range of digital platforms, virtual venues for discourse that can be custom tailored and designed by communities with different needs, priorities, and objectives.

Challenge 3:
Communities need agency in shaping their spaces for discourse and learning

As the COVID-19 pandemic has driven teaching, learning, and all other campus activities online, UC community members and UC National Center for Free Speech and Civil Engagement fellows interviewed for this project all agreed that the dominant commercial platforms are ill-suited for the many types of interactions

[79] Sarah Emerson, "Facebook Deplatforms Hundreds of Anti-Racist Skinheads and Musicians," *OneZero*, June 10, 2020 https://onezero.medium.com/facebook-deplatforms-hundreds-of-anti-racist-skinheads-and-musicians-6b57bef204e1

[80] Oversight Board, https://www.oversightboard.com accessed August 3, 2020.

[81] Casey Newton, "Facebook's independent oversight board could be overwhelmed by the challenge," *The Verge*, May 7, 2020, https://www.theverge.com/interface/2020/5/7/21249154/facebook-oversight-board-membership-announcement-history-challenges

[82] Jackson, Bailey, and Welles, Op. cit., "Afterword," p. 204, https://direct.mit.edu/books/book/4597/chapter/211101/Afterword-Ethics-Backlash-and-Access-in-Twitter

needed the full range of conversations that people on a university campus need to have. Different types of interactions for different purposes require differently designed spaces – be they physical or digital. It was striking that even for "digital natives," social media platforms were described as being unfit for purpose, or requiring unsatisfactory tradeoffs.

Students interviewed across four UC campuses by UCI law clinic students were selected because they are active in campus civic organizations, or involved with projects related to free speech and civic engagement. A common perspective was that social media platforms are of limited value for student leaders or organizations seeking to bring people together for constructive conversations. Interviewees tended to describe social media as a place for disagreement that does not support successful academic discussions, community problem solving, or political debate. Instead, students said they mainly use social media platforms as tools for planning, organizing, and promoting activities. A common reason that students gave for this problem was the difficulty of interpreting context online, in contrast to in-person interactions, where it is easier for individuals to infer social context.[83]

With classes and student life forced completely online by COVID-19 in the middle of the Spring 2020 semester, student interviewees worked to create private, safe spaces for interaction among people who know one another in real life, using private Facebook groups as well as chat apps like Slack and Discord.[84] Even so, interviewees reported discomfort about having become completely dependent on online platforms for discussing controversial topics, retaining a strong preference for holding such discussions offline because face-to-face discussions are typically more civil and respectful.[85] The confidentiality of online discussions in zoom video conferences, slack chats or e-mail groups can more easily be violated when bad-faith participants — or uninvited eavesdroppers who breach platforms' digital security settings — make transcripts or recordings, or forward confidential communications.

Facebook shapes how students organize protests and interact with broader social and political movements through its design, behavioral targeting for paid content, recommendation algorithms, terms of service, and enforcement mechanisms. This situation is far from ideal. Several UC National Center for Free Speech and Civil Engagement fellows stressed in interviews how important it is for communities to be able to negotiate and set their own rules of engagement; and for members of a community to be able to design and define their spaces for different types of discourse. Physical campuses offered many opportunities for agency and control by students as well as faculty over different types of conversations and interactions. Going online, everyone now depends on commercial platforms — from Zoom, to Slack, to Google Docs — that were not designed with the needs of university communities in mind. Campuses must adapt their activities to the tools; there is little opportunity for co-evolution or co-creation of spaces for learning, discourse, or activism.

UC National Fellow Nikita Gupta asked how platforms can be re-molded and re-imagined to meet the community's needs. "Social media emerged and now we are finally understanding it. Now we need to wrangle

[83] Miller, Steinmetz, and Li, *Op. cit.*, p. 13.

[84] Miller, Steinmetz, and Li, p. 13

[85] Miller, Steinmetz, and Li, p. 19

it and shape it to make it more helpful for humanity: we need to be able to use it for dialogue. We need room for learning and education" and we need to "restructure how we use the platforms — and even what they are."[86] American University's Lara Schwartz observed that campus communities need platforms that work better for brainstorming, with visual cues. "We need to shift the paradigm from combat to collaboration." Universities need to facilitate the creation of spaces that enable joint inquiry and brainstorming. Problem-solving conversations, she points out "have to start with a session of exploration to determine the nature of the problem." Platforms need to facilitate such conversations.[87]

One of the UC National Fellows pointed to an innovative open source platform run by a non-profit organization called Living Room Conversations, which according to its website is a "conversational model developed by dialogue experts in order to facilitate connection between people despite their differences, and even identify areas of common ground and shared understanding."[88] When a new group is set up, the platform proactively offers resources about human rights and civil liberties, in addition to guides about intentional conversations. It is not set up for activism but rather for intentional dialogue. Other tech-savvy educators known for early adoption and experimentation with technology such as Howard Rheingold[89] point to open source tools like BigBlueButton[90] with whiteboard and brainstorming capabilities, and Discourse for real-time and asynchronous discussion.[91] But these tools are not well known, and for most educators and students require levels of institutional support that would require universities to make substantial new investments into tech support and even software development, ideally with the active participation of students and faculty.

Addressing the broader question of how digital communications technologies should be designed, operated and governed in service of democracy, MIT's Ethan Zuckerman argues that as long as policy solutions center around holding Facebook, Twitter, and Google accountable to the public interest, "the solution space we consider for combatting mis-/disinformation, polarization, and promotion of extremism is overly constrained. Our solutions cannot be limited to asking these platforms to do a better job of meeting their civic obligations – we need to consider what technologies we want and need for digital media to have a productive role in democratic societies." The answer is what Zuckerman calls "digital public infrastructure."[92]

Zuckerman proposes a one percent tax on "highly surveillant advertising," by which he means the type of targeted advertising used by companies like Google and Facebook "that incorporates user tracking, combines demographic and psychographic data to create user profiles, or targets using factors other than a user's stated intentions and geography." If targeted advertising were to be taxed in such a way, $1-2 billion could easily be

[86] Gupta, *Op. cit.*

[87] Lara Schwartz (Director of American University's Project on Civil Discourse), in conversation with the author via Zoom, April 17, 2020.

[88] https://www.livingroomconversations.org/

[89] Tweet by Howard Rheingold, https://twitter.com/hrheingold/status/1285323429659328512, accessed August 3, 2020.

[90] https://bigbluebutton.org/

[91] https://www.discourse.org/about

[92] Ethan Zuckerman, "The Case for Digital Public Infrastructure," *Knight First Amendment Institute at Columbia University*, January 17, 2020, https://knightcolumbia.org/content/the-case-for-digital-public-infrastructure

generated for a fund that would support the development of digital platforms whose purpose is to serve the public interest.[93] Zuckerman also points out that platform development and community-building must be accompanied by research that helps us understand how the various digital platforms are affecting communities, and society more broadly. Because all platforms require varying degrees of rules development and enforcement, organizations and communities require research as well as coaching on techniques to broaden participation and reduce the silencing effect of online harassment. One example of how such research and coaching can work can be found at Cornell University's Citizens and Technology Lab, which works with Reddit and other online communities to help volunteer moderators design rules and interventions that help to reduce harassment and bolster the effectiveness of fact-checking.[94]

Such programs could be duplicated and expanded across the country (and potentially in other countries with supportive policy environments) in a systematic way. Universities, in collaboration with the cities and towns where they are located, are an ideal starting point for incubating and piloting new types of platforms for shared learning, community-building, and problem solving. These initiatives could help to incubate new businesses as well as non-profits across the country. Platform innovations would also benefit public interest journalism by enabling communities to develop new mechanisms for reporting and storytelling to inform community deliberation, local policymaking and activism.

III. Policy responses

A policy environment that supports civil rights objectives and is compatible with human rights standards is essential to ensure that the digital public sphere evolves in a way that genuinely protects free speech and advances social justice. One example of a strong policy framework that meets those objectives can be found in a set of policy recommendations, aimed at the next U.S. Presidential Administration and Congress, recently published New America's Open Technology Institute (OTI), which works closely with a broad coalition of advocacy organizations working in the fields of civil rights, media justice, and public interest technology policy.[95]

OTI's recommendations can be grouped into four basic categories that describe the types of legal and regulatory reforms necessary to support an equitable and rights-protecting online public sphere:

- **Access:**
  Internet access must be universally available and affordable as a basic condition for public participation and economic opportunity; net neutrality rules must be restored and enforced to ensure equal access to audiences by non-profits, small startups, and multinational media behemoths.

[93] *Ibid.*

[94] https://citizensandtech.org/

[95] 2020 Party Platform Recommendations, Open Technology Institute, July 13, 2020, https://newamericadotorg.s3.amazonaws.com/documents/OTIs_2020_Party_Platform_Recommendations.pdf

- **Free speech:**
  Platforms must remain shielded from liability for user speech; at the same time platforms must be required to be transparent about how content is moderated, prioritized, targeted, and amplified.
- **Privacy and data protection:**
  The right to private and secure communications must be protected through strong privacy law and other legal provisions that reinforce the right to offer and use encryption[96] technologies; surveillance laws must be reformed to ensure sufficient accountability and oversight.[97]
- **Competition and innovation:**
  Strong anti-trust laws must be enforced to increase competition and decrease the power of a small handful of companies over the national public discourse; platform inter-operability[98] should be incentivized so that people can share content and exchange messages between different platforms that perform similar functions; and data-portability requirements[99] should enable people to move their content and personal data from one platform to another.

These policy elements are consistent with the types of human rights-protecting internet policy principles that human rights organizations and global coalitions civil society groups from across the world have been calling for — for over fifteen years.

1. Embedding human rights standards into the global digital public sphere

As the global adoption of the internet reached critical mass around the turn of the century, new questions emerged about how fundamental rights should apply online, and what the shifting roles of states, private companies and civil society mean for citizens' human rights in the online environment. In December 2003 and November 2005, governments, private sector representatives, and other stakeholders including civil society and technical experts came together for UN-sponsored World Summit for the Information Society (WSIS) meetings in Geneva and Tunis. Two of the outcome documents of these meetings, the Geneva Declaration of Principles and the Tunis Agenda for the Information Society, provided a first roadmap for the information society.[100] While these documents make references to fundamental rights, a report by the Association for Progressive Communications (APC), the world's oldest global digital rights organization, noted that the WSIS left several critical issues related to human rights unaddressed, including the question of how the internet and

[96] Danielle Kehl, "Encryption 101," *Slate*, February 24, 2015, https://slate.com/technology/2015/02/what-is-encryption-a-nontechnical-guide-to-protecting-your-digital-communications.html

[97] Danny O'Brien, "EU Court Again Rules That NSA Spying Makes U.S. Companies Inadequate for Privacy," *Electronic Frontier Foundation*, July 16, 2020, https://www.eff.org/deeplinks/2020/07/eu-court-again-rules-nsa-spying-makes-us-companies-inadequate-privacy

[98] Becky Chao and Ross Schulman, "Promoting Platform Interoperability," *Open Technology Institute*, May 13, 2020, https://www.newamerica.org/oti/reports/promoting-platform-interoperability/

[99] Ross Schulman, "A Tech Intro to Data Portability," *Open Technology Institute*, June 15, 2018, https://www.newamerica.org/oti/blog/tech-intro-data-portability/

[100] "World Summit on the Information Society, First Phase: 10-12 December 2003" World Summit on the Information Society, https://www.itu.int/net/wsis/geneva/index.html and "Tunis Agenda for the Information Society," November 18, 2005, WSIS-05/TUNIS/DOC/6(Rev. 1)-E, https://www.itu.int/net/wsis/docs2/tunis/off/6rev1.html

other information technologies may shift relations between states and their citizens.[101] A key theme that emerged from the WSIS process was that a multi-stakeholder approach should be taken to the governance of the internet, with governments, private actors and civil society all having a role to play in decision-making processes related to the development of norms, standards, and processes that shape the internet's global functioning. The WSIS process also conceived the Internet Governance Forum (IGF), organized annually by the United Nations and a multi-stakeholder advisory council, as a forum for multi-stakeholder dialogue on issues related to the governance of the internet.

Civil society organizations from around the world have thus played a critical role in shaping debates on human rights at the Internet Governance Forum and other UN-sponsored fora. At the same time, independent civil society-driven initiatives and coalitions have come together over the past two decades to address emerging human rights issues in the online environment. These efforts have yielded consensus declarations, charters, and lists of principles, containing policy recommendations that apply international human rights standards to the online environment – some focusing on specific issues, while others address a broader policy spectrum. An analysis of the policy positions advocated by ten such initiatives reveals a striking overlap with OTI's internet policy recommendations.[102]

Several of the policy documents analyzed for this paper offer broad global policy frameworks for human rights-compatible internet governance, regulation, and design. One of the earliest civil society initiatives to offer principles for applying human rights standards to the internet was the APC Internet Rights Charter[103] published in 2006 by the Association for Progressive Communications in collaboration with advocates and organizations from Europe, Africa, Asia and Latin America. Five years later in 2011 The Charter of Human Rights and Principles for the Internet was published after three years of drafting by a multi-stakeholder working group affiliated with the IGF was led by civil society, including NGOs and academic experts from the Global South.[104] More recently, the 2019 Contract for the Web was produced through another multi-stakeholder consultation and drafting process organized by the World Wide Web Foundation.

Other documents are regional in nature, including those that elevate the concerns of Global South stakeholders struggling to address economic inequality, colonial legacies, and authoritarianism and/or weak government in many of their own countries. The African Declaration on Internet Rights and Freedoms[105], a Pan-African initiative first launched in 2014 at the Internet Governance Forum in Istanbul, provides a human rights-protective roadmap for internet policy on the African continent. The Toronto Declaration on the Right to Equality and Non-discrimination, first introduced at the RightsCon Toronto conference in May 2018, was

[101] David Souter, "Whose Summit? Whose Information Society? Developing countries and civil society at the World Summit on the Information Society," Association for Progressive Communications, 2007, https://www.apc.org/sites/default/files/whose_summit_EN.pdf

[102] See Appendix for full list of the ten consensus documents. Detailed analysis and mapping of the contents of global internet policy documents was conducted by Andrea Hackl with support from the UC National Center for Free Speech and Civic Engagement.

[103] APC Internet Rights Charter, APC, November 2006, https://www.apc.org/en/pubs/about-apc/apc-internet-rights-charter

[104] "IRPC Charter" Internet Rights and Principles Coalition, https://internetrightsandprinciples.org/charter/ accessed August 5, 2020.

[105] African Declaration on Internet Rights and Freedoms, November 2014, https://africaninternetrights.org/en/file/216/download

developed by the global digital rights NGO Access Now and Amnesty International with participation from conference participants representing a range of Global South-based organizations, seeks to address issues related to equality and discrimination in the context of governments' and private companies' development and use of machine learning systems.[106] The Charter of Fundamental Digital Rights of the European Union, drafted by a group of German journalists, academics and politicians under the invitation of the Zeit Stiftung and first published in 2016, responds to what the drafters perceive as gaps and shortcomings in the EU regulatory landscape and seeks to establish a universal framework for fundamental rights in the digital environment for EU citizens.[107]

A third category of documents addresses specific issue areas with broad support from organizations across the world. The Necessary & Proportionate Principles, first launched in 2013 and revised in 2014, lay out a set of thirteen principles that provide a framework for governments to ensure their surveillance activities comply with international human rights standards.[108] The 2015 Manila Principles on Intermediary Liability reflect a broad consensus position that online intermediaries (including social media platforms) should not be held liable for third party content, and lay out guidelines for governments and internet companies to ensure that their requests and actions around content moderation comply with international human rights frameworks.[109] Other civil society efforts have emerged that more particularly address the role that both governments and companies should play in strengthening encryption standards. Most recently the Global Encryption Coalition[110] was launched in April 2020 by a coalition of several dozen civil society groups from around the world, dedicated to defending encryption against policy efforts to ban or weaken technology that enables secure end-to-end communication.

Added together, these global civil society consensus documents reflect broad, long running civil society demand for policy environments consistent with OTI's policy proposals: regulations must not only protect freedom of expression and privacy as human rights. They must enable universal access to the internet as a prerequisite for full and equitable participation in the public discourse. They also reflect a strong demand that governments and companies be held appropriately accountable, and be subject to transparency and oversight requirements, to ensure that they make and live up to clear commitments to protect human rights, regardless of frontiers or technology used. Governments must not bar people from using encryption and related secure communications technologies that protect political dissent and investigative journalism – upon which the exercise of human rights and the survival of democracy ultimately depend.

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[106] "The Toronto Declaration: Protecting the right to equality and non-discrimination in machine learning systems," May 2018, https://www.accessnow.org/cms/assets/uploads/2018/08/The-Toronto-Declaration_ENG_08-2018.pdf

[107] Charter of Fundamental Digital Rights of the European Union, (Revised version of 2018) https://digitalcharta.eu/wp-content/uploads/DigitalCharter-English-2019-Final.pdf

[108] Necessary & Proportionate On the Application of Human Rights to Communications Surveillance, Electronic Frontier Foundation, Final Version May 2014 https://necessaryandproportionate.org/principles/

[109] Manila Principles on Intermediary Liability, March 2015, website https://www.manilaprinciples.org/principles ; full document, March 24, 2015, https://www.eff.org/files/2015/10/31/manila_principles_1.0.pdf

[110] Global Encryption Coalition, last updated July 7, 2020, https://www.globalencryption.org/

Furthermore, expansion of the digital public sphere needs a policy environment that enables, supports, and incentivizes greater diversity of platforms and communication services. While the U.S. and other major democracies worked together through much of the past decade to advance the common policy goal of a free and open global internet, they failed to make or implement clear commitments to protect other human rights on the internet, including privacy and non-discrimination. They also lacked the political will to integrate domestic and foreign policies into a coherent approach to internet policymaking grounded in international human rights standards. Had they done so, one can only wonder whether many countries might have experienced different political trajectories over the past five years, and how the world today might be different as a result.

2. Rebooting U.S. internet policy

In January 2010, Secretary of State Hillary Clinton delivered her seminal "internet freedom" speech at the Newseum in Washington D.C., elevating the promotion of a free and open global internet as a priority for U.S. foreign policy. In a speech the following year, as the Arab Spring uprisings against dictatorships played out across the Middle East and North Africa, she invited "countries everywhere to join us in a bet we have made—a bet that an open Internet will lead to stronger, more prosperous countries."[111]

Many critics, (myself included) voiced concerns that U.S. "internet freedom" diplomacy as articulated at the time lacked honesty about the United States' own domestic shortcomings in respecting and protecting human rights online. Critical observations were also made about the role that companies and policymakers in Western democracies themselves were playing in the development and expansion of censorship and surveillance systems around the world. Yet it is important to acknowledge that despite its many inconsistencies, U.S. internet freedom policy nonetheless drove a decade of policy activity across a range of spheres promoting the notion that people have rights to freedom of expression and privacy online that are to be defended and protected. It also supported civil society advocacy, research, and provided a focal point for broader policy debates about the internet's future.[112]

Among the major U.S. initiatives was the 2011 launch, with the Netherlands, of the Freedom Online Coalition (FOC) along with thirteen other countries who shared a "commitment to respect human rights and fundamental freedoms online."[113] While the FOC received little press attention and has gone largely unnoticed even by many foreign policy opinion leaders, it did coordinate significant diplomatic activity that laid down some baseline principles for internet policymaking, particularly during Clinton's tenure in the first term of the Obama administration. Most notably, FOC members played a central role in getting a resolution passed in the UN Human Rights Council, affirming that human rights apply online as well as offline.[114] While this resolution

[111] Secretary of State Hillary Rodham Clinton Remarks on Internet Freedom, February 15, 2011, speech archived by the Electronic Frontier Foundation, https://www.eff.org/files/filenode/clinton_internet_rights_wrongs_20110215.pdf

[112] Rebecca MacKinnon, "12: In Search of "Internet Freedom" Policy," *Consent of the Networked: The Worldwide Struggle for Internet Freedom* (Basic Books, 2012) and MacKinnon, "Rebooting Internet Freedom," *Op. cit.*

[113] "History," The Freedom Online Coalition, accessed August 3, 2020, https://freedomonlinecoalition.com/about-us/history/

[114] Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, A/HRC/RES/32/13 (2016).

has been honored by governments no better than various governments tend to honor other human rights commitments, its passage has nonetheless empowered global stakeholders to flag online censorship and surveillance as human rights violations when such measures have failed to meet a "necessary and proportionate" test under human rights law.[115] As the FOC gradually expanded its membership, its main focus has been around diplomatic policy coordination behind the scenes at the United Nations and in multilateral negotiations and processes especially related to trade and cybersecurity, to ensure that internet-related human rights concerns are at least considered. FOC members also give financial support to an emergency fund for "digital defenders" – online activists who face persecution in their home countries.[116]

FOC member countries worked actively to counter efforts by other governments that supported a doctrine of "internet sovereignty" led by China and Russia. Their vision of internet governance espouses that it is the "sovereign rights of states" to control and shape all networked technologies that operate within or across territory and entities over which they have legal jurisdiction. Such a vision has no room for the use of technology to challenge state power, and thus has great appeal to authoritarian governments and incumbent demagogues around the world seeking to stifle opposition and retain power.[117] But a fatal flaw of the U.S.-led internet freedom doctrine was that the diplomatic efforts were not backed up by meaningful efforts by member governments to align their domestic policy, law and regulation with human rights standards. A further flaw was that the emphasis on a global free flow of information helped to maximize U.S. internet platforms' global dominance without any meaningful interrogation of – let alone effort to check – the ways that they exacerbate power imbalances and inequities in many societies, with harmful implications for human rights.

Social media has been an important tool for many other movements against political repression and authoritarianism. In countries where the press is heavily censored, social media platforms that operate globally are sometimes the only vehicle for independent journalism and activism that can reach significant audiences.[118] Yet the dominance of a small number of U.S.-based internet platforms in a vast range of societies around the world – from Germany to Myanmar to Egypt and Tunisia – has created vulnerabilities to disinformation and extremist movements everywhere. In countries where platforms owned by Facebook and Google dominate, communities have no say in how the U.S. tech giants handle their data, shape their access to information, or police their speech. Populist autocrats have become increasingly successful in using social media to discredit and even silence critics by organizing supporters to threaten and even attack them. For example in the Philippines, social media has been used by the Duterte regime to sway public opinion against

[115] See for example "France: Analysis of draft hate speech bill," *Article 19*, July 3, 2019, https://www.article19.org/resources/france-analysis-of-draft-hate-speech-bill/

[116] "How We Work," *Freedom Online Coalition*, accessed August 3, 2020, https://freedomonlinecoalition.com/how-we-work/

[117] Joe Uchill, "Russia and China get a big win on internet "sovereignty"," Axios, November 21, 2019, https://www.axios.com/russia-china-united-nations-internet-sovereignty-3b4c14d0-a875-43a2-85cf-21497723c2ab.html

[118] Sarah Repucci, "Media Freedom: A Downward Spiral," and Adrian Shahbaz, "Why Social Media Are Still Worth Saving," *Freedom and the Media 2019*, Freedom House, June 2019, https://freedomhouse.org/sites/default/files/2020-02/FINAL07162019_Freedom_And_The_Media_2019_Report.pdf

journalists who investigate the regime, framing them as criminals.[119] In Myanmar, Facebook (which is so dominant that many people in the country have never used any other internet-related service) has been used by members of the military leadership to foment genocide against the Muslim Rohingya minority.[120]

Digital rights advocates based in the Global South have for years raised concerns about a new form of digital colonialism through which data is extracted from users in poor countries to generate profits for rich country companies and their shareholders. As researchers with the India-based NGO IT for Change concluded in a recent report, the failure by states and international bodies to govern data as an economic resource has enabled "the private capture and enclosure of data resources" extracted from people in countries unable to reap the economic benefits of such data.[121]

The result is that communities are dependent on platforms with no agency to shape how they are governed, but whose leaders are able to leverage power dynamics that Facebook amplifies to their political advantage. In *Digital Democracy, Analogue Politics: How the Internet Era is Transforming Politics in Kenya* Nanjala Nyabola recounts how Cambridge Analytica was hired by the campaign of incumbent president Uhuru Kenyatta to influence voters on Facebook for his successful if highly contentious and controversial 2017 reelection bid. The story she recounts reinforces the findings of Facebook's independent civil rights audit in the United States: freedom of expression is distorted when people can pay to manipulate social media discourse, and win elections. "The lesson from Kenya in 2017," she writes, "is that detaching political technology from social contexts can have devastating effects."[122]

Promoting a free and open internet has helped to facilitate the global dominance of U.S.-based internet companies. While the global free flow of information is without question necessary for the protection and enjoyment of human rights, the FOC nations' failure to address the human rights harms caused by what Harvard scholar Shoshana Zubov has dubbed surveillance capitalism[123] has helped to entrench digital colonialism. "The solution to constraints on democracy in the developing world therefore cannot be more technology," Nyabola concludes, especially not technology for profit." Top-down deployment of platforms from Silicon Valley without engaging communities that use the technology produces results that do not necessarily benefit those communities even if the technology was intended to benefit them. The rules and norms of discourse must be shaped and driven by a clear understanding of a community's power dynamics and existing inequities. Only then can a platform's design and governance be adjusted to ensure that the

[119] Craig Silverman, "The Philippines Was A Test Of Facebook's New Approach To Countering Disinformation. Things Got Worse," *Buzzfeed News*, August 7, 2019, https://www.buzzfeednews.com/article/craigsilverman/2020-philippines-disinformation

[120] Paul Mozur, "A Genocide Incited on Facebook, With Posts From Myanmar's Military," *The New York Times*, October 15, 2018, https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html

[121] Anita Gurumurthy, Deepti Bharthur, Nandini Chami with Jai Vipra and Ira Anjali Anwar, "Platform Planet: Development in the intelligence economy," IT for Change, 2019, https://itforchange.net/sites/default/files/add/Report-Platform%20Planet_Development_in_the_intelligence_economy.pdf, p. 92.

[122] Nanjala Nyabola, "Chapter 8: Politics, Predators, and Profit: Ethnicity, Hate Speech, and Digital Colonialism," in *Digital Democracy, Analogue Politics: How the Internet Era is Transforming Politics in Kenya (African Arguments)*, (Zed Books, 2019), pp. 157-178.

[123] Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power*, (PublicAffairs, 2019).

technology will not serve to amplify and strengthen those who are already powerful, offering them a sophisticated channel through which to abuse their power further.

The lessons of Myanmar, Kenya, and the civil rights audit in Facebook's home market all lead to the same conclusion. If control over data is what gives platforms their power and that power has come to hinder the advancement of human rights, the U.S. Government has a duty to step up and protect the human rights not only of its own people. The future of human rights in much of the world depends heavily on whether the U.S. can regulate how social media platforms collect and monetize data, and can at the same time enact policies outlined in the previous section that maximize competition and support decentralized innovation.

The next U.S. Administration should commit to work with global allies to foster a more diverse and decentralized information sphere — not only for the sake of human rights around the world but in order to prevent a further exacerbation of global inequality. FOC governments should publicly recognize that the human rights they have committed to protect involve much more than freedom of expression or freedom to connect – but also other rights discussed earlier in this paper including freedom of information and non-discrimination. They must commit to advance policy frameworks in their own countries that support the expansion of the digital public sphere by a diverse range of organizations.

As I have long argued, internet freedom starts at home.[124] At a workshop titled "Rebooting global internet policy for democracy" held under the Chatham House rule on December 10, 2019 at New America in Washington DC, approximately 30 participants from a range of organizations focused on domestic and global internet policy, press freedom, and human rights, all agreed that U.S. global internet policy will suffer from a deficit of legitimacy and credibility with global stakeholders unless and until the U.S. can implement domestic policies that support human rights and strengthen democracy at home.[125] At a time of polarization, pandemic, economic crisis and social upheaval, we face the daunting political challenge of developing and building consensus around domestic policies that genuinely support free speech and social justice as complementary and mutually reinforcing objectives. Meeting this challenge requires a clearly articulated vision and strong leadership.

Conclusion:
How universities can drive innovation in support of free speech and social justice

At the 2018 UN Internet Governance Forum in Paris, French President Emmanuel Macron lamented that the global internet is dominated by two polar opposite approaches to governance: an authoritarian state-dominated "hegemonic" Chinese internet, and a "Californian form of internet" dominated by the major U.S.-based internet platforms which are largely un-unregulated. He called for a "new path where governments, along with Internet players, civil societies and all actors are able to regulate properly" in support

[124] Rebecca MacKinnon, "Internet Freedom Starts at Home," *Foreign Policy*, April 3, 2012, https://foreignpolicy.com/2012/04/03/internet-freedom-starts-at-home/

[125] "Rebooting global internet policy for democracy," invitation-only workshop convened under Chatham House Rule, December 10, 2019, noon-5pm, New America, Washington DC.

of democracy and innovation.[126] But what does it mean to "regulate properly?" While Europe has taken a more heavy-handed approach to regulation, freedom of expression has taken a back seat to other objectives and priorities.[127] This paper has addressed many of the ways that human rights and democracy are ill-served by the "Californian internet," a mode of internet governance that many Americans no longer support for good reasons.[128] But a new path, one that truly protects human rights and helps democracy better serve all citizens, will not be brought to us top-down by the president of France, or the U.S., or any other world leaders.

The new path requires a strong, shared commitment by governments and the private sector to protect human rights. Their commitment cannot be mere lip service; we need viable and effective legal and other mechanisms through which people can hold governments and companies accountable. The governance, design, and management of venues and platforms for speech — online or otherwise — must be grounded in a clear understanding of the UDHR's Article 19, which encompasses not only the freedom to speak, but the right to access information and formulate opinions without interference. The commitment must include all human rights, including privacy, non-discrimination, assembly, the right to political participation, the right to security of person, as well as basic economic and social rights.

The policy principles outlined in the previous sections of this paper offer a clear path for protecting and enabling people's ability to exercise their human rights through the internet and related technologies. The next U.S. Administration and Congress — regardless of the outcome in November 2020 — will not rapidly or easily embrace a fully coherent national and global internet policy agenda that reflects all of those principles. Powerful people in business and government will continue to view technology, and technology policy, as a tool to advance and protect a range of interests and policy objectives. Human rights will be a competing objective among many, even for those who are committed to human rights.

In 2012 I published a book in which I argued that a human rights-compatible internet ultimately needs to be advanced by a global digital rights movement as broad and deep as the global environmental movement.[129] The ten consensus documents described in this paper and listed in the Appendix are products of a global digital rights movement that has grown exponentially over the past decade, with strong participation by U.S. advocacy organizations. Some participants in this movement have held government positions, and a few have held elected office. Authors and signatories of the ten documents also include people from the world of academic research and scholarship, many of whom are connected to universities and think tanks that are part of the Global Network of Internet and Society Research Centers.[130]

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[126] Speech by M. Emmanuel Macron, President of the Republic at the Internet Governance Forum, Unesco – Paris, *Élysée*, November 12, 2018, https://www.elysee.fr/en/emmanuel-macron/2018/11/12/speech-by-m-emmanuel-macron-president-of-the-republic-at-the-internet-governance-forum

[127] Jennifer Daskal, "Internet Censorship Could Happen More Than One Way," *The Atlantic*, September 25, 2019, https://www.theatlantic.com/ideas/archive/2019/09/europe-gives-internet-speech-reprieve/598750/

[128] Shira Ovide, "Big Tech's Backlash Is Just Starting," *The New York Times*, July 30, 2020, https://www.nytimes.com/2020/07/30/technology/big-tech-backlash.html

[129] Rebecca MacKinnon, "Building a Citizen-Centric Internet," *Consent of the Networked*, *Op. cit.*, pp. 221-248.

[130] Network of Centers, http://networkofcenters.net/ accessed August 3, 2020.

The digital rights movement faces the daunting challenge of convincing lawmakers to advance an internet policy agenda that both protects free speech and upholds civil liberties. Success is by no means assured. In the meantime, universities, public interest groups, and communities around the country have an opportunity to undertake the hard work of building the institutions and platforms for speech and discourse that serve the public interest first and foremost.

The COVID-19 pandemic has forced universities largely online for the foreseeable future. The fundamental problem of economic disparity and unequal internet access has laid bare a basic barrier to instruction and learning, let alone civic engagement. Students, faculty, and administrators are all struggling to make the digital tools readily available to them meet their needs with mixed and often frustrating results. We lack control over how platform features are designed, how information and access is policed and prioritized within them, and what types of interactions the platforms are built to enable or encourage.

Universities and local communities can do much more to leverage our power as voters and consumers to press the companies that run commercial platforms to make changes that better protect our members' rights and serve our needs. We can send clearer messages to our elected representatives about the policy environments that we require in order to ensure that the digital public sphere serves the public interest. There is also a need for a wider variety of digital platforms and models for private design and governance of online discourse.

The challenges and resources needed to develop and maintain such platforms are indeed significant. But universities can play a leading role in supporting the development of new spaces for discourse and learning that meet their own needs, protecting free speech while promoting diverse and respectful participation. A new field of public interest technology – modeled after public interest law – is already starting to be built with the goal of training technologists who work in the public interest.[131] Innovative hubs for civic technology are also emerging across the country. The New York-based nonprofit Civic Hall has created a useful Civic Tech Field Guide that indexes many civic tech projects, with a subsection devoted to "engagement tech" that many student activists may find useful in thinking about how civic engagement must evolve in the pandemic era when physical engagement is restricted.[132]

The University of California participates in the Public Interest Technology University Network through its founding member UC Berkeley as well as UC Santa Cruz.[133] To date, network members have been focused

[131] Natasha Singer, "Top Universities Join to Push 'Public Interest Technology'," *The New York Times*, March 11, 2019, https://www.nytimes.com/2019/03/11/technology/universities-public-interest-technology.html; Susan Crawford, "Why Universities Need 'Public Interest Technology' Courses," WIRED, August 22, 2018, https://www.wired.com/story/universities-public-interest-technology-courses-programs/; "5 reasons you might be a Public Interest Technologist," Ford Foundation, October 23, 2018, https://www.fordfoundation.org/ideas/equals-change-blog/posts/5-reasons-you-might-be-a-public-interest-technologist/; Bruce Schneier, Public-Interest Technology Resources, https://public-interest-tech.com/ accessed August 3, 2020.

[132] "Engagement tech," Civic Tech Field Guide, https://civictech.guide/engagement/ accessed August 3, 2020.

[133] "About the Public Interest Technology University Network," *New America*, https://www.newamerica.org/public-interest-technology/university-network/about-pitun/ accessed August 3, 2020; "Public Interest Technology at UC Berkeley," Berkeley School of Information, https://www.ischool.berkeley.edu/public-interest accessed August 3, 2020; Jennifer McNulty, "UC Santa Cruz joins national "tech for social good" network," UC Santa Cruz News Center, February 21, 2020, https://news.ucsc.edu/2020/02/benner-network.html

largely on public interest objectives and problems in the world outside of the campuses themselves, working with local communities and governments. But at this time of crisis and reinvention in academia there is an urgent need — indeed and opportunity — to build projects and programs that solve challenges around free speech and inclusion for academic teaching and research, as well as campus and community discourse. Departments and centers involved with public interest technology work across the UC system could collaborate with faculty and students to address their specific frustrations and problems.

Visionary national and global leadership for a supportive policy environment would be ideal. But while we are waiting for that leadership to emerge, we must at the same time take greater responsibility for our own digital future. Few if any institutions are better suited to lead this effort than the University of California, birthplace of the Free Speech Movement, and before that, home to the loyalty oath controversies.[134] For seven decades, the UC system has grappled with the never-ending challenges of living up to a Constitutional duty to protect free speech while also providing all members of its campus communities with supportive and respectful environments for learning, civic engagement, and academic inquiry – even around controversial and unpopular subjects. Companies and other organizations that run online platforms — as well as the lawmakers seeking to regulate them – have much to learn from these experiences. Universities in turn have much to learn about how to better design, deploy, and govern (and participate in the governance of) technology that better serves their needs for learning, research, engagement and discourse.

There will always be disagreement about how to balance different rights and interests, which is why ensuring broad participation in the creation of venues and platforms for speech, as well as in the governance, and management of them, will be vital to democracy's survival in the internet age. Universities, and the communities with which they are interconnected, are an ideal laboratory for experimentation and innovation in shaping the future of digital platforms for public discourse, learning, and collaboration that can help to strengthen democracy.

[134] "August 25, 1950: 31 University of California Faculty Fired in Loyalty Oath Controversy," *Today in Civil Liberties History*, https://todayinclh.com/?event=31-university-of-california-faculty-fired-in-loyalty-oath-controversy (accessed August 4, 2020).

APPENDIX:

List of global digital rights consensus documents

- **2006 - APC Internet Rights Charter.**
  Published by the Association for Progressive Communications in collaboration with advocates and organizations from Europe, Africa, Asia and Latin America, this comprehensive document covers seven themes: internet access for all; freedom of expression and association; access to knowledge; shared learning and creation; privacy, surveillance, and encryption; governance and encryption; and awareness and realization of rights.
  https://www.apc.org/en/pubs/about-apc/apc-internet-rights-charter

- **2011 - The Charter of Human Rights and Principles for the Internet.**
  Produced by a multi-stakeholder working group led by civil society, including NGOs and academic experts from the Global South who were members of the Internet Rights and Principles Dynamic Coalition organized by participants of the UN Internet Governance Forum.
  https://internetrightsandprinciples.org/charter/

- **2013 (revised 2014) - Necessary & Proportionate Principles.**
  Thirteen principles provide a framework for governments to ensure their surveillance activities comply with international human rights standards. Drafted by a global coalition of groups including the Electronic Frontier Foundation and Privacy International, the Principles were first introduced in 2013, and endorsed by organizations and experts from around the world.
  https://necessaryandproportionate.org/

- **2014 – NetMundial Principles.**
  An outcome document from the Multistakeholder Meeting on the Future of Internet Governance which took place in April 2014 in São Paulo, these principles emphasize the importance of human rights online with a focus on internet access, freedom of expression, and protections from unlawful surveillance. https://netmundial.org/principles

- **2014 - African Declaration on Internet Rights and Freedoms.**
  This Pan-African initiative provides a human rights-protective roadmap for internet policy on the African continent, signed by more than 300 individuals and organizations. It addresses thirteen issue areas, including those covered by the APC charter with additional emphasis on marginalized groups, gender equality, right to due process, and cultural/linguistic diversity.
  https://africaninternetrights.org/en/declaration

- **2015 - Manila Principles on Intermediary Liability.**
  Launched in 2015 at RightsCon Manila, these principles were drafted by an international coalition of human rights organizations that include the U.S.-based organization the Electronic Frontier Foundation, the British organization Article 19 and the Centre for Internet & Society based in

Bangalore, and were endorsed by organizations from around the world. They focus on how online intermediaries should not be held liable for third party content and lay out guidelines for governments and internet companies to ensure that their requests and actions around content moderation comply with international human rights standards. https://www.manilaprinciples.org/principles

- **2016 (revised 2018) - Charter of Fundamental Digital Rights of the European Union.** Drafted by a group of German initiators that include journalists, academics, and politicians and first published in 2016, the twenty-three articles of this document seek to establish a more universal framework for fundamental rights in the digital environment for EU citizens. It addresses the responsibilities of both state and non-state actors and has been endorsed by 75 supporters representing diverse sectors including academia, civil society and the media. https://digitalcharta.eu/sprachen/

- **2018 - Toronto Declaration.** Protecting the right to equality and non-discrimination in machine learning systems. This document addresses issues related to equality and discrimination in the development and use of machine learning systems. Prepared by Amnesty International and Access Now, it was endorsed by Human Rights Watch and Wikimedia Foundation when launched at RightsCon 2018 in Toronto. https://www.accessnow.org/the-toronto-declaration-protecting-the-rights-to-equality-and-non-discrimination-in-machine-learning-systems/

- **2019 - Contract for the Web.** This document seeks to inform global debates on digital rights and addresses the responsibilities of governments, companies and citizens in preserving a free and open web. It was drafted by a multi-stakeholder process led by Tim Berners Lee's World Wide Web Foundation with a range of civil society organizations around the world, Wikimedia, some governments, and also several private companies. Over 160 organizations endorsed it upon launch. https://contractfortheweb.org/

- **2020 - Global Encryption Coalition.** This coalition is organized around a short statement about the responsibilities of governments and companies in upholding one basic principle: "encryption is a critical technology that helps keep people, their information, and communications private and secure." Global civil society members include the APC, the Colombia-based organization Fundación Karisma and the Citizen Lab based in Toronto. https://www.globalencryption.org/