

July 1991

## Cultural Critique and Legal Change

Charles W. Collier

*University of Florida Levin College of Law, [collier@law.ufl.edu](mailto:collier@law.ufl.edu)*

Follow this and additional works at: <https://scholarship.law.ufl.edu/flr>



Part of the [Law Commons](#)

---

### Recommended Citation

Charles W. Collier, *Cultural Critique and Legal Change*, 43 Fla. L. Rev. 463 (1991).

Available at: <https://scholarship.law.ufl.edu/flr/vol43/iss3/3>

This Article is brought to you for free and open access by UF Law Scholarship Repository. It has been accepted for inclusion in Florida Law Review by an authorized editor of UF Law Scholarship Repository. For more information, please contact [kaleita@law.ufl.edu](mailto:kaleita@law.ufl.edu).

## CULTURAL CRITIQUE AND LEGAL CHANGE

Charles W. Collier\*

In *Emerging Centrist Liberalism*,<sup>1</sup> Mark Kelman locates postwar "centrist" legal discourse within a universe of competing and evolving political traditions. After considering the legal process school, law and economics, and Critical Legal Studies, Kelman concludes that "[u]ltimately . . . I suspect that . . . the Critical Race Theorists and feminists pose[ ] a considerably more interesting foil for the centrists."<sup>2</sup> In this comment I shall explore that proposition by analyzing in more detail a few main contributions of these newer legal traditions and constructing (or imagining) centrist responses to them.

Mark Kelman has previously written illuminatingly,<sup>3</sup> if controversially,<sup>4</sup> on what might be termed the "reach" of the criminal law. He has developed a highly suggestive and useful conception of the "time frame," an interpretive construct through which we view (or decide in advance how to view) intent, voluntary acts, criminal events, and the defendant's status and personal history.<sup>5</sup> Kelman's thesis is that such time frames are artificially or arbitrarily and perhaps politically constructed, *before* the stage of rational legal argumentation, and usually at the expense of the defendant.<sup>6</sup> Here issues regarding the "reach" of the law arise, such as: Should the criminal law consider a murder defendant's "age, grade, intelligence, experience, and training,"<sup>7</sup> his "rotten social background,"<sup>8</sup> or her history of being a "battered woman"?<sup>9</sup>

---

\*Associate Professor of Law, University of Florida. B.A. 1972, Reed College; M.A. 1973, M. Phil. 1975, Ph.D. 1978, Yale University; J.D. 1985, Stanford Law School.

I should like to thank Diana Tennis for providing valuable research assistance.

1. Kelman, *Emerging Centrist Liberalism*, 43 FLA. L. REV. 417 (1991).

2. *Id.* at 437.

3. See Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981).

4. See Schwartz, *With Gun and Camera Through Darkest CLS-Land*, Appendix 1, 36 STAN. L. REV. 413, 456-61 (1984).

5. Kelman, *supra* note 3, at 593-600.

6. See *id.* at 591-673.

7. See *United States v. Calley*, 22 C.M.A. 534, 547 (1973) (Darden, C.J., dissenting).

8. See *United States v. Alexander*, 471 F.2d 923, 957-65 (D.C. Cir. 1973) (Bazelon, C.J., dissenting).

9. See L. WALKER, *THE BATTERED WOMAN SYNDROME* (1984); Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA.

Kelman's discussion of the reach of the criminal law could be extended in a number of directions, and a similar analysis could be applied to the "cultural critiques" of the Critical Race Theorists and feminists discussed in *Emerging Centrist Liberalism*. These cultural critiques often impart legal significance to conduct and areas of life that had hitherto been considered beyond the reach of the law and thus beyond its sanctions and protections. The archetypical centrist response is to ask: Should legal rights and liabilities be recognized in these new domains? If so, can legal remedies and reforms be designed to protect and enforce those rights and liabilities (without thwarting other, more important social goals and aspirations)?

The main contribution of the new left academic revisionist critiques to political and legal discourse is to shift attention from economy to culture. The cultural critiques are "most convincing[ ]," writes Kelman, when they emphasize that "people genuinely suffer from cultural assaults as much as from material deprivation."<sup>10</sup> This new emphasis is a needed corrective to the work of traditional leftists, who

focused monomaniacally on poverty as the privileged form of politically cognizable pain. . . . In fact, in materially prosperous economies, we may not always be able to draw sharp distinctions between financial want and cultural assault. Relative deprivation may jeopardize one's sense of self-worth or belonging in the community more than one's capacity to survive or live free from physical pain.<sup>11</sup>

This emphasis on "cultural assault" might usefully shape the agenda for a brave new world in which a more "expansive understanding of individual need[s]"<sup>12</sup> reflected the displacement, if not disappearance, of material deprivation as the dominant form of individual need. In our world, however, the latest economic data point rather strikingly to the exact opposite prospect. The most recent Census Bureau reports show that "[t]he poverty rate rose sharply last year and the incomes of Americans declined."<sup>13</sup> Indeed, the incidence of poverty today is "higher than at any time in the 1970's."<sup>14</sup> Perhaps most noteworthy

---

L. REV. 379 (1991); Note, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619 (1986) (authored by David L. Faigman).

10. Kelman, *supra* note 1, at 437.

11. *Id.*

12. M. WALZER, SPHERES OF JUSTICE 84 (1983).

13. DeParle, *Poverty Rate Rose Sharply Last Year as Incomes Slipped*, N.Y. Times, Sept. 27, 1991, at A1, col. 3 (national ed.).

14. *Id.* at A11, col. 2.

is the fact that this decline in real income was not at all the result of "relative deprivation" in Kelman's sense;<sup>15</sup> in fact, "differences *narrowed* in the earnings between blacks and whites and between men and women."<sup>16</sup> These and similar data,<sup>17</sup> along with persistent reports of ever-rising homelessness,<sup>18</sup> indicate clearly that cultural deprivation has not somehow eclipsed economic need as the dominant social, political, or legal issue.

To invoke these economic realities, however, is not to deny that "needs are not merely physical phenomena."<sup>19</sup> They are perceived, reflected upon, and interpreted "as" needs only within a complicated human context of historically, politically, and culturally constituted assumptions, priorities, collective values, shared understandings, and expectations.<sup>20</sup> Thus, however the true state of "need" may be narrowly defined in economic terms, the "cultural construction" of socially recognized deprivation remains interesting and important in its own right.

The new left academic revisionist analysis of "cultural assault," conducted under the rubric of "words that wound," presents the centrist with important perplexities regarding the reach of the law. The two cultural critiques that Kelman mentions in this context are Delgado, *Words That Wound*<sup>21</sup> and Matsuda, *Public Response to Racist Speech*.<sup>22</sup>

15. See Kelman, *supra* note 1, at 437 (discussing "relative deprivation").

16. DeParle, *supra* note 13, at A11, col. 1 (emphasis added).

17. See, e.g., MCFATE, JOINT CENTER FOR POL. & ECON. STUD., POVERTY, INEQUALITY AND THE CRISIS OF SOCIAL POLICY (1991); O'Hare, Pollard, Mann & Kent, *African Americans in the 1990s*, 46 POPULATION BULL., No. 1, at 27-33 (Washington, D.C.: Population Reference Bureau, Inc., July 1991).

18. See, e.g., Morgan, *Bulldozing Their Shanties, New York Evicts Squatters*, N.Y. Times, Oct. 16, 1991, at B12, col. 1 (national ed.); Purdum, *Wanted: Homes for Homeless Shelters*, N.Y. Times, Oct. 13, 1991, at E16, col. 4 (national ed.); Dugger, *Benefits of System Luring More Families to Shelters*, N.Y. Times, Sept. 4, 1991, at A1, col. 1 (national ed.); *Mayor's Aide for Policy on Homeless Quits*, *id.* at A20, col. 1 (referring to the "growing frustration" that city officials have experienced in coping with "a homeless population that has reached crisis proportions"); Wilkerson, *Shift in Feelings on the Homeless: Empathy Turns into Frustration*, N.Y. Times, Sept. 2, 1991, at A1, col. 2 (national ed.).

19. M. WALZER, *supra* note 12, at 76.

20. See *id.* at 66-67, 82.

21. Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982) [hereinafter Delgado, *Words that Wound*]; see also Delgado, *Campus Antiracism Rules: Constitutional Narratives in Collision*, 85 NW. U.L. REV. 343 (1991) [hereinafter Delgado, *Campus Antiracism Rules*] (examining universities' regulation of racist speech).

22. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

Richard Delgado's critique focuses on racial insults as a form of cultural assault. Delgado has exhaustively canvassed the social science literature on the effects of verbal racism<sup>23</sup> and proposed a new tort action to combat racial insults.<sup>24</sup> It is clear that at least some of the racial insults described by Delgado fall within the recognized "fighting words" exception to First Amendment protection<sup>25</sup> (though it should be noted that the Supreme Court has not upheld a conviction on the basis of that doctrine since its inauguration in 1942).<sup>26</sup> But much of what Delgado considers actionable can by no stretch of the legal imagination be termed "fighting words," at least as the Court has understood that term.<sup>27</sup> Thus, for example, in Delgado's scheme "boy" might be actionable, "depending on the speaker's intent, the hearer's understanding, and whether a reasonable person would consider it a racial insult in the particular context."<sup>28</sup>

The breadth of Delgado's perspective is breathtaking: Racial insults "are in no way comparable to . . . 'mere insult[s].' Racial insults are different qualitatively because they conjure up *the entire history of racial discrimination in this country*. . . . Thus the defendant is, in effect, a joint tortfeasor along with *all others, past and present, who have perpetuated racism*."<sup>29</sup> And even when the plaintiff cannot show "tangible harms," reasons Delgado, "juries should be free to set damages, within reasonable limits, in order to deter other wrongdoers."<sup>30</sup> Furthermore, "punitive damages may often be appropriate."<sup>31</sup>

23. See Delgado, *Words that Wound*, *supra* note 21, at 135-49.

24. See *id.* at 179-80. In order to prevail in an action for a racial insult, the plaintiff would be required to prove that "[l]anguage was addressed to him or her by the defendant that was intended to demean through reference to race; that the plaintiff understood [the language] as intended to demean through reference to race; and that a reasonable person would recognize [the language] as a racial insult." *Id.* at 179.

25. See *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); Delgado, *Words that Wound*, *supra* note 21, at 172-73, 174-75 & n.241.

26. G. GUNTHER, *CONSTITUTIONAL LAW* 1073-75 (12th ed. 1991); G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 1100 (2d ed. 1991).

27. See Gard, *Fighting Words as Free Speech*, 58 WASH. U.L.Q. 531, 536-37 (1980) (describing Supreme Court's understanding of "fighting words" as words that are intentionally uttered face-to-face to an individual, constitute an extremely provocative insult, and would cause an immediate violent response by the average addressee); Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484, 508-14.

28. Delgado, *Words that Wound*, *supra* note 21, at 180.

29. *Id.* at 157, 169 (emphasis added) (footnotes omitted) (quoting RESTATEMENT (SECOND) OF TORTS § 46 comment d, illustration 4 (1965)).

30. *Id.* at 168.

31. *Id.*

Delgado takes pains to disassociate himself from “white, male, middle-class lawyers who care a great deal about free speech.”<sup>32</sup> These centrists lack “politico-moral standing” to “speak[ ] for the victims of racial abuse,” at least partially because they “care[ ] a great deal about free speech but care[ ] less about eliminating racism in society.”<sup>33</sup> That juxtaposition — and the suggestion that it somehow reflects an inherent opposition between mutually exclusive alternatives — goes a long way toward explaining centrist perplexities with positions like Delgado’s.

Another influential new left cultural critic, Mari J. Matsuda, “takes inspiration from Professor Delgado’s position, and makes the further suggestion that formal criminal and administrative sanction — public as opposed to private prosecution — is also an appropriate response to racist speech.”<sup>34</sup> A key assumption in her analysis is that “there is a connection between racist words and racist deeds,”<sup>35</sup> which is doubtless true. But instead of advocating more severe punishment for racist deeds, and the verbal incitement to them, Matsuda urges the adoption of a treaty that would “declare as an offense punishable by law all dissemination of ideas based on racial superiority or hatred.”<sup>36</sup> Evidently, it is even more efficient to ban *ideas* before they become expressed in words (not to mention deeds). While acknowledging that Hitler, too, had banned ideas, Matsuda points out “that anti-Semitic hate propaganda and the rise of Nazism were clearly connected.”<sup>37</sup>

In Matsuda’s scheme of things, the human being is a very lowly animal indeed, unable or unwilling to distinguish usefully between thoughts, verbal expressions, and overt acts — all of which are linked for Matsuda in an irresistible causal “connection.”<sup>38</sup> Thus, apparently

32. Delgado, *Professor Delgado Replies*, 18 HARV. C.R.-C.L. L. REV. 593, 596 (1983).

33. *Id.*

34. Matsuda, *supra* note 22, at 2321. Matsuda suggests a framework for considering whether racist language merits public sanction:

In order to distinguish the worst, paradigm example of racist hate messages from other forms of racist and nonracist speech, three identifying characteristics are suggested here:

1. The message is of racial inferiority;
2. The message is directed against a historically oppressed group; and
3. The message is persecutorial, hateful, and degrading.

*Id.* at 2357.

35. *Id.* at 2335.

36. *Id.* at 2341 (quoting the International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195).

37. *Id.* at 2342.

38. Matsuda implies that our physical safety is threatened by the mere existence of racist ideas: “Racial supremacy is one of the ideas we have collectively and internationally considered

"mere" verbal behavior like "call[ing] the holocaust a myth" is just as harmful as, can usefully be analogized to, and should receive no more legal protection than "removing body parts without [a] survivor's permission[,] . . . malicious mishandling of [a] deceased husband's remains," and "failure to properly cremate and scatter remains as promised."<sup>39</sup>

Matsuda speaks with the sovereign confidence and authority of one who knows which ideas are worthy of being thought and which are unthinkable, which words may be spoken and which are unspeakable.<sup>40</sup> "Hateful verbal attacks upon dominant-group members by victims," for example, are "permissible."<sup>41</sup> But "when that speech is used to attack a subordinated-group member, using language of persecution, and adopting a rhetoric of racial inferiority, *I am inclined to prohibit such speech.*"<sup>42</sup>

Matsuda is inclined to prohibit much more than expressly racist verbal attacks. Thus, even though the revisionist histories distributed by anti-Semitic hate groups are sometimes "cunningly devoid" of explicit hate language, she is "inclined to criminalize" them anyway.<sup>43</sup> Further, state intervention against those who collect racist memorabilia "might be appropriate," at least "where collectors' displays cause gratuitous harm to viewers."<sup>44</sup> And Matsuda concludes

and rejected. As an idea connected to continuing racism and degradation of minority groups, it causes real harm to its victims. We are not safe when these violent words are among us." *Id.* at 2360.

39. See *id.* at 2366, 2367 n.234 (citations omitted).

40. Matsuda argues that present judgments of racist speech should be informed by the historical "bad acts" of those espousing similar ideas: "This Article calls for an end of . . . unknowing . . . It is more honest, and less cynically manipulative of legal doctrine, to legislate openly against the worst forms of racist speech, allowing ourselves to know what we know." *Id.* at 2374.

41. *Id.* at 2358; cf. *id.* at 2361-63 (arguing that in the case of the "angry nationalist," dominant group members may be hurt by an attack on their ethnicity, but "[t]he dominant group member . . . is more likely to have access to a safe harbor").

42. *Id.* at 2363-64 (emphasis added). The contextual relativity in the definition of "dominant groups" and "subordinate groups" is highlighted by Matsuda's examination of Zionism:

If a Zionist's expression of anger includes a statement of generic white supremacy and persecution, the speaker chooses to ally with a larger, historically dominant group, and the victim's privilege should not apply. On the other hand, angry, survivalist expression, arising out of the Jewish experience of persecution and without resort to the rhetoric of generic white supremacy, is protected under the contextualized approach.

*Id.* at 2364.

43. *Id.* at 2366 (emphasis added).

44. *Id.* at 2368.

that the “danger of . . . missing . . . the ironic message” in Mark Twain’s use of “racist dialogue to portray a racist land” presents the danger that “Mark Twain’s realism, in some schools, will cause the kind of harm Twain himself would have abhorred. We need safe harbors before we begin rocking boats.”<sup>45</sup>

By contrast, “a rapid-fire sequence of racial epithets spoken by characters from different racial groups” in Spike Lee’s film *Do the Right Thing*<sup>46</sup> is apparently acceptable, because the film offers “an incisive anti-racist critique of racist speech.”<sup>47</sup> (When in doubt, consult “the experience of victim-group members [as] a guide.”<sup>48</sup>) Even our universities, which traditionally have been institutions specifically devoted to the free exchange of ideas<sup>49</sup> — “safe harbors” for freedom of expression, where boats may safely be rocked — should impose *stricter* controls on speech than society at large, because “[o]fficial tolerance of racist speech in this setting is more harmful than generalized tolerance in the community-at-large.”<sup>50</sup>

To appreciate what is at issue, it may be useful to consider some of the concrete measures Delgado, Matsuda, and other cultural critics have endorsed to regulate racist speech. Charles R. Lawrence, for example, claims to propose “narrowly framed restrictions on only the most abusive, least substantive forms of racist speech.”<sup>51</sup> Here is a campus speech policy that Lawrence terms “the University of Michigan’s effort[ ] to provide a safe harbor for its black, hispanic, and Asian students”:<sup>52</sup>

---

45. *Id.* at 2369.

46. *Do the Right Thing* (Universal Pictures 1989).

47. Matsuda, *supra* note 22, at 2369.

48. *Id.*

49. *See, e.g.,* Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (stating that the classroom is “peculiarly the marketplace of ideas”); Shelton v. Tucker, 364 U.S. 479, 487 (1960) (“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”); Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957) (“The essentiality of freedom in the community of American universities is almost self-evident.”); Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251 (1989) (discussing the meaning of academic freedom as defined by the Constitution, the courts, and the academic community); Gunther, *Good Speech, Bad Speech*, 42 STAN. LAW., Spr. 1990, at 4, 7 (“University campuses should exhibit greater, not less, freedom of expression than prevails in society at large.”); Schmidt, *Wisdom Hath Buildded Her House*, The Inaugural Address of Benno C. Schmidt, Jr., Twentieth President of Yale University (Sept. 20, 1986) (“The foundation of [our central] mission is academic freedom and absolute adherence to freedom of expression . . .”). *Cf.* Byrne, *Racial Insults and Free Speech Within the University*, 79 GEO. L.J. 399, 400, 419-22 (1991) (excluding from the class of actionable racial insults those that are unfalsifiable).

50. Matsuda, *supra* note 22, at 2371.

51. Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 473.

52. *Id.* at 480.



[Persons are subject to discipline for]

1. Any behavior, verbal or physical, that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, sex, sexual orientation, creed, national origin, ancestry, age, marital status, handicap or Vietnam-era veteran status, and that

a. Involves an express or implied threat to an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

b. Has the purpose or reasonably foreseeable effect of interfering with an individual's academic efforts, employment, participation in University sponsored extra-curricular activities or personal safety; or

c. Creates an intimidating, hostile, or demeaning environment for educational pursuits, employment or participation in University sponsored extra-curricular activities.<sup>53</sup>

The University also issued an "interpretive guide" to its policy that included the following examples of punishable behavior: failing to invite a student of another race, sex, sexual orientation, or ethnic origin to a floor party or study group; laughing at an improper joke; and "comment[ing] in a derogatory way" about the "physical appearance[,] sexual orientation[,] cultural origins, or religious beliefs" of another person or group.<sup>54</sup>

The University's policy was decisively invalidated in its first legal challenge as "clear[ly] . . . overbroad both on its face and as applied" and "so vague that its enforcement would violate the due process clause."<sup>55</sup> Applying elementary constitutional principles, the court cited

53. *Doe v. University of Michigan*, 721 F. Supp. 852, 856 (E.D. Mich. 1989). In *Doe*, after litigation commenced, the University withdrew section 1(c) on the grounds that "a need exists for further explanation and clarification of [that section] of the policy." *Id.* One commentator sadly observed that "a university that was once dedicated to maximum freedom of mind and conscience now finds itself struggling to guarantee the *minimum* freedom insisted on by the law." D. D'SOUZA, *ILLIBERAL EDUCATION* 144 (1991) (emphasis added). "During the controversy, the administration's approach [was] to steer within constitutional boundaries while imposing maximum permissible restraints on what students [could] say." *Id.* at 155.

The threat to universities as "safe harbors" seems more immediate when one considers that the University of Michigan is not an obscure, provincial institution but one of the nation's most prominent and distinguished research universities.

54. *Doe*, 721 F. Supp. at 857-58. Various students found in violation of the policy were sentenced to "educational" punishments that would "sensitize" them. *Id.* at 857, 861, 865. Charges against one student were dropped after the student agreed to recant in a letter of apology to the *Michigan Daily* entitled "Learned My Lesson." *Id.* at 865; D. D'SOUZA, *supra* note 53, at 148.

55. *Doe*, 721 F. Supp. at 866-67. The *Doe* court stated that the policy sweeps within its scope "a significant amount" of speech that is "unquestionably protected . . . under the First Amendment." *Id.* at 853.

fourteen United States Supreme Court cases for the proposition that the University could not prohibit speech because it “disagreed with ideas or messages sought to be conveyed” or because a large number of people found the speech “to be offensive, even gravely so.”<sup>56</sup> With the policy in force, Salman Rushdie would certainly be ill-advised to venture onto the University of Michigan campus for a reading from his *Satanic Verses*.<sup>57</sup> And large numbers of law professors might also be in violation, if the following description of their teaching is at all representative:

The classroom is hierarchical with a vengeance, the teacher receiving a degree of deference and arousing fears that remind one of high school rather than college. The sense of autonomy one has in a lecture — with the rule that you must let the teacher drone on without interruption, balanced by the rule that he can’t do anything to you — is gone. In its place is a demand for pseudo-participation in which one struggles desperately, in front of a large audience, to read a mind determined to elude you. It is . . . humiliating to be frightened and unsure of oneself, especially when what renders one unsure is a classroom arrangement that suggests at once the patriarchal family and a Kafka-like riddle-state.<sup>58</sup>

Another example of “hate speech” regulation is the following section from the Swedish Penal Code that Matsuda cites approvingly as a model for criminal legislation in this country:

If a person publicly or otherwise in a statement or other communication which is spread among the public *threatens or expresses contempt* for an ethnic group or other such group of persons with allusion to race, skincolour, national or ethnic origin or religious creed, he shall be sentenced for agitation against [an] ethnic group to imprisonment for at most two years [or,] if the crime is petty, to pay a fine.<sup>59</sup>

---

56. *Id.* at 863.

57. S. RUSHDIE, *THE SATANIC VERSES* (1989).

58. Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591, 593 (1982).

More recently, the University of Wisconsin’s efforts to provide the *minimum* level of protection for free speech on its campuses have also been held unconstitutional. See *The UWM Post v. Board of Regents*, 774 F. Supp. 1163 (E.D. Wis. 1991). The court noted that the invalidated policy had been drafted “[w]ith the help of UW-Madison Law School Professor[ ] . . . Richard Delgado.” *Id.* at 1165.

59. Matsuda, *supra* note 22, at 2348 n.147 (quoting SWED. PENAL CODE ch. 16, § 8 (emphasis added)).

It is more than a little ironic that Matsuda and other cultural critics now favor the very sorts of restrictions on the *content*<sup>60</sup> of thought, expression, and symbolic conduct that were used against progressive activists of earlier eras and, in particular, against the civil rights and antiwar movements of the 1960s. In *Street v. New York*,<sup>61</sup> for example, a black man had been convicted of "contempt[uously]" burning an American flag to protest the shooting of civil rights leader James Meredith.<sup>62</sup> Similarly, in *Smith v. Goguen*,<sup>63</sup> the appellee had been convicted of "contemptuously" wearing an American flag sewn to the seat of his pants.<sup>64</sup> In *Cohen v. California*,<sup>65</sup> the appellant had been convicted of "offensive conduct" for wearing a jacket bearing the words "Fuck the Draft" in the Los Angeles County Courthouse.<sup>66</sup> More recently, in *Texas v. Johnson*,<sup>67</sup> the petitioner had been convicted of causing "serious offense" to others by burning an American flag at the 1984 Republican National Convention, as part of a protest against Reagan administration policies.<sup>68</sup>

The Supreme Court overturned all of these convictions and in so doing elaborated highly speech-protective principles for the benefit of these and other minorities, outsiders, protesters, and politically disfavored groups.<sup>69</sup> As the Court concluded recently in *United States v. Eichman*,<sup>70</sup> using language that seems almost tailor-made for the "hate speech" problem,

60. See *id.* at 2374 (content-neutrality as a "trap"); *id.* at 2357 ("Setting aside the worst forms of racist speech for special treatment is a non-neutral, value-laden approach that will better preserve free speech.").

61. 394 U.S. 576 (1969).

62. *Id.* The *Street* Court rejected content-based restrictions on speech: "It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Id.* at 592.

63. 415 U.S. 566 (1974).

64. *Id.*

65. 403 U.S. 15 (1971).

66. *Id.* The appellant had testified that he wore the jacket "as a means of informing the public of the depth of his feelings against the Vietnam War and the draft." *Id.* at 16.

67. 491 U.S. 397 (1989).

68. *Id.* at 399. "At his trial, Johnson explained his reasons for burning the flag as follows: 'The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time.'" *Id.* at 405.

69. *Id.* at 420; *Smith*, 415 U.S. at 582; *Cohen*, 403 U.S. at 26; *Street*, 394 U.S. at 594. See also *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Lovell v. Griffin*, 303 U.S. 444 (1938) (All these cases involved convictions of Jehovah's Witnesses for various forms of more or less ineffectual religious proselytizing.).

70. 110 S. Ct. 2404 (1990).

We are aware that desecration of the flag is deeply offensive to many. But the same might be said, for example, of *virulent ethnic and religious epithets* . . . vulgar repudiations of the draft . . . and scurrilous caricatures. . . . "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."<sup>71</sup>

Sometimes, though, the doctrine of content- and viewpoint-neutrality works the other way around. In 1949 the Supreme Court upheld the right of a racist named Terminiello to give a speech that "vigorously, if not viciously" insulted various racial and political groups<sup>72</sup> and "followed, with fidelity that [was] more than coincidental, the pattern of European fascist leaders."<sup>73</sup> In overturning Terminiello's conviction for "stir[ring] the public to anger, invit[ing] dispute, bring[ing] about a condition of unrest, or creat[ing] a disturbance," Justice Douglas penned for the Court a ringing endorsement of tolerance that has become a landmark of constitutional law:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. . . . [T]he alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.<sup>74</sup>

The *Terminiello* doctrine was then expressly relied on as the basis for decision in *Street*,<sup>75</sup> *Cohen*,<sup>76</sup> *Johnson*,<sup>77</sup> and *Eichman*,<sup>78</sup> and in such civil rights victories as *Edwards v. South Carolina*,<sup>79</sup> *Cox v.*

---

71. *Id.* at 2410 (emphasis added) (citation omitted).

72. *Terminiello v. Chicago*, 337 U.S. 1, 3 (1949).

73. *Id.* at 22 (Jackson, J., dissenting).

74. *Id.* at 4-5.

75. *Street*, 493 U.S. at 591-92.

76. *Cohen*, 403 U.S. at 20.

77. *Johnson*, 491 U.S. at 408-09.

78. *Eichman*, 110 S. Ct. at 2410.

79. 372 U.S. 229, 237-38 (1963).

*Louisiana*,<sup>80</sup> *Brown v. Louisiana*,<sup>81</sup> and *New York Times v. Sullivan*.<sup>82</sup> "Time and again during the 1960s and 1970s, the ACLU and other civil rights groups were able to defend free speech rights for civil rights demonstrators by relying on the *Terminiello* decision."<sup>83</sup> And I predict that the Court will likewise rely on *Terminiello* to invalidate the following "hate speech" regulation that is now before it for review:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know *arouses anger, alarm, or resentment in others* on the basis of race, color, creed, religion, or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>84</sup>

In the academy, meanwhile, the "centrist" is effectively being forced off center stage by "a highly contextualized analysis and a range of relevant evidence quite at odds with that found in typical legal inquiry."<sup>85</sup> This new analysis "makes . . . relevant knowledge as old as the Torah and as new as the back page of this morning's newspaper."<sup>86</sup> With the reach of the law thus broadened to the distant legal horizon, positions and principles that once lay at the very center of liberal, tolerant orthodoxy — such as the principle that "we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death"<sup>87</sup> — increasingly count as "absolutist"<sup>88</sup> or even "extremist."<sup>89</sup>

80. 379 U.S. 536, 551-52 (1965).

81. 383 U.S. 131, 133 n.1, 135 (1966).

82. 376 U.S. 254, 270 (1964).

83. Strossen, *supra* note 27, at 537. Similarly, in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), the Court upheld the free speech rights of a Ku Klux Klan leader in a decision that produced "the most speech-protective standard yet evolved by the Supreme Court." Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine*, 27 STAN. L. REV. 719, 755 (1975).

84. St. Paul, Minn., Leg. Code § 292.02 (1990). See *Matter of Welfare of R.A.V.*, 464 N.W.2d 507 (Minn. 1991) (finding St. Paul's bias-motivated disorderly conduct ordinance constitutional and reinstating charges against an individual for burning a cross inside the fenced yard of an African-American family's home); *R.A.V. v. City of St. Paul, Minn.*, 111 S. Ct. 2795 (1991) (granting petition for writ of certiorari).

85. Matsuda, *supra* note 22, at 2373.

86. *Id.* at 2373-74.

87. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

88. See, e.g., Lawrence, *supra* note 51, at 461, 467, 477; Matsuda, *supra* note 22, at 2321, 2323, 2356, 2376, 2380.

89. See, e.g., Matsuda, *supra* note 22, at 2346, 2350, 2353.

Ours is a needy age, and it has witnessed the decline, if not breakdown, of virtually all important cultural institutions.<sup>90</sup> Our politics has degenerated into “national housekeeping”<sup>91</sup> and the electronic manipulation of slogans and images.<sup>92</sup> Our educational institutions seem to have found their full and sufficient calling in preparing students for, and testing them on, multiple-choice examinations.<sup>93</sup> And in contemporary music it is increasingly difficult to detect what used to be called the “elements” of melody, harmony, and rhythm.<sup>94</sup>

In the midst of this postmodern “articulation crisis,” it is little wonder that the values of freedom of thought and expression count for so little, and that traditional liberal tolerance and the American “ideology of freedom”<sup>95</sup> could be seen as “an extreme commitment to the first amendment at the expense of antidiscrimination goals.”<sup>96</sup> Yet even Matsuda concedes that this ideology of freedom “has contributed to social progress and the limitation of repression,”<sup>97</sup> and it may even have made the current new left cultural critiques possible. Before that tradition is definitively discarded, then, perhaps what we need, more than anything else, is a truly centrist cultural critique.

90. See R. BELLAH, R. MADSEN, W. SULLIVAN, A. SWIDLER & S. TIPTON, *THE GOOD SOCIETY* (1991); P. FUSSELL, *BAD: OR, THE DUMBING OF AMERICA* (1991).

91. See H. ARENDT, *THE HUMAN CONDITION* 2-78 (1971).

92. See generally Collins & Skover, *The First Amendment in an Age of Paratroopers*, 68 TEX. L. REV. 1087 (1990); Tierney, *Sound Bites Become Smaller Mouthfuls*, N.Y. Times, Jan. 23, 1992, at A1, col. 2 (national ed.) (articles detailing the degeneration of political discourse in the age of television).

93. See De Witt, *In Vermont Schools, Test on How Well Students Think Draws New Interest*, N.Y. Times, Sept. 1, 1991, at A10, col. 1 (national ed.).

94. See generally V. ZUCKERKANDL, *THE SENSE OF MUSIC* (1959) (explaining the elements of music).

95. Matsuda, *supra* note 22, at 2353.

96. *Id.* at 2346.

97. *Id.* at 2353.

