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Critical Race Theory: Essays on Hate Speech: Foreword

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In the wake of three recent decisions, one by the United States Supreme Court dealing with punishment for hate crimes, two by the Canadian Supreme Court upholding limitations on pornography and hate speech, 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. Then, federal courts struck down codes in effect at the Universities of Michigan and Wisconsin. 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. Most institutions that had been considering hate speech rules put them on hold.

But the Supreme Court decision in Wisconsin v. Mitchell, upholding enhanced sentences for defendants convicted of racially motivated crimes,

2. Regina v. Butler, 89 D.L.R. 4th 449 (Can. 1992) (upholding an antipornography law in face of objection that it limited speech protected by the Canadian charter); Regina v. Keegstra, 3 S.C.R. 697 (Can. 1990) (upholding a federal hate speech law against allegation that it impermissibly limited speech). In these decisions, the Canadian Supreme Court applied a harm-based rationale to uphold laws restricting both pornography and hate speech. Butler, 89 D.L.R. 4th at 450; Keegstra, 3 S.C.R. at 699. Because the Canadian charter's speech provision is patterned after the United States' conception of free speech, and the doctrinal system of each country uses some type of balancing test to determine the legitimacy of restraints placed on constitutional liberties, these Canadian decisions rekindled interest in similar speech regulation in at least some quarters in the United States.
3. For a discussion of some of these incidents at campuses including The Citadel, Dartmouth College, Columbia University, University of California at Berkeley, Stanford University, University of Massachusetts, University of Michigan, and University of Wisconsin, see infra notes 4-10 and accompanying text; Richard Delgado, Campus Antiracism Rules: Constitutional Narratives in Collision, 85 Nw. U. L. Rev. 343, 349-58 (1991).
5. UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991) (striking down systemwide code as vague and overbroad). For further discussion of these decisions, see infra notes 17-25 and accompanying text.
7. Richard Delgado & Jean Stefancic, Overcoming Legal Barriers to Regulating Hate Speech on Campuses, CHRON. HIGHER ED., Aug. 11, 1993, at B1; Telephone Interview with Michael Olivas, Professor of Law, Director, Institute of Higher Education Law & Governance, University of Houston (April 26, 1993) [hereinafter Olivas interview].
coupled with recent scholarship on the feasibility of tort-based regulation, 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. 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. 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.