Tough Love Lawyers

One love. One heart. Let's join together and I'll feel all right.... [But yet] there is one question I'd really like to ask. Is there a place for the hopeless sinner who has hurt all mankind just to save his own soul?

—Robert Nesta Marley, “One Love”

Until there's no longer first class and second class citizens of any nation... Everywhere is war.

—Robert Nesta Marley, “War”

Will “One Love” Work Right Now?

Yale law professor Stephen Carter and Harvard law professor Randall Kennedy, unlike Shelby Steele, do not seek a somehow raceless culture. Unlike Sowell, they do not seek to displace race by a mock-scientific public policy. They generally believe that it is both futile and undesirable to make such attempts. They value what Carter calls racial solidarity. Carter and Kennedy believe, however, that race presents the intellectual with dilemmas. Carter finds aspects of racial identity potentially “inimical to the intellectual life” in which one ought, ideally, to be “a free thinker with ideas of [one’s] own.” Kennedy, too, shares this allegiance. He aims at “a commitment to truth above partisan social allegiances.”

Can such notions conflict with commitments to racial justice? In one sense, Carter and Kennedy fully admit, even insist upon, such a conflict. They assume that sometimes the intellectual’s allegiance to truth must legitimately lead her to voice politically awkward conclusions. However, thus framed, the issue is an easy one. Nobody, intellectual or otherwise, ought generally to tell deliberate lies (but certainly, lie to the KKK about where the
fleeing Negroes are, to the German Nazis—past and present—about where the Jews and "Gypsies" are).

An unthinking refusal to criticize public figures on the sole basis of their race is positively harmful. It is easy to answer the question, Ought Clarence Thomas's race to exempt him from public criticism by blacks who disagree? Obviously not. Such automatic solidarity worked in favor of Thomas, and against important interests, in Thomas's confirmation hearings. Unthinking solidarity is hardly an ideal. The interesting debate is not over whether to disclose or to conceal criticisms of prominent African Americans.

We are on more interesting ground when Carter objects to the "ridiculous proposition that Clarence Thomas ought to have certain views." Contrary to Carter's unargued suggestion, everyone is surely equally entitled to have an opinion about what views Supreme Court justices ought to have on any issue of concern. And if lots of us dislike lots of Thomas's views, it is sensible, not ridiculous, to oppose him. Carter's view that blacks seeking public office have a "right" might seem dictated by his view that "open dissent is an act of loyalty." Although Carter states this view of "dissent" as a truism, it surely raises a question. Is dissent always loyalty? Is melanin really a carte blanche? Is Judas defunct in African America?

The debate surrounding Randall Kennedy's "Racial Critiques" article, in which he attacked Negro Crit writings, offers a good entry into this discussion. Richard Delgado, a Kennedy critic and himself a target of Kennedy's article, correctly rejected the view that Kennedy ought to withhold the article from publication simply because a group favored nonpublication. However, Delgado declined to join in the view that Kennedy shares common ground with Negro Critics. Delgado insisted that Kennedy and others are doing something very different from Negro Criticism. That suggestion raises the interesting debate about the political consequences of associating oneself with inherited ways of doing things. It allows discussion of whether Julien Benda's hold on contemporary thinking has political consequences. Perhaps progressives who do things in old ways advance something other than justice? This issue is lucidly defined by Edward Said, near the end of Orientalism: "The trouble sets in when the guild tradition ... takes over a scholar who is not vigilant, whose individual consciousness as a scholar is not on guard against 'idees recues' all too readily handed down in the profession."

Carter objects that those who label him a "BLACK NEOCONSERVATIVE" (his capitalization) enforce a "denial of his right to think." Overabsorption in labels is certainly always unhelpful, hence my own emphasis on
the different views even within the Tough Love Crowd. Nevertheless, Carter’s objection is hard to understand. If some are heatedly resisting Julien Benda while others are shoring him up, we have at least two incompatible projects. Carter’s right to think is not in question; why should anyone’s right to censure be less secure? Randall Kennedy himself, ably debunking the invented specter of “political correctness” on university campuses, has defended every community’s right to “mobilize opinion.” Yet Kennedy, too, laments—when his own ox, the “Racial Critiques” article, stands to be gored—that “disagreement becomes attack and dissent becomes betrayal.”

Kennedy’s complaint here is hard to understand. Kennedy avowedly endorses an ideal of impersonal legal work that is irreconcilable with Negro Criticism. Unless one starts by assuming that legal dispute is a kind of gentleman’s disagreement (what Delgado has called an “elaborate minuet”), it is hard to see how one reaches the conclusion, suggested by some, that respectful disagreement rather than ferocious ideological struggle is the ideal picture of scholarly engagement.

Those, then, are the stakes. On one side are the doubters of the guild, who insist that law schools update their ideals and gear up for justice in the world. On the other are unreconstructed scholars, hewing old wood in Benda’s way. The deficiencies of Benda’s guild are widely conceded. Writing in 1989 (the year that Kennedy’s “Racial Critiques” piece appeared), Andrew Ross could take it as axiomatic that the “claim of disinterested loyalty to a higher, objective code of truth is, of course, the oldest and most expedient disguise for the interests of the powerful.” Yet Randall Kennedy endorses just such an ideal in the cause of racial justice. Similarly, Stephen Carter, quoting Kenneth Clark, endorses the view that, in weighty matters, the hordes must be kept at bay: “‘Literalistic egalitarianism, appropriate and relevant to problems of political and social life, cannot be permitted to invade and dominate the crucial areas of the intellect, aesthetics, and ethics.’”

Carter never pauses to consider whether social equality and elitist knowledge production might conflict. He entirely ignores what is arguably the single most influential strand of contemporary thought: the insistence that knowledge and power are inseparable. When Carter says that “a commitment to an inclusionary politics bears no necessary relation to a judgment about what is good and right and what is bad and wrong,” he seems unaware that this is a tendentious and arguably absurd statement. Certainly, Carter is at best raising a question (is an inclusionary politics compatible with entrenched intellectual tastes?) rather than announcing a truth. To detect such
issues, Carter need go no further than the epigraph of Michel Foucault’s
*Language, Counter-Memory, Practice:*

Thought is no longer theoretical. As soon as it functions it offends or reconciles,
attracts or repels, breaks, dissociates, unites or reunites; it cannot help but liberate
and enslave. Even before prescribing, suggesting a future, saying what must be done,
even before exhorting or merely sounding an alarm, thought, at the level of its
existence, in its very dawning, is itself an action—a perilous act.

When Carter calls for calm voices and common cause he is unaware (or
pretends to be unaware) that to heed his call is to hand him victory. It is
Carter who is uninterested in questions about the inherited mode of legal
scholarship; it is critical race theorists who want to raise those questions. In
one of the more significant of his law review articles, “The Right Questions
in the Creation of Constitutional Meaning,” Carter notes, with real or
feigned perplexity, that “critical analysis without an accompanying denuncia-
tion is an art form that barely has a place any longer in legal scholarship.”
Carter objects to what he sees as an unfortunate tendency for constitutional
theorists to castigate each other for addressing wrong questions. Carter argues that every question is in some sense a “right question,” including the
old questions that traditional lawyers have always asked. Carter here enters
the tedious rhetoric of pluralism, which has reduced much of American
critical practice to the exact opposite of a critical practice and has made so
many American intellectuals unthreatening embellishers of the existing order.
Carter’s entire constitutional theory proceeds on the frank and debatable
assumption that things will always “muddle on” pretty much as they are.
Carter’s call for the compatibility of everything, his call for common cause
despite his own complacencies, is quietly oppressive.²

*Is Judas Defunct in Law?*

The existing criticism of Carter and Kennedy mostly takes parts of their
work in isolation. This grants the Toughs an unfair advantage. It sets the
debate in narrow terms and allows them to pose as courageous dissenting
truth tellers on particular single issues (“You mean a black man can’t have
doubts about affirmative action?”; “You mean a black man can’t chase
scholarly merit?”). Yet the specific problems with Kennedy’s “Racial Cri-
tiques” and Carter’s Reflections reflect broader, dispositional flaws in Ken-
nedy’s entire oeuvre, in all of Carter’s writing. Their progressive intentions fall
flat in practice because they adhere to ideals of intellectual untetheredness.
A good example is Kennedy’s article on the death penalty case of *McClesky v. Kemp.* This article is frequently cited as a work that emphasizes the American criminal justice system’s systematic undervaluation of black victims of crime. That conventional reading is an important part of the message of Kennedy’s *McClesky* piece, but it is not the whole story. Kennedy’s article deserves closer attention because its ostensible progressivism is paper thin.

Kennedy’s racial-justice concerns in *McCleskey* disappear in a mist of unfetteredness. Kennedy refuses to be bound by the “orthodox”-progressive view that the death penalty ought to be abolished. He instead announces that his analysis “does not proceed from abolitionist premises.” Kennedy’s rejection of abolitionism is much more than the usual lawyer’s tactic, presenting arguments in the alternative. Kennedy presents his rejection of abolitionism as his considered opinion. He notes that “death penalty abolitionists have argued movingly that capital punishment is wrong in principle and vicious in practice inasmuch as its administration reflects the pervasive racial and economic injustices of American society.”

He continues, “Although I concede the powers [sic] of these arguments, I am not an abolitionist. In my view, considerations of deterrence and retribution sometimes justify condemning criminals to death.”

This is thus a “considered” opinion in the sense that Kennedy has adopted it as his own view, not simply for the sake of argument. Yet, in a more important sense, it is exactly unconsidered. Kennedy made not the slightest attempt to engage the arguments in favor of abolition. He entirely ignored the Jesuitica standards of academic method that he elsewhere took up in order ostensibly to test Negro Critics. Far from assessing and rejecting the racial justice arguments for abolitionism, Kennedy simply asserted a peculiar and somehow “intellectual” freedom to adopt, as an act of raw power, the opposite view.

Kennedy proceeded in a similarly untethered fashion when he faced a specific and central tenet of abolitionism, the death-is-different distinction. Death-is-different advocates urge, first, that no political entity ever has the authority to take a citizen’s life. In analogy with laws against suicide pacts, they argue that a citizen lacks the power ever to consent to a social contract in which her life is part of the bargain. Less abstractly, opponents of death argue that even if the state can, in theory, impose this ultimate sanction, death can nevertheless have no place in a world of racially skewed and fallible criminal justice systems, because death can never be undone. While one who is wrongly imprisoned can be superficially compensated by an
award of money damages, a corpse cannot be revivified. We haven't yet institutionalized the fable of Lazarus.

Rejecting this distinction between death and other criminal sanctions, Kennedy simply announced, without explanation, that he "sees the death penalty as part of a continuum of punishments rather than a unique phenomenon occupying a wholly different moral plane." Yet this "seeing" does not easily resemble thinking. Kennedy's unfetteredness operates more like a backhoe than a ballerina.

With this bulldozered rejection of the death-is-different distinction, Kennedy apparently intends to clear a path for race-conscious administration of the death penalty. Aware that race consciousness is used in lots of contexts outside that of the death penalty, Kennedy realizes that if death is not different from those contexts, those contexts are precedents for a progressive race consciousness in death-penalty administration. This sounds like it might redeem Kennedy's argument, until one looks closer. Kennedy is not merely or at all concerned to avoid the fallible justice system's imposition of death sentences on black convicts. Kennedy instead announces that "the plight of convicted murderers" is not his priority. He instead advances a remarkable proposal that, he acknowledges, "might move some black criminals closer to the gas chamber." The remarkable proposal is meant to repair the undervaluation of black victims by the criminal justice system. "Undervaluation," in this context, means that convicted killers of blacks are less frequently sentenced to death, regardless of the race of the perpetrator. Kennedy proposes that this problem might be solved by the execution of more of those convicted of killing black victims. Since some of those accused of killing blacks are themselves black, full acknowledgment of the value of black victims might mean killing more blacks convicts.

The widely acknowledged fallibility of the criminal justice system simply disappears in Kennedy's analysis. Kennedy simply assumes that being a "convicted murderer" is the same as actually having murdered someone. In fact the Supreme Court has recently taken judicial notice that America has executed at least twenty-three demonstrably innocent persons during this century, the last as recently as 1984. Kennedy's analysis is not tethered by such concerns.

But perhaps there is yet a way to salvage Kennedy's racial-justice credentials. Kennedy says he is disregarding the plight of accused Negroes the better to serve decent, law-abiding Negroes. Unfortunately, Kennedy's championing of Negro community interests itself collapses upon examination.
Kennedy chose to portray his antiabolitionism in a “community oriented fashion.” Kennedy suggested that abolitionist influence within the NAACP Legal Defense Fund (LDF) may have diverted the LDF’s energies from pursuing the true interests of the black community. He postures, then, as our hero. The racial-justice concern that captures Kennedy’s attention is an “inequality in the provision of a public good.” But the public good in question is an astonishing one. Kennedy elucidates: “Whereas other [equal protection] cases have involved the racially unequal provision of street lights, sidewalks and sewers, McClesky involves racial inequality in the provision of a peculiar sort of public good—capital sentencing.”

Kennedy senses that in order to validate his peculiar public good he has finally to tether himself somewhere: “I recognize that in speaking in terms of group rights I am taking sides in a controversial debate over the legitimacy of group rights as distinct from the more familiar conception of individual rights.”

Yet, despite his awareness of the trickiness of this issue, Kennedy’s discussion of why the death penalty is a public good to the black community consists of two baffling sentences suppressed in a footnote: “That a large sector of the population views capital punishment as a valuable public policy is beyond dispute. Thirty-seven states currently authorize capital punishment, and thirty-three have actually carried out death penalties since 1976.”

This breezy conclusion that the thing is good for Negroe simply because “a large sector” of the general population evidently enjoys it ought to unsettle even the most indolent of progressive minds. Yet the flaws in this argument not only escape Kennedy’s energies but also survive Kennedy’s explicit acknowledgment, in this very article, that “opposition to the death penalty is more prevalent among blacks than whites”; that “the disparity in views between blacks and whites on the death penalty has been increasing”; and that “a relatively large percentage of blacks favor abolishing the death penalty.” In his subsequent “Racial Critiques” piece, where his central (and reformulated) intention was to debunk what he had by then come to see as the excessive currency of group claims, Kennedy nevertheless felt obliged to give ground on this issue, conceding that “Negroes are more likely than whites to oppose capital punishment.” Kennedy actually cited, in the McClesky article itself, a Harris poll showing that a majority of blacks (52 percent) want the thing abolished. The same poll, as cited by Kennedy, showed that a majority of whites (67 percent) want to keep the death
penalty. Kennedy expressly referred, again in the McClesky piece itself, to the role that “majoritarian politics” and black political weakness play in death-penalty issues. Yet Kennedy uncritically adopted the majoritarian evaluation of the death penalty as a “public good.” This is scary heroism. Indeed, if this is not an intellectual betrayal of black interests, it is unclear what could ever qualify as such. Derrick Bell’s widely dismissed remark that “the cause of diversity is not served by someone who looks black and thinks white” here assumes renewed significance. The issue is not an inner ethnic tingling. Anthony Appiah’s In My Father’s House makes it very hard for opponents of Negro Criticism to paint its claims as crude forms of biological determinism. As Appiah argues, “The existence of racism does not require the existence of races.” Likewise, the legitimacy and usefulness of remedies intended to address racism need not wait upon “proof” that race, somehow defined, somehow exists. The author of the book in your hands writes, for now, as a “Negro Crit,” which hardly erases the Malayali heritage of his mother’s house, in southern India. The book in your hands right now endorses one Frenchman (Michel Foucault) while resisting another (Julien Benda) who in turn has the Tough Love Crowd in his grip. The book invokes an Irishman (James Joyce) to answer a suburban Californian English professor (Shelby Steele). Moreover, following the simplistic biological compass that Appiah has attempted to discredit, many continue to call this West Coast professor black, despite his own advocacy and lifestyle of “passionate racelessness” and of a “deracinated” America.

The issue, then, is not some ethnic innateness, but rather tetheredness to interests outside law’s walls. And this tetheredness, in turn, is not to some homogeneous and monocultural black constituency. Rather, tetheredness reflects itself in resistance to the quietly oppressive protocols within law’s walls. One need not wait upon an authoritative account of African American interests in order to question the innumerable practices, within law schools, that serve the powerful rather than the dispossessed. This crucial tetheredness is not advanced by Negroes, steeped in Benda’s school, who see law as a site of insular musing and intellectual diversion. And the latter is the choice Kennedy made. In McClesky, Kennedy’s makeover of Negro abolitionism as its opposite permitted a number of snazzy analytical moves. Undoubtedly, analogizing the death penalty to street lights and to drains contains exactly the right balance of provocation and irrelevance to satisfy prevailing scholarly norms.

Despite quick mention of the complexity of claims of group interest,
Kennedy's analysis of that intractable issue never gets at all sophisticated, despite the fact that his entire analysis depends on an asserted grounding in "community interests." And this is no accident. Taking the problems of group interest seriously would have rendered Kennedy's analysis impossible. He would have been forced to write a very different article, with time spent establishing his premise (that death is a public good from a Negro community perspective) rather than arguing from it. Kennedy refused to do that kind of hard work.

There are, then, real limits to the idea that Negro Crits and the Tough Love lawyers share common goals of racial justice. The two schools differ vigorously over what the work of lawyers ought to be. This central difference over the nature of legal work was clear in the public debate over Kennedy's "Racial Critiques" piece. Kennedy proceeded as if in ignorance of Tray Ellis and the "New Black Aesthetic." This project, as summarized by Professor Henry Louis Gates, Jr., "takes the blackness of the culture for granted" and writes with a new self-assurance "by assuming [blackness] as a legitimate grounds for the creation of art."8 While Negro Crit lawyers have set about rendering race in that new way, Kennedy would detain us with a pedantic dance of proofs and evidence. Ironically, in a supposed attack on stereotypes, Kennedy assumes that Negro Crits are attempting a "substantive definition of blackness" that would have to withstand some process of mock-scientific "testing." Conversely, in Patricia Williams's response to Kennedy, the centrality of the nonstereotypical new black aesthetic in Negro Crit law is unmissable:

[Kennedy's] article is a representative response from the academy to new black voices. He is saying, "Prove that racism exists." I'm not going to do that. I take American history as a given, and work with the results. (Emphasis added)

The definition of legal work is thus at the heart of the debate, yet Kennedy's impersonal intellectual ideal is not presented as a debatable one. It is presented as a given, as is Carter's pursuit of universalized standards. The call for common cause with the Toughs is a call to abandon our refusals, while the Tough Love lawyers keep their own. The Tough rhetoric of common ground is a synonym for surrender.

The Slipperiness of Common Ground

Despite their obviously strong political differences, Stephen Carter confesses, in his Reflections, to a "daydream" that one day Thomas Sowell and
Derrick Bell might shake hands across a conference table. This charmed aspiration is, ironically, a form of the same sin that Carter ostensibly addresses throughout *Reflections*: the sin of stereotyping. Profound disagreement is, in Carter’s daydream, happily remedied by shared brownness. Carter’s celebration of black diversity has room in its rainbow for every form of life except the black person who is bad for other black people. If melanin really works in this way, like teflon against claims of racism, then Ronald Reagan was surely right, as Stephen Carter reports, to seek Thomas Sowell’s services after winning the 1980 election. And Reagan and Bush were both right to create Clarence Thomas. In an enormous paradox, the Tough Love Crowd begins by posturing as heroic dissenters and ends by claiming nothing less than the right, single-handedly and assisted by the rhetoric of “common ground,” to redefine African American political interests. Stephen Carter, like Julien Benda, first declares that “just as I deny the right of the group (or any of its members) to tell me what to think, I deny the right of the group (or any of its members) to decide for me whether expressing my views will do harm or good.”

Despite conceding that his opponents, too, reject group vetoes, Carter persists in calling those opponents “would-be silencers.” Taken with his embrace of racial solidarity and with his express desire not to be considered a dissenter (“I don’t even want to be known as a dissenter”), Carter’s attack on the supposed silencers begins to look, paradoxically, like a power grab that would itself silence mass opposition to Toughs. Carter’s plea for common ground suddenly resembles something with tentacles.

Carter’s objection to the silencers, alarmingly, extends well beyond a defense of his right to hold his own views, unharassed. Carter objects, under the rubric of “silencing,” to the group moving as a group to take political action against black political appointees who hold views that the group opposes. He laments the fact that “there was a moment when it appeared that Clarence Thomas, a black lawyer, might lose a judgeship because of his vigorous dissent from the mainstream civil rights program.” (Carter, writing before the Supreme Court nomination, refers here to an earlier Thomas nomination to the Court of Appeals for the District of Columbia). Carter here attempts to transform, without argument, the very concept of “a judgeship.” His language quietly recasts federal appeals court posts away from what they are (sites of political power) and toward what they are not: earned private or professional distinctions to which individual blacks have a career entitlement, properly beyond group interference. Carter’s arguments that judges are ideally not political actors are dealt with below. What’s interesting
here is his attempt to get around the weakness of those arguments by appealing to an invented right of dissent. Carter’s “right to dissent” conjures a Tough entitlement to power, immune from those with the power to stop the Toughs in their tracks.

Carter’s model of judgeships as professional achievements is carried even further when he argues that for civil rights groups to have opposed Thomas more strongly than they did whites with similar political views would have been “reverse discrimination.” In this new objection, overtly appealing to an employment law concept, a judge’s power becomes Thomas’s entitlement. Carter’s “reverse discrimination” claim would be sufficiently distracting even within its usual labor law parameters. Outside those parameters, the difficulties multiply. We easily recognize, for instance, both that Justice Ginsberg is a talented individual and that she filled the Court’s too-long-vacant “Jewish Seat” (as it was widely described in the press). Moreover, then-President Bush’s claim that Thomas was chosen regardless of race was widely ridiculed. And we know Thomas filled Thurgood Marshall’s seat. In this setting it is hardly fanciful to say that, but for Thomas’s presence on the Court, the political pressure for an African American nominee would be irresistible. So the process Carter describes (more aggressive black collective opposition toward a black neocon than a white nominee like Souter) is entirely rational. Racial representation is already, in practice, a legitimate part of thinking about the Supreme Court.

Carter’s unfortunate assumption that nominees are entitled to judgeships reappeared, writ large, in the Clarence Thomas Supreme Court nomination itself. During the hearings the Senate Judiciary Committee assumed that Thomas was “innocent until proven guilty” of Anita Hill’s disclosures. Yet that legal standard is, as others have observed, irrelevant since the proceedings were not a criminal trial and the Senate’s task was to assess whether Thomas had the exalted fitness for the Court, not whether he could sustain a plea of “not proven” in the face of Hill’s disclosures.

Moreover, the Senate’s adoption of an entitlement-based model (and Carter’s lapse into such a model in defending Thomas as to the earlier hearings) contradicts Carter’s own considered view of the appropriate confirmation process. Carter has himself written that Senate participation in the confirmation process ought to be more than a “resume review.” The Senate ought also to reject the too-demanding role of inquiry into a nominee’s judicial philosophy (which Carter thinks is beyond the senators’ competence). The senators ought instead, Carter says, to confine themselves to
probing a nominee’s “background moral vision and degree of moral reflectiveness.” Moreover, while a test of simple “moral vision” would be sufficiently unfathomable (its only determinate consequence is to deprive mass Negro opposition of its legitimacy), Carter also wants to exclude what he considers mere minor transgressions and mere personalization of the confirmation process. Carter’s test is designed to ensure that the right sort of “moral philosophers” sit on the Court. Let’s observe how Carter’s test, designed to sift mere trivialities from truly revelatory moral flaws, worked in the Hill-Thomas affair.

Carter publicly spoke up for Anita Hill’s integrity when her disclosures hit the news. He said that, as her personal friend, he did not doubt that her disclosures were accurate. He wrote an article defending Hill’s integrity. Surely, then, Thomas failed Carter’s moral vision thing? Wrong. Carter’s public intervention, in the Houston Chronicle, was headlined “Both the Accuser and the Accused Are Two Very Fine People.” Carter never once argued that Thomas ought to be denied confirmation (whether for want of credentials, judicial philosophy, or failures of moral vision). Yet Carter credited Hill’s story. Carter faulted the attacks on Hill by Thomas and his supporters. And Carter regretted that Thomas failed to come forth with “statesmanlike words” of apology. All this notwithstanding, Carter did not oppose Thomas. Rather, he praised Thomas as one of “two very fine people” (“fine” is surely now the 1990s’ least-coveted accolade). Carter’s test is not only unpersuasive legal scholarship and unworkable legal practice; it is also a cakewalk. This is especially problematic since, on Carter’s view, the only other possible check (group mobilization against neocon nominees) is declared taboo as a form of “silencing.” Carter ritually invokes morally charged examples of people subjected to hideous abuse and drummed out of academic settings. Far less prominent in Carter’s analysis, however, is the complete irrelevance of these morally charged scenarios to ostensible dissenters like himself. The Tough Love Crowd is flightless. They are the exact opposite of victims. Speaking as if for an oppressed group, Carter opines, “Our need for these free-thinking dissenters may prove to be greater than their need for us. The black conservatives … are quite comfortable in their tenured academic positions and other posts, which is, after all, what academic sinecures are for.”10 (Note, in passing, Carter’s Bendaresque formulation of what academic posts “are” for.)

Carter’s use of the inclusive pronoun (“our need”) does not conceal the fact that this veiled threat is his own. He may be besieged, but his bushels
are full, his powder is dry, and he will outlast us. “Silencing” nevertheless remains, despite its complete irrelevance to himself and the Tough Love Crowd, a conspicuous theme of Carter’s *Reflections*. Of the book’s nine chapters, one is called “Silencing Dissent,” another “On Contenting Oneself with Silence,” and a third “Silencing Doubt.” Almost every page of Carter’s book is shadowed by the imminent door knockings of an eerie thought police. The sympathetic reader might assume that Carter is on the verge of turning in his quill. But no: “Despite the name calling of their critics, they [i.e., the black conservatives] will not be silenced.” Despite his use of a distancing pronoun (“they” won’t be silenced) it’s clearly Carter strutting here. And while he forever urges the rest of us to face up to Tough professional competition, Carter’s rhetoric of silencing is itself a retreat from robust and legitimate debate of the differences that separate him and his critics. Continuing in this vein, Carter repeatedly warns us not to “alienate some of the best minds we have.” This new phrase (“best minds”) now implies not only that there is a common cause (which itself needs argument, unless pigmentation is enough) but also that Carter and his Crowd have smart solutions that elude the rest of us. This argument is not only self-aggrandizing but—Carter seems unaware—also a political dead horse. The idea that “competence” solves political problems where “ideology” fails was the central plank of the unmemorable Democratic presidential campaign of 1988. Moreover, the Tough Love Crowd’s insufficiently challenged declarations of analytical prowess are overblown.

**Just How Clever Is Tough Love Lawyering?**

Stephen Carter, in his *Reflections* and elsewhere, speaks approvingly of Randall Kennedy’s “Racial Critiques” piece, concurring in its substance and defending its author from what Carter thinks are unjustified and unwise betrayal claims. Assessment of the first complaint (“unjustified”) is already underway in the form of the arguments against common ground. Time now to address Carter’s new claim—that African America stands to lose through alienating fine minds. Carter and Kennedy have a shared agenda: stable standards of intellectual excellence. These standards, they say, are besieged by Negro Crits and other vulgarians who would abolish valuable notions of meritorious scholarship. So, let us test the stable excellences of Kennedy’s own attempt to show the failed excellences of the Negro Crits in “Racial Critiques of Legal Academia.”
At a pivotal turn in his controversial attack on Negro Crits Mari Matsuda, Derrick Bell, and Richard Delgado, Kennedy announces what is unquestionably the cornerstone of his critique. Without it, his entire meritocracy-based attack on the Negro Crits would be groundless. In this key passage, Kennedy states his allegiance to a widely accepted ideal of scholarly procedure [that] reflects values at the heart of what Robert K. Merton describes as “the ethos of modern science.” One of these values is universalism, which refers to “the canon that truth claims are to be subjected to preestablished impersonal criteria.” A related value is disinterestedness, meaning a commitment to truth above partisan social allegiances.\(^{12}\) (Emphasis in Merton’s original)

Robert Merton’s *Social Theory and Social Structure* is a rather big book, evidently sometimes unwieldy. Merton carefully and separately discusses what he considers the very different pursuits of scientific and of nonscientific knowledge. In his discussion of knowledge outside the physical sciences, Merton expressly denies what Kennedy here takes him to assert: Merton denies both the possibility and the usefulness of seeking truth outside of partisan social allegiances. Merton explicitly debunks the idea that a disinterested or “Outsider” perspective “has monopolistic or privileged access to social truth.” Merton instead insists, sounding rather like the Negro Crits Kennedy wants to attack, that both the Outsider and the Insider have “distinctive and interactive roles in the process of truth-seeking”\(^{13}\) (emphasis added). Merton’s argument is thus a ringing endorsement of the inclusion of “Outsiders”—Merton’s word—in the legal academy. How else, indeed, could Merton’s preferred interactive ideal unfold?

Furthermore, disastrously for Kennedy, Merton’s argument is a resounding and express rejection of the idea that Insiders should strip bare of partisan social allegiances. Unfortunately for the unwary reader of “Racial Critiques,” Kennedy missed all Merton’s relevant thinking (summarized in the previous paragraph) and opened his copy of *Social Theory* at Merton’s part 4, which is declaredly relevant to the physical sciences and declaredly irrelevant to law. The very first sentence of Merton’s part 4 reads, “Part IV is composed of five papers in the sociology of science, a specialized field of research which can be regarded as a subdivision of the sociology of knowledge which springs from and returns to controlled experiment or controlled observation.”\(^{14}\)

This doesn’t quite resemble the tax code. Moreover, had Merton’s language that Kennedy quotes in support of universalistic ideals in legal scholarship been quoted in full, its irrelevance would have been manifest. Merton refers, in a sentence that Kennedy sliced in half, to “preestablished imper-
sonal criteria: consonant with observation and with previously confirmed knowledge." This, too, is not quite the tax code (the italicized language, my emphasis, is what Kennedy omitted). Moreover, on the very same page as the irrelevant language that Kennedy half-quotes, Merton explicitly distinguishes scientists (whom he is talking about) from lawyers (whom he, expressly, is not talking about). This distinction between scientists and lawyers is indeed one that philosophers of science habitually make. Thomas Kuhn, in *The Structure of Scientific Revolutions*, wrote that lawyers are different from scientists because scientists are accountable to a closed circle of professional peers whereas, in contrast, the "principal raison d'etre" of the law is "external social need." This criterion of external social need is exactly the one to which Outsider theorists are trying to make law responsive as they push it away from science-based models. Robert Merton’s work is an impetus, not a bar, to this effort. Kennedy’s reliance on Merton to the contrary is misplaced. Kennedy nevertheless insists that his “intellectual debt” to Robert Merton “can be seen in practically every aspect of [‘Racial Critiques’].” Kennedy’s gaffe, at the heart of what sets out to be an exposé of the scholastic failings of law’s foremost insurrectionaries, invites an unflattering comparison with Allan Bloom. Bloom’s *Closing of the American Mind* undertook, too, an attack on various insurrectionary intellectual currents. Paul Bove, in an article entitled “Intellectual Arrogance and Scholarly Carelessness,” has remarked that “it is a sign of the crisis under which Bloom writes that he so profoundly contradicts some of the deepest tenets of the position he claims to espouse.” Kennedy’s “Racial Critiques” piece is mired in similar contradictions. Ostensibly a champion of careful and traditional scholarly method, he demonstrably misreads the central text on which he purports to rely.

Kennedy’s adherence to scientific ideals in legal scholarship is a second gaffe, independent of his misreliance on Merton: Kennedy proceeds as though legal realism never happened. If Kennedy made the slightest effort to pursue legal scholarship somehow based on observation and previously confirmed knowledge, it is difficult even to imagine what his work would look like (think of test tubes in contract class). Such work would probably be derided—even in an unreconstructed legal academy. It is perhaps unsurprising that Kennedy’s actual practice of legal scholarship, outside of his convenient attack on Negro Crits, discloses no such narrow scientism. In an article published almost contemporaneously with the “Racial Critiques” piece, Kennedy evinced a more sensible (though still problematic) awareness
of "the ways in which politics inescapably affects scholarship." No longer needing an instrument with which to attack Negro Critics, Kennedy shifted gears to a questionable, but at least not facially absurd, allegiance to the prevailing Bendaesque model of disinterested inquiry. Kennedy rejected, as Benda would, the approach of those who have opted "to fashion their scholarship into ideological weaponry serving immediate political ends." He favored those who attempt "the difficult, but far more fruitful, task of expressing their politics without forsaking the independent claims of their intellectual craft" (emphasis added). This is, precisely, Benda's call for the elimination of the passions from the clerkish sphere. In this article, "Reconstruction and the Politics of Scholarship," Kennedy offered a favorable book review of Eric Foner's work on the Reconstruction. He praised Foner for pursuing his work in a mindset unfettered by political baggage.

Yet there are several problems, brushed aside by Kennedy, with the idea that political values can be held in check for the supposed benefit of intellectual craft. (No view of Foner's work is implied here; my concern is only with the logic of Kennedy's account of that work.) First, Kennedy suggests that, through adherence to "intellectual craft," scholars may approach nearer to a "reality" that is sometimes "intractably complicated." Kennedy's demon is thus the blinkered zealot who distorts truth because of unmoderated politics. Yet, moderating one's politics under the supposed demands of craft is merely to be differently blinkered, not unblinded. Kennedy evinces a stereotypical notion of what counts as political scholarship. For him, as for Julian Benda, politics resembles disarray. Yet, others have asked, "Must it be assumed that only that is politics which is preparation for an insurrection?"

Moreover, there is a troubled twist in Kennedy's allegiance to Julien Benda's way of thinking. Many writers have shown that dispassionate ideals oppress. Audre Lorde has objected that

men avoid women's observations by accusing us of being too "visceral." ... Pain is very visceral, particularly to the people who are hurting.... Pain teaches us to take our fingers OUT the fucking fire. (Capitalization original)

Kennedy advocates disinterest, yet ostensibly favors mass voices. He praises Foner's work—in terms that echo Noam Chomsky—because of its attention to "the masses that are often rendered invisible by elitist historical studies." Yet Kennedy never seriously faces the question of methodology as a question. One might expect Kennedy's intellectual ideals to reflect his desire to give voice to the dispossessed. Yet Kennedy entirely fails to address
the straightforwardly elitist agenda that underlay the successful attempt, at the turn of the century, to cast legal study as a science. Kennedy treats the received ideal of disinterest as a fixed truth rather than an unfortunate legacy of a questionable past.

The uneasiness between Kennedy’s allegiance to impersonal ideals and his allegiance to the dispossessed is striking when one sets his “Racial Critiques” piece alongside his article, published three years earlier, called “Race Relations Law and the Tradition of Celebration: The Case of Professor Schmidt.” In this earlier article Kennedy straightforwardly championed the dispossessed. Kennedy criticized the methods by which legal scholars maintain the idea that “the United States Supreme Court has served the nation well and furthered human freedom.” Kennedy argued that legal scholars have cultivated hyperbole about the moral rectitude of the Court and of its various justices. He argued that this celebratory scholarship assists patterns of racial subjugation by heaping disproportionate praise on morally ambiguous decisions. In a powerful analysis, Kennedy commented that such scholarly celebrants underestimate “the degree to which radicals on the margins define the ambit of possibilities open to persons acting in any given historical moment.” Kennedy’s underlying complaint was that the celebratory scholars slighted black interests and belittled black suffering. Kennedy ended with a manifesto:

Analyzing the Supreme Court’s race-relations jurisprudence from a point of view which adequately assimilates the feelings and interests of black victims will require the cultivation of new sources of information, the revision of established views, and perhaps most daunting, an empathetic imagination of the suffering inflicted by racial offense. . . . whatever the difficulties, few things pose more of a moral and intellectual imperative.22 (Emphasis added)

This early manifesto is far from Kennedy’s later conversion to impersonal scholarship and disinterestedness above partisan social allegiances—which he suddenly adopted, three years later, to attack critical race theory in the months before Harvard Law School’s vote on his tenure. The passage above reads like a critical race theory document in its insistence on the place of the personal in law. The “Racial Critiques” piece, three years later, discarded this manifesto and rejected “race, nationality, religion, class and personal qualities [as] irrelevant” to good scholarship.

Why the change? One need not leave this question to gossip or speculation. In the 1989 “Racial Critiques” article Kennedy acknowledged that the “impersonal” model is a “widely accepted ideal of scholarly procedure.” In
the 1986 manifesto, Kennedy, seeking a “fundamental explanation” for the tradition of celebration of the Supreme Court, suggested that the explanation for such “apologetics” (Kennedy’s choice of word) is “the relationship of scholarship to power.” Kennedy continued:

Nations exert the political equivalent of gravitational pressure on the thinking of their intellectuals, frequently pushing scholars toward various modes of nationalistic self-congratulation. Despite their pretensions to independence, scholars are subject, like others, to the blandishments and intimidations that power can mobilize. . . . [The legal] community, like every community, has created a politics that governs its actions and, in particular, the conventions that bestow intellectual legitimacy. Although deference to such conventions may well be unconscious, a consequence of the very socialization we call “education,” it is nonetheless real.²³

Three years after writing this, Kennedy mysteriously converted to the creed of Julien Benda, to a widely accepted ideal of scholarly procedure: disinterestedness. In 1989, in the “Racial Critiques” piece, this paradoxical ideal—both lucrative and disinterested—became the linchpin of Kennedy’s attack on a genre of scholarship advancing the highly personal aims with which he earlier seemed to align himself. In “Reconstruction and the Politics of Scholarship” (also published in 1989) this prevalent ideal was, again, his starting point.

Kennedy’s confirmation conversion, as Harvard Law School’s tenure decision loomed in 1989, was, moreover, a broad-based affair going beyond the works already discussed. In 1986, in “Persuasion and Distrust: A Comment on the Affirmative Action Debate,”²⁴ Kennedy scathingly and specifically rejected the view that all the players in the affirmative action debate had a common abhorrence of racial injustice. He openly disparaged the idea that Benjamin Hooks and William Bradford Reynolds could be considered “ideological brethren.” And he went further, explicitly rejecting the view that the “realm of scholarly discourse and the creation of public policy” could be considered untainted by prejudice. He rejected the view that prejudice was confined to the “workaday world of ordinary citizens.” He explicitly considered and rejected the arguments against “scrutinizing the motives of policymakers and fellow commentators.” In 1989, Kennedy converted as tenure day loomed. Racial prejudice in legal academia was now a mere “plausible hypotheses[is].” Its status as a “persuasive theory” had suddenly to wait upon a procedure of “testing.” Far from providing the new sources of information that Kennedy urged in his 1986 critique of conventional legal scholars, Negro
Crits suddenly “distort[ed] reality” and offered “deficient diagnosis.” Citing a Shelby Steele article, Kennedy concluded, in 1989, that Negro Crits were merely playing “the race game.” Far from infusing law with valuable insight, Negro Crits were really employing a “stratagem” of misrepresentation in a cynical attempt to manipulate white guilt. Kennedy repeated, in the press, the misrepresentation that Negro Crits “are engaged in interest group ethnic politics.” In 1986 it was naive to believe that “the realm of scholarly discourse” is free of prejudice. In 1986 Kennedy further asserted that the “portrait of conflict-within-consensus is all too genial.” But in 1989, Kennedy was “tired of it.” As of 1989 critical race theory is to blame for frustrating “fruitful collegial exchange” and is responsible for creating an “us” and “them” atmosphere and a “conception of academia as battleground.” In 1986 Benno Schmidt was faulted for his “apologist” invocation of too-accommodating moral standards in evaluating Supreme Court justices. Yet in 1989, in “Martin Luther King’s Constitution: A Legal History of the Montgomery Bus Boycott,” Kennedy is suddenly concerned “to respect segregationists in the sense of taking their ideas seriously” and to reject the view that “the side supporting de jure segregation . . . was wholly bereft of morality or reason.” This is either trite (who’s ever wholly bereft of anything?) or itself a form of apologetics (resembling the more recent media rehabilitation of repentant Alabama segregationist governor George Wallace).

Kennedy’s 1989 volte-face turned farce at the end of the “Racial Critiques” piece, written slightly before the fall of the Berlin Wall. In explaining how he came to write that article rather than something else, Kennedy’s language echoed the hyperbolic Cold War project of containing the enemy in our midst. Kennedy wrote, he said, to contain the spread of a dangerous Negro Crit tendency. Kennedy worried that “left unchallenged, this tendency will seep into the culture at large.”

With this apocalyptic challenge of the American Left, Kennedy joins other culturally comfortable critics, such as Allan Bloom, Walter Jackson Bate, and Roland Picard, in their nostalgic resistance to intellectual ferment. The late Roland Barthes, for instance, insisted that the inherited language of French literary criticism itself be placed in question, much as the new Negro Crits insist that the inherited manner of legal scholarship itself be part of the discussion. Barthes was subjected to a familiar, hyperbolic, and public attack by a member of the postwar French establishment (Raymond Picard) who
said Barthes was a dangerous leveler. Picard argued that Barthes would deprive French criticism of its ability to distinguish between pebbles and diamonds. Barthes, in response, emphasized Picard’s place within the tradition of Julien Benda and made a comment that deserves to be read unexpurgated:

When a word like dangerous is applied to ideas, to language or art, it immediately signals a desire to return to the past. It means the speaker is fearful... . The speaker fears all innovation which he denounces on each occasion as “empty” (in general that is all that can be found to be said about what is new). However this traditional fear is complicated today by the contrary fear of appearing anachronistic. ... Regression [read “racism”] today [1967] appears shameful, just like capitalism. Whence come the remarkable jerks and abrupt halts: there is a pretence for a while of accepting modern works, which one ought to discuss since they are being discussed; then, suddenly, a sort of limit having been reached, people proceed to a joint execution. (Emphasis added)\textsuperscript{30}

What is remarkable, returning to Randall Kennedy, is that while Picard was declaredly a scion of the establishment and was acknowledged as such by a laudatory mainstream press, Kennedy’s analogous work continues to be feted as heroic dissent—even though life tenure on Harvard’s law faculty followed smartly upon his intervention. The \textit{New York Times} suggestively reported the controversy caused by Kennedy’s article under the headline, “Minority Critic Stirs Debate on Minority Writing.” Kennedy claimed that he was struggling to “break down a confining etiquette.” He certainly achieved that, though perhaps not in the manner he meant to suggest. Kennedy liberated conservative columnist George Will to dispatch a widely syndicated column attacking Negro Crits and amplifying, exponentially, Kennedy’s own considerable oversimplifications. Will praised Kennedy for “74 pages of temperate arguments against the balkanizing of the academic mind.” Kennedy also partially liberated some of his own colleagues. The \textit{Times} article quoted “a white law professor, speaking on condition of anonymity,” who protested that “there was a sort of ‘lynch Randy Kennedy’ mindset.” Derrick Bell’s letter in response to that faceless colleague’s remark made the point (not a novel one) that there is in America a healthy market for blacks who wish “to achieve eminence by serving as racial apologists.”\textsuperscript{31} Was Bell raising an invented issue? The misplaced lynching metaphor, for instance, has a familiar ring, having been deployed for the benefit of a Tough Love judge. To mention intellectual independence, in this context and on Kennedy’s record, defiles language.
Stephen Carter’s Tough Stuff

The tone of Stephen Carter’s work differs from Randall Kennedy’s in a crucial and deceptive sense. Carter is entirely the opposite of an appointed executioner. He appears impeccably liberal and humane. Conversely, Kennedy is more overt in enforcing his preferences. Kennedy was not, for instance, content to rest with his correctly scathing review of Houston Baker’s perplexing book *Black Studies, Rap, and the Academy*. Kennedy’s first order of business in reviewing Baker’s book was to attack the author’s publisher for printing it. The issue here is neither the quality of Baker’s book nor Kennedy’s right to criticize it. Nor has Kennedy transgressed a taboo against attacking publishers. Rather: it has become hard, now, to tell the silencer from the silenced. Kennedy’s misreading of Robert Merton’s work, and his invented rendering of the work of those he sets himself to criticize, certainly occasion firm views about the status of “Racial Critiques” as serious scholarship. Yet it is far from hard to believe that the *Harvard Law Review* published it anyway.

Kennedy’s enforcement of his intellectual tastes is even more effective where he is no mere petitioner in a book review (as in opposing Baker), but actually the man in charge. As editor of *Reconstruction*, a journal that he founded with philanthropic funding, Kennedy again created controversy. In an article entitled “Pulling Punches on Thomas: Journal of Opinion Finds Some Topics Too Hot to Handle,” the *New York Times* discussed Kennedy’s rejection of an article critical of Clarence Thomas. Its author was a former Rehnquist law clerk who supported Rehnquist’s elevation to chief justice (no radical law clerk, he). Kennedy announced that the article violated his tastes because it contained a “hint of smartiness.” Therefore, Kennedy said, “I didn’t want to be a part of it.” Given the enormous place of claims of silencing in Tough Love complaining, this is an odd way to edit a journal. Kennedy’s implicit assertion that he considers himself part of everything that he allows to pass into the pages of the journal is sufficiently alarming. Even more so is the impressionistic manner of his decisionmaking. Kennedy initially accepted the piece but then rejected it, citing two points of detail and a piece of whimsy. The details: a reference to Thomas’s penchant for pornography and a reference to what Kennedy called “the infamous Coke can.” (Both these details featured prominently in a subsequent article on Thomas in the *New Yorker* magazine, itself hardly a racy news organ.) To
these details Kennedy added this whimsy: "Perhaps I am being unduly skittish, but so be it." 32 **SO BE IT.**

Stephen Carter looks warm and cuddly by contrast. Carter can appear to be America's most tolerant lawyer. The *New York Times Book Review*, assessing Carter's *Culture of Disbelief*, suggested that Carter's work might reawaken a disappearing "middle ground of civility and reasonability [sic]" 33 in American politics. Carter's apparent tolerance is, again, clear in his response to Negro Crits themselves. One reporter observed that although Carter's *Reflections* had been attacked by Negro Crits, Carter nevertheless had encouraging words for the group. "As time has gone by, my sympathy and admiration for their work has increased," 34 said Carter. Carter's unsolicited benediction asserts, yet again, that he shares common ground with Negro Crits. Carter's assertion of a sweeping "right to dissent," and his manipulation of the rhetorics of dissent and of silencing in order to implement a redefinition of group interests, were each remarked upon earlier. It is now time to face, frontally, the systematic problems with Carter's ostensibly humane allegiance to an impeccable liberalism.

Carter's unsolicited encouraging words are themselves the first clue. Carter instinctively asserts the *authority* of the patient mentor. This charming self-aggrandizement pervades *Reflections* itself. Carter, like the other Toughs, repeatedly portrays his opponents as still gripped by a school-day idealism beyond which he has himself matured. He patronizes his students: "I fear that a weakly conceived ideology may be clouding their analytical faculties, and that is when I begin to worry a little." 35 What is clearest in remarks like these is surely not what Carter intends. He wants to seem a wise overseer. Instead, he comes across as an anxious aspirant for membership in what Liza Featherstone has called the "elite of the self-styled well adjusted." 36 And this elitism works both ways. Carter has a consistent neo-Confucian deference to his own elders: "My more mature and far wiser colleagues tell me that . . . the occasional upsurge in student activism is natural." This infantilization of himself and of others becomes a concrete part of Carter's constitutional law scholarship itself, in his overt defense of "ancestor worship" as a principle of constitutional interpretation. In constitutional law, ancestor worship refers to the theory that the views of relevant Wise Elders (in America, the Founding Fathers) ought to be given automatic obedience. Thus Carter: "They were the Founders who laid down the rules; we are the inheritors who follow the rules that the Founders laid down." 37

This is an odd philosophy for a black racial-justice progressive, give
that our own ancestors were in chains at the relevant time and, perhaps understandably, played hooky from the Philadelphia Convention. Such facts prompt Carter to the occasional, but always temporary, renunciation of personal reverence for the Founders. Yet in these interregnums, Carter merely erects a more mystical constitutional theory of “intertemporal identity” in which “we” are all, today, at one with a select band of privileged ancestors. Carter presumably envisages everyone’s ancestors in immaculate and metaphorical ancestral couplings, so as not to offend the antimiscegenation laws, some of which survived nearly until the 1970s. Hard to see why anything so ethereal should detain a serious scholar—except that in this respect Carter enjoys significant company among law professors. Carter ultimately concedes that this constitutional “mythos” is just that—a myth. “Nothing in the argument turns on the truth of this assumption,” says Carter, and the emphasis is his own. Yet, instead of making the most of this room for creative progressivism, Carter, remarkably, turns to resurrect old chains. Carter slides away from his unstable renunciation of ancestor worship and insists anew that

the irrelevance of the Founder’s political science to our era is a proposition to be argued not assumed; and even should the wisdom of the Founders turn out to be nonsense when translated to our era, the question of who should hold the power to abandon it sits uneasily and unanswered on the interpreter’s shoulder.

Furthermore, when Carter does remember to renounce worship of the Philadelphia men, his task becomes choosing a preferable Founding Event, the values of which should guide constitutional interpretation. In this new task, Carter again takes the most conservative path available, opting anew for the felt immanent values of the 1787 Philadelphia Convention itself. Others have argued, for instance, that the upheaval surrounding the New Deal constitutes a far more relevant founding event than does Philadelphia, 1787. This argument would transform talk about “America” into talk about the New Deal, at least for legal-constitutional purposes. Such a transformation has arguably strong benefits, from a progressive point of view, over an “America” frozen at 1787.

Carter, faced with this argument, becomes both a dinosaur and a scientist. Carter the dinosaur admits that contemporary theorists reject his own preference for the 1787 Founding Event. Carter concedes, as is habitual, that his own argument “has about it a somewhat musty, antiquated, even shabby air, like a quaintly decorated table.” While antiquated, Carter is nevertheless a scientist because he shifts into a finely tuned factual inquiry in order to reject
the New Deal as the relevant Founding Event. Carter rejects it because of his empirical hunch that the “public veneration” attaching to the New Deal doesn’t quite match the “awe” that attaches to Philadelphia, 1787. Carter further rejects a range of contemporary arguments against his position with the triumphant assertion that his own conceded “muddle” is better than the opposing arguments because “none of [the contemporaries] can trump the arguments for judicial enforcement of the science of the Founding Generation.”

Here we have dinosaur, scientist, and ancestor worshiper, in one large and single gush. Carter announces, “The Spirit of the Constitution is the spirit of 1787.” This proclamation occurs in a 1990 article, in the course of Carter’s harsh criticism of Olsen, the case that upheld the congressionally created office of independent counsel that led to Lawrence Walsh’s Iran-Contra investigation. If Carter’s analysis by now sounds less like dispassionate investigation than like Madison Avenue hype, the point has been made. Carter is a cheerleader, with shrewdly concealed pom-poms—and for the wrong crowd.

Less amusing is Carter’s omission. Entirely absent from Carter’s search for the nation’s Founding Event is the single period in American history in which blacks achieved significant political influence in parts of the country; a period that followed a bloody war in which the status of the Negro was a central issue; and a period that saw Negro equality enshrined (albeit hesitantly and partially) in law for the first time in American history. The idea of the Reconstruction era as the relevant constitutional mythos is, moreover, not a novel one. Reconstruction is the name that Tough Love lawyer Randall Kennedy chose for the journal that he founded. And that choice was no accident. Kennedy himself has written of the extent to which a powerful pejorative tradition of Reconstruction historiography has unduly suppressed the relevance of Reconstruction-era jurisprudence to present-day issues. Kennedy has referred to Reconstruction as “the second founding of the nation” and has agreed that “rarely has a community invested so many hopes in politics as did blacks during the Reconstruction.”

Eric Foner’s book, the subject of Kennedy’s article, is itself suggestively entitled Reconstruction: America’s Unfinished Revolution. Yet we search Carter’s ruminations on Founding Events in vain for any reference to this rich vein of inquiry. Furthermore Kennedy, like many others, calls the civil rights revolution of the 1960s a “Second Reconstruction,” which might logically suggest a third Founding Event (or fourth, if we include the New Deal) that Carter might have pursued. Carter chose to ignore all these in favor of the spirit of 1787.
Still, Carter's preference for 1787, his preference for the legal theory of originalism, and his erasure of Reconstruction need not have any absolute significance. What matters, after all, is not the theory one adopts but where one takes it. And it is here that Carter's counterprogressive values reveal themselves in the raw. Carter readily concedes that originalism "privileges one set of values over another."

Carter actually chooses to privilege liberal legal theory as an end in itself and ahead of the distinct value of racial justice. Carter might retort that liberal legal theory and racial justice are not competing, nor merely compatible, but actually complementary. He might claim that he is not choosing between legal liberalism and racial justice. He might claim that the best way to advance racial justice is to advance the cause of legal liberalism. But upon a closer look, it is clear that Carter repeatedly and actively suppresses racial-justice concerns for the specific benefit of something called liberalism, and in deference to a presupposed original balance of power within the federal government.

Carter's allegiance to liberal theory as a distinct end in itself is obvious in his broad pronouncements as well as in his detailed arguments. Carter's main constitutional law article is subtitled "A Preliminary Defense of an Imperfect Muddle." In this article Carter is passionately and frankly concerned to "repulse the assault" of those who argue that law does not bind judges. He is concerned to preserve mainstream liberal constitutional discourse. Carter's work is "confessedly reformist." His project is entirely premised on a piece of fine calibration, another empirical hunch: "Most Americans probably consider their government—their society—essentially just, and my empirical hunch is that most Americans consider the laws promulgated by their government presumptively entitled to respect."

This hunch ignores exactly those people, the culturally dispossessed, whom Carter claims ought to accord him the status of loyal dissenter. Carter here duplicates the blind spot that turned Randall Kennedy's ostensible championing of Negro community good into something else on the death penalty issue. When Carter speaks, it is avowedly in the name of "we the people (or many of us anyway)." The question is, Who's left out? He, moreover, openly defends the interests of the state over the lesser pestering of morality. Defending a distinction between law and morality, Carter insists that "if the liberal state is to function we can't invoke morality too often."

Finally, Carter's renunciation of morality in liberal politics is itself dramatically unstable. Carter's Culture of Disbelief is an extended criticism of liberalism's exclusionary rhetoric of neutrality and of the fact that it requires
America's religious to recast themselves before they enter the public square. Yet what remains firmly excluded from the public square, in Carter's constitutional theory, is the expression of passionate views about America's fundamentally unjust racial caste system. Carter excludes such views by his empirical hunch that everyone thinks the opposite; by his manipulation of the rhetorics of loyal dissent and of silencing to hush a race; and—a new point—also by silencing these voices in his adherence to what, ironically, sets out to be a "dialogic" model of constitutional law.

To facilitate his ideal constitutional model of a society in orderly dialogue, Carter produces a series of new empirical hunches. To his previously disclosed hunch that everyone who matters thinks society is essentially just, he adds a hunch that Americans are all "essentially decent people"; a hunch that "judges are essentially conservative creatures"; and a hunch that civil disobedients are "essentially" not radicals.  

The central problem with these eminently convenient hunches is that they hinge on a violently narrow yet pleasant-sounding concept of reasonableness. When Carter explains, in the Wall Street Journal, his "partial estrangement from the civil rights establishment of which [Thurgood Marshall] has always been a hero," he attributes this estrangement partly to his preference for an ideal of a "rule of law" as enforced by justices "amenable to reason."  

Faced with compelling moral arguments in favor of political egalitarianism, Carter endorses a sharp separation between moral preferences and constitutional analysis. This separation is a relentless Carter theme wherever the issue is social justice (his tune changes, arbitrarily, where the issue is religious rather than political morality). An "ideal of justice beyond politics" recurs in all of Carter's relevant law review articles. Carter's charmed hopes for the separation of principle from politics flounder on the impossibility of the suggested ideal, as Carter himself tirelessly concedes. Carter's life's work in constitutional theory has so far been an attempt to preserve the viability of American constitutional legal practice, despite its own glaring failure to deliver on claims central to its legitimacy. Carter gamely calls his own constitutional theory "a tool of legitimacy." Carter's passion to prop up a nonexistent impartial system cannot be overstated. He admits that his arguments do not meet the challenge of his opponents. But he doesn't therefore abandon the old kinds of oppressive theorizing. Rather, he confesses that his argument requires "a leap of faith," and he continues as before. Carter thus averts the collapse of his preferred system of constitutional law through a simple refusal to face the arguments that would enforce that collapse. Such
arbitrary deliverance of a system from a crisis it would otherwise face is, of course, the central function of the apologist. Whether or not Carter’s leaps of faith are loyal to African America is hardly self-evident, but rather depends on which complications he suppresses in order to preserve his preferred system. The important question is, Who becomes, in Carter’s ideal model of rational dialogue, the culturally dispossessed? Sadly, Stephen Carter, like so many lawyers, politicians, and theorists before him, chooses to suppress America’s Negro Question. What first seemed an affable, even courtly, parenthetical remark—“We the people (or many of us anyway)” —becomes the site of a moral and political atrocity. Carter elsewhere explicitly argues that “if ‘the law’ is ‘our law,’ the reason must be that ‘we’ are the elite without whose consent no one could govern.” Carter’s point is that “the elite” in a successful democracy such as Carter believes America to be must be broad enough so that the great mass of people identify with it. Clearly Carter is alluding to the great American middle class. Yet they are an elite relative to whom? None other than the Negro faces at the bottom of the well. Carter here unknowingly recites exactly the same story Derrick Bell tells, except that he does it in smiley face. He overtly places himself (and his hopes for the survival of what he calls democracy) with the self-styled elitist middle rather than the peripheral dispossessed. How then is he loyal to the latter?

Carter’s abandonment of the dispossessed is further evident when he resists those who emphasize law’s unbindingness in order to open a space for social change. Many have argued, powerfully, that law does not bind judges, and many believe that such arguments open a space for ethical choice and progressive politics within legal practice. Carter deletes this space:

Sometimes, the principles the courts would need to embrace [to reach a politically preferable result] are simply too outlandish, too unconnected to anything resembling “law.” Recent efforts to avoid this truth by treating law as mere arbitrary power and bounds on judicial discretion as illusory often read less like serious analysis than like sour grapes. (Emphasis added)

The compelling argument that law does not bind judges is detailed below. Here, the interesting point is that although Carter has himself created a self-described muddle culminating in an ignominious leap of faith in his attempt to address this very argument, he now suddenly opines that it is not serious. This way of proceeding is an act of raw power rather than of intellect. He asserts that his opponents are avoiding something called “truth,” and this assertion evidently dispenses with any need for further argument. This recurs in those rare moments when Negro Crit arguments confront Carter’s
own. In the course of Carter's championing a dialogic model of constitutional law, Derrick Bell makes a forlorn but devastating appearance. Carter notes that dialogic theorists (himself included) offer "no solace for those troubled by Derrick Bell's provocative challenge to mainstream theorists to show why those the Constitution was designed to oppress should now be bound by it."

Carter's talk of solace is a pale response to an unanswerable question. Moreover, Carter is himself, declaredly, not a solace seeker of the kind he takes Bell to be. When Carter calls Bell's argument "provocative," it is as though Bell's effort were an adolescent trick rather than a successful attempt to throw Carter's entire enterprise into question. Carter concedes the success of Bell's argument, redefines Bell as a solace seeker, exempts himself from such solace seeking, and simply continues with what, in another self-immolating confession, he calls his "justification project." Carter persists in the questionable project despite admitting "shuddering contradictions" of which he is "not proud." He acknowledges that the "republican revival" that is at the heart of the dialogic tradition he follows is rooted in a heritage that "was horribly oppressive, at least for those who were not white male property owners." He concedes that the dialogic model has numerous other problems too ("the difficulties are legion"). But he presses on: "The dialogic metaphor still has much to recommend it."

Carter's frank admissions of the priority he places on preserving liberal theory, and his equally frank dismissals of racial-justice priorities as solace seeking, are so frequent that it takes a certain stamina to match his self-accusations with one's own protests. Carter is declaredly concerned to find "happy proposition[s] for liberal theory." Carter elsewhere devotes an entire article to something called the "Theory of Democratic Prosperity," according to which majoritarian democracy must be organized so as never overly to offend the wealthy elite. If that elite should ever feel genuinely threatened, Carter reasons, it will be forced to resort to extrademocratic means of protecting itself. So, the canny progressive judge ought always to make "partly empirical, partly instinctual determination[s]" as to whether particular populist decisions would too-threaten the elite. A court within this picture would, Carter points out, "be engaged in a pragmatic enterprise, one in which the highest value is the preservation of the institutions of constitutional government" (emphasis added). Looked at this way, Carter assures us, "seemingly odious" nineteenth-century decisions can really be explained as good-faith attempts to preserve democracy from "democratic excess of the kind that could end the constitutional experiment."
While others have criticized First Amendment doctrine to the extent that it facilitates the whims of the wealthy and tramples upon the dispossessed, Carter insists that “constitutional restrictions on the ability of the majority to strip the powerful of their resources (including speech resources) are hardly evidence that the document is undemocratic.” Carter’s contrary hunch is that since money is a necessary counterweight to an overweening state, the First Amendment’s responsiveness to monied interests is perhaps really a guarantor of democracy. If the unpropertied rabble could influence the government, it might try to gouge the rich—and the rich would respond with undemocratic repression, so we ought to be grateful that the First Amendment doctrine empowers the rich in advance, and saves us all that unpleasantness. Under Carter’s Theory of Democratic Prosperity,

The anti-majoritarian protections of property, for example, become not the safeguards of the propertied class, but rather the preservatives of democracy itself; by limiting the scope of societal changes that the masses can demand, the Constitution lessens the likelihood that those with the greatest private power will dismantle the democratic institutions. The Theory is also able to justify the exclusion of slaves, and to a large extent, the poor from suffrage for the first century of the nation’s existence. Before the massive economic expansion of the past century, there simply was not enough wealth to share with all these potential voters. (Emphasis added)

When Carter says his theory can justify the exclusion of slaves and the poor, the question is, Justify to whom? And the answer is, to some audience other than the slaves and the poor themselves. To the wealthy, certainly. And to some disembodied entity known as the “American experiment,” which, at all costs, Carter feels must be preserved. One could hardly ask for a clearer clash of racial justice versus something else (in this case, Lockean liberal theory with a dash of Hobbes and a paradoxically weak stomach for a fight). Carter includes a wan disclaimer in the midst of indulging this analysis. He says that “without endorsing a judicial review based on the Theory of Democratic Prosperity, it is a matter of more than passing interest to try to work out what its method might entail.” Yet Carter makes no serious attempt to illuminate the ethical atrocity of the theory. His uncritical and “more than passing interest” in the theory is itself already an endorsement. Certainly, Carter hasn’t spent anything near as much energy or ink on Derrick Bell’s work. Moreover, the theory is eminently consistent with Carter’s views generally, such as his oft-repeated opinion that society will pretty much muddle on as it is. Carter’s affinity for the Theory of Democratic Prosperity is unmistakable upon the most cursory reading of the article.
In summary, Carter’s allegiance to an avuncular yet oppressive liberalism, his recognition that liberalism obliterates difference, his patronizing attitude toward his students, and his anticipated patronizing attitude toward his own children are all explicit here:

I am reasonably sanguine—not to say cynical—about the future. Capitalism will co-opt most of the current activists, because that is what capitalism does best. Liberalism will learn from them, absorbing what is valuable in their ideas and discarding what is not, because that is what liberalism does best. And, God willing, something over a decade from now, my own children, rebelling angrily on college campuses, will be lamenting the demise of “real” student radicalism—you know, the kind they had back in the 1980s and 1990s.

Carter’s statement that liberalism is, after all, a kind of ultimate arbiter, having final say over what to keep and what to discard, is a straightforward admission of Edward Said’s claim that liberal cultural idealism is a “forceful and tyrannical”—not pluralistic and accommodating—values system. Carter here affirms that liberalism, discarding the supposedly valueless, creates Said’s culturally disenfranchised.

In The Culture of Disbelief, Carter appears to resist the violent exclusions enforced by U.S. liberalism. Carter’s Culture advances a plea for the inclusion of religion within rational liberal dialogue. He appeals to liberalism’s vaunted tolerance. It would certainly be entertaining to parse the collapse of Carter’s Culture into a condemnation of both religion (for “Faustian” political pacts such as tax exemption) and liberalism (for enforcing an arbitrary model of rationality), but that would be a diversion. More interesting is the absence of any such contradiction and collapse in Carter’s work in the areas of constitutional theory and civil disobedience. In Carter’s constitutional theory, racial-justice concerns (unlike religious ones) are eviscerated. While Carter has an empirical hunch that all Americans view their society as fundamentally just, he has no such hunch that Americans view their society as fundamentally sufficiently religious. In Carter’s theory, “rational” liberal reason has its way wherever racial-justice passions, rather than religious ones, are the issue. The result is a rout of racial justice in Carter’s constitutional world. While Carter laments, in Culture, that religious devotees are violently forced to dress themselves in secularism before engaging in public debate, Carter’s own writings breezily require exactly such cross-dressing on the part of those who view American society as fundamentally tainted by racial injustice. So, Carter’s allegiance to a patrician liberalism is the opposite of the harmless, apolitical, and inherently humane pursuit that he fancies it to be. Carter’s affable sensibility is like a
scary kind of Mister Magoo in its somnambulant violence. Telling of his young daughter’s exposure to an offensive slogan emblazoned on a Confederate flag, Carter gratuitously informs us that his wife is wiser than he in matters of childrearing. This gracious and back-handed tribute to natural female wisdom exactly captures the simultaneous charm and violence of Carter’s high liberalism.

And Carter carries this genial and oppressive disposition even into legal interpretation. In law, which has been described as a field of pain and death, Carter’s humane liberalism quickly becomes an affable sadism. Evidence Carter’s championing of what he concedes is a quaint relic in legal theory: the prima facie obligation to obey the law. Carter begins by invoking—over Derrick Bell’s admittedly unanswerable dissent—his empirical hunch that America is fundamentally just. Carter then announces a requirement that all laws are presumptively entitled to obedience. Next, invoking a highly debatable interpretation of the legacy of Martin Luther King, Jr., Carter prescribes what can, with precision, be described as legal-theoretical sadism. Carter asserts that King, driven primarily by a relentless optimism and by a belief in the essential good faith of the American people, counseled not only nonviolence but also willing submission to the punishment of unjust laws. In fact, as Tough Randall Kennedy has pointed out, King’s campaign was premised not on a naive rule-of-law idealism but on “a keen appreciation for both the power and the limits of the law” (emphasis added). Carter’s King is thus as much an uninteresting icon as is Spike Lee’s Malcolm X.

Driven by this icon and by rule-of-law rhetoric, Carter’s ostensible commitment to racial justice soon disappears in favor of a peculiar “ideal of the just law.” Under Carter’s ideal, citizens should submit to punishment under laws that are entirely unjust in those citizens’ views. Submission to such punishment will, Carter says, spur dialogue among America’s essentially decent polity, and will appeal to the conscience of the ideal citizens who will then be moved to amend the law. Were this accepted by Negro Critics, here’s what Carter would have in store for Audre Lorde, Patricia Williams, Mari Matsuda, and Kimberle Crenshaw. Of each he would say that “she can show no greater love for the ideal of just law and no greater faith in the capacity of just societies to change than by submitting herself to punishment under the law that is unjust.”

The female pronoun is Carter’s, and this is Tough stuff. It is the law-and-order mirror image of certain ostensibly progressive excesses of the 1960s. The Black Panther party’s Elaine Brown has written of brutal beatings, with
a bullwhip, that she suffered at the hands of David Hilliard, also a prominent figure in the Black Panther movement. Alice Walker’s criticism of Hilliard’s bullwhip affection triggered this perplexing response from Brown: “Yes, I was beaten, as [Walker] pounds home. . . . [But] David, who never laid a hand on me but to heal, whose touch was revolutionary love, David does not deserve so much venom.”

If Carter recoils from this bullwhip vision (and I make that charitable assumption), how come he adopts some analogue thereof in his own work? The answer is that Carter’s “dialogic” theorizing is so untethered from any real person’s body that the specter of sadism he proffers is intended as some kind of metaphor or something (again this is a charitable reading: Carter relies, in his analysis, on the real spectacle of pain as a trigger of the polity’s conscience). Yet law is not a metaphor, but rather a field of pain and death. So Hilliard’s bullwhip is apropos, and Carter’s suggestion is terrifying.50

As always, it is useful to contrast Carter’s Tough commandments for Negroe with his leniency toward others. In criticizing the case of Morrison v. Olsen, which upheld the office of the independent counsel (think of Lawrence Walsh, Iran-Contra), Carter performed a wonderful turnabout regarding the meticulous punishment of wrongs. Carter suddenly opposed “overly literal enforcement of the law” as “profoundly unfair” to potential defendants, and he suddenly berated “fans of criminal punishment who want to see every wrongdoer in jail.”

Carter’s Tough scheme for social progress through mass submission to the punishment of unjust laws is, finally, built on a number of his own “empirical hunches,” all of which might prove faulty. His main idea—that the spectacle of pain will yield results in law reform—depends wholly on an intriguing idea of an American polity governed by rational dialogue about morality and about policy. We would, in Carter’s intriguing model, pay in pain now, without any assurance that Carter’s utopia has arrived. Indeed, on Carter’s iconographic reading of the Martin Luther King years, the American utopia had then arrived, and so has either subsequently been lost, or else is still here and therefore decades old.

Finally, the unreliability of Carter’s empirical hunches is compounded by a general deficiency in models of constitutional law as dialogue. Stanley Cavell’s Claim of Reason is easily the most thoughtful work we have on conversation in culture. Stephen Carter’s work, in contrast, is strong evidence that Cavell’s worst fears have materialized. Cavell cautions, “It does not appear unthinkable that the bulk of the entire culture, call it the public
discourse of the culture, the culture thinking aloud about itself, hence believing itself to be talking philosophy, should become ungovernably inane.”

Need one mention the Guinier affair to press this point? Tough Randall Kennedy himself called the Guinier affair “one of the most vivid examples of the dumbing down of American politics I’ve ever seen.” Stephen Carter’s offering of Negro bodies to an idealized and speculative dialogue is, more than dumb, *immoral.*