FOREWORD: ESSAYS ON HATE SPEECH†

In the wake of three recent decisions, one by the United States Supreme Court dealing with punishment for hate crimes,¹ two by the Canadian Supreme Court upholding limitations on pornography and hate speech,² interest in campus antiracism measures has revived. In the late 1980s, a number of U.S. campuses responded to a wave of racist incidents by enacting student conduct codes forbidding certain types of racist acts or expression.³ Then, federal courts struck down codes in effect at the Universities of Michigan⁴ and Wisconsin.⁵ A short time later, the Supreme Court invalidated a St. Paul, Minnesota hate speech ordinance under which a white youth had been convicted of burning a cross on the lawn of a black neighbor.⁶ Most institutions that had been considering hate speech rules put them on hold.⁷

But the Supreme Court decision in Wisconsin v. Mitchell,⁸ upholding enhanced sentences for defendants convicted of racially motivated crimes,
coupled with recent scholarship on the feasibility of tort-based regulation,\(^9\) has spurred renewed interest. Today, many authorities, including university administrators, scholars of color, and even a few detractors of hate speech rules, believe that properly drafted prohibitions could now be put in place.\(^{10}\) But will they be? In the short run at least, there is room for doubt.

Each of the two essays that follows addresses an aspect of the ways we resist change in this area of law and policy. The first, by Richard Delgado and Jean Stefancic, begins by pointing out a stubborn indeterminacy in the way we portray the two core values at stake in the hate speech controversy: community (equal dignity) and liberty (freedom of speech). These values are in tension, not merely because gains for the one seem to come at the expense of the other, but for a deeper reason: the two values operate together to demarcate the boundaries of a single social feature, the interpretive community.\(^{11}\) Changing the way we think and speak about an outsider group requires a paradigm shift and, in essence, the creation of a new interpretive community. Society is reluctant to make such changes, or even imagine them, and judges even more so.

Even if reformers succeed in persuading others to take seriously the possibility of passing rules requiring more respectful treatment of minorities, many will resist such rules. The second essay, by Richard Delgado and David Yun, addresses a vital mechanism of that resistance, namely the deployment of paternalistic objections to proposed reform. In this approach, opponents of hate speech rules simply announce that there is no dichotomy, no tension at all. Equality and freedom are really not opposed; if minorities truly understood their situation they would not be clamoring for hate speech rules, but would instead embrace the civil libertarian/free speech position.

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11. See Essay I, notes 27-32 and accompanying text (defining and explaining the term "interpretive community").
Both forms of resistance—the inability concretely to imagine a new world; and the insistence that minorities, if they knew what they should, would not want to live in it—serve as powerful brakes on the movement toward changing our attitudes about limiting speech. But reformers are not entirely without tools. The first essay outlines means by which reformers may break through the conceptual blinders that characterize this controversy. The second provides arguments to refute the paternalistic objections arrayed against reform. Hate speech regulations are not beyond our grasp constitutionally or psychologically, nor are they unwise, but reformers must use all devices, rhetorical and legal, if they are to bring about change.