Clarence Thomas and the Tough Love Crowd

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Is Law Like a Friar’s Roast?

I have tried to do my part towards making the teaching and the study of law in that school worthy of a university.... To accomplish these objects, so far as they depended upon the law school, it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books.

—Christopher C. Langdell, *Harvard Celebration Speeches*, 1887

Have you not noticed what a false and unreal sound abstract terms have on the lips of those ancients in the college?... The toy life which the Jesuits permit these young men to live is what I call the stationary march. The marionette life which the Jesuit himself lives as a dispenser of illumination and rectitude is yet another variety of the stationary march.

—James Joyce, *Stephen Hero*, 1944

Is Law School a Friar’s Roast?

A Friar’s Roast is a no-holds-barred escape from accountability in which, according to actress Whoopi Goldberg, anyone familiar with the club’s tradition knows that “jokes about sex, gender, bodily functions, religion and race are the rule rather than the exception.” And lawyers have traditions that, while less spectacular, appear equally immune to serious questioning. Julien Benda’s tradition of disinterested truth seeking remains the way of business for intellectuals in America. The landmark Declaration of the American Association of University Professors (AAUP) endorsed in 1915 the tradition that Benda, in 1927, would fortify with his powerful voice: that of the university as a nonpartisan forum detached from the conflicts of the outside world.

This detached ideal continues to dominate popular debate about the role
of universities, even though few deny that the ideal is outdated. Derek Bok, former dean of Harvard Law School and former president of Harvard College, entered the debate over the role of the contemporary university with a book called Beyond the Ivory Tower. Bok’s title might suggest a move beyond the transcendent ideals of Julien Benda, but the opposite is the case. Bok concedes that the image of the ivory tower university grew obsolete after World War II because of the universities’ increasing immersion in, and reliance on, society beyond their walls. Yet Bok does not abandon old transcendent ideals, but rather addresses himself to “the constant tensions that result from embracing transcendent goals and ideals while having to exist and be of service to a practical, imperfect world.” Bok thus admits the obsolescence of the ivory tower image without conceding the irrelevance of transcendent goals. He sets himself to achieve a balance between old goals and new conditions. He ignores the possibility that new conditions might require new goals.

This debate, which Bok discusses in relation to universities generally, is also raging in America’s law schools. Contemporary legal scholars are all now vaguely aware of the connections between legal knowledge and power. Stephen Carter himself has recently served up a good example of this connection. Carter has long opposed “litmus tests” for judges. In The Culture of Disbelief, Carter advanced a mildly prochoice position but also urged that religion ought to have an expanded role in public debate and that the antichoice religiously based argument, that a fetus is a person, ought to be a legitimate part of American jurisprudence. Carter made this suggestion in Culture while being well aware, as he states elsewhere, that “it will obviously be easier for pro-life forces to enact abortion restrictions if they can convince legislators (and the public) of the personhood of the fetus.” Within days of Culture’s appearance, President Clinton personally urged Americans of all political and religious stripes to read it. Days after that, the White House announced that it would not eliminate candidates for appointment to lower federal courts because of their opposition to abortion. This caused predictable and robust political protest. A New York Times editorial characterized the Clinton action as “a political sellout of incalculable dimensions.” It is of course unlikely that Carter’s book caused this White House action. Clinton was probably expressing a long-held or somehow expedient view. Unquestionably, however, Carter’s book facilitated the announcement by supplying Clinton with a veneer of intellectual respectability.

Less dramatically, law teachers shape their students’ visions of what it is
possible for a lawyer to do. Law teachers thus play a role in deploying the energies of many of America’s talented. Additionally, law professors directly participate in the political process on many issues (congressional testimony on proposed legislation, judicial confirmations, etc.) in which Congress listens precisely because of a professor’s authority as a legal “expert.”

In this politically charged setting, some scholars have sensibly suggested that new goals ought to displace the “transcendent” priorities that have held sway for so long. The Tough Love lawyers, in contrast, tell us that impartiality, disinterest, and neutrality keep us nearest truth. Law is the last bastion of such old rhetorics. Despite the legal realist movement of the 1930s, Herbert Wechsler’s 1959 article, bearing the self-explanatory title “Toward Neutral Principles of Constitutional Law,” could become influential among American lawyers. Stephen Carter, even today, insists that the legitimacy of judicial review hinges on justifying the process of judicial decisionmaking rather than on the decisions of individual judges. And in 1993, a lawyer who has himself launched vituperative attacks on transcendentalism in law could plausibly ignore the entire tilt of his own career in order to attack Negro Crits in the name of the supposedly inherent general rules of persuasive argument. Someone else has argued that lawyers are now engaged in an “idolatrous practice,” in a religious enterprise, because lawyers proceed on an unacknowledged assumption that their habits carry transcendent authority. He added that the law school (not the supposedly untutored public) is the “leading temple” devoted to this idolatrous practice. His conclusion? This state of affairs may be “an illusion too precious to be relinquished.”

Given the unfortunate state of legal commentary itself, it is not surprising that even the most thoughtful contributors, outside of law, assume that law has a certainty that eludes other disciplines. Literary theorist Stanley Fish, turning his energies to legal theory, defers to “competent” practitioners of something called “adjudication.” Likewise, philosopher Stanley Cavell assumes that parties before a court are in competition for a stable standard called “the favorable or unfavorable response of the law” (emphasis added).

Lawyers who reject the transcendent assumption that such stable legal standards exist are roundly attacked for degrading the law and for intolerably departing from what are said to be the settled rules of legal truth production. Work that questions these ostensibly settled rules is dismissed as fiction. It has, for instance, been suggested that Patricia Williams’s *Alchemy of Race and Rights* is clearly not a factual work and ought therefore to have been pre-
sent as a novel. Meanwhile, Randall Kennedy’s “Racial Critiques” article, notwithstanding its serious flaws, continues to be cited as evidence that Negro Crits, whom Kennedy criticizes, neglect an indispensable ideal: the production of empirical evidence and real proof. Moreover, allegiance to these illusory standards of legal-scientific truth production is not confined to opponents of Negro Criticism. A relatively friendly *Harvard Law Review Book Note on Alchemy* treated the book as bifurcated between literary and scientific claims. The reviewer praised the supposed literary aspects of the book but commented that “when the text crosses back from art to science ... Williams’s argument becomes as partial and contradictory as that of her adversaries.” It is, however, news that Negro Crit texts participate in scientific ambitions at all. A passage in *Alchemy* where reference is made to statistics on crime prompts the reviewer to suggest that Williams “masquerades a partial picture ... as objective truth.” Yet Williams’s resort to statistics always intends to throw up their indeterminacy and further a principal Negro Crit theme: frequently in America “truth like a fad takes on a life of its own, independent of action and limited only by the imagination of self-proclaimed visionaries.” Williams’s point is that the crucial irresolvability of episodes like the Tawana Brawley affair is usually solved, simplistically, by a regime of truth that elevates an arbitrary truth from among a multitude of competitors. Even this friendly reviewer thus manages to overemphasize the semantic posture of the chapter in question (asserting a competing truth). The reviewer neglects that competing truth’s arbitrary erasure by the prevailing regime of truth, and therefore misses Williams’s central theme: given the failure of objectivism, power makes truth.

In another assault by friendly fire, Edward Rubin has offered an attempt (entitled “On beyond Truth”) to address the crisis of stable standards within legal academia. Rubin begins promisingly, noting that in law “the entire field crackles with normativity,” so that the scientific concepts of validity are unhelpful. Yet Rubin himself proposes the spectacularly unhelpful alternatives of “normative clarity” and “persuasiveness,” limited by a principle of “bizarreness.” Who is to apply these new tests of truth? Rubin means to be reassuring when he says that this task will be handled by “a large sample of distinguished reviewers” guided by a belief that something called “theory” provides something called “altitude” and thereby guards against mere opinion and bias. Rubin thus reenters the quest to escape the crackling normativity of the field by employing a spurious metaphor of flight.

In yet more friendly fire, Daniel Farber and Suzanna Sherry also begin in
a promising fashion. They specifically note that since Negro Crits have challenged prevailing standards, “A constructive response ... cannot simply reassert those traditional standards.” Yet the epigraph of their article prefigures their own failure: “To have crafted ... something true and truly put—whatever the devil else legal scholarship is, is from, or is for, it’s for the joy of that too.” Seemingly unaware of the enormous and foredoomed audacity of such truth seeking, Farber and Sherry set themselves the old task of elaborating “methods of judging truthfulness” (emphasis added). Farber and Sherry are aware that “the meaning of ‘truth’ itself is contested,” but they simply assert, “We do not believe it necessary to explore the philosophical disputes over the nature of truth in order to resolve the standards for assessing nonfictional stories.” Farber and Sherry admit the unattainability of truth (or at least decline the question) even as they retain the legitimizing rhetoric of truth. While Negro Crits insist on unswerving allegiance to communities outside of law school walls, Farber and Sherry would block that project with this dogma: “Community building may be valuable, but it is an enterprise quite distinct from increasing understanding of the law.”

No further argument, apparently, is necessary.

This, then, is the Friar’s Roast that legal scholarship has become. Legal scholars, right now, are playing a game of make believe. Right now they are operating on the explicit assumption that questions about the nature of truth are not central to legal practice. They assume it’s fine to continue in rhetorical allegiance to Benda’s mission of disinterested truth seeking, even while admitting that Benda’s model is unattainable in practice. Yet, as Ernest Gellner has put the point in criticizing the undeserved dominance of Julien Benda’s ideals in contemporary intellectual practices,

The tacit deployment of a model which fails to do justice to the seriousness of [the] difficulties is itself a kind of intellectual treason. The strident denunciation of the treason of the clerics, which pretends that our situation is far clearer and unambiguous than it in fact is, is itself a form of infidelity to the truth.10

Law needs new unsparing satirical critics. Perhaps Negro Crits are new Jonathan Swifts.11

People Enact Truth

Contrary to a myth whose history and functions would repay further study, truth isn’t the reward of free spirits, the child of protracted solitude, nor the privilege of those who have succeeded in liberating themselves. Truth is a thing of this world.

—Michel Foucault, Truth and Power
Negro Crit responses to the mock-scientific attacks and assorted misunderstandings canvassed in the previous section have persuasively emphasized that, in law, the issue of truth versus fiction is not “out there” to be picked up like pebbles off a beach. Law isn’t like manna from heaven. Judges, law clerks, Court TV, messengers, lawyers, paralegals, Federal Express couriers, secretaries, and interactions among all of the above enact much of society’s legal “regime of truth.” The courts participate in big and small ways.

Small ways: the court’s evidentiary rules decide what evidence is admissible in any dispute, and then the judge decides what among the admissible evidence is persuasive. Even in the relatively rare cases where there is a jury, so that the judge doesn’t have the final say on the persuasiveness of the evidence, the judge still guides the jury’s deliberations. And trial jurors are themselves hardly infallible arbiters of truth. What was previously a malcontent’s complaint has become, since the Rodney King verdict, a part of popular lore: juries can and do flunk the truth test.

Big ways: conservative and progressive lawyers alike agree that courts generally, and the United States Supreme Court in particular, contribute to the country’s “vision” of itself. Their job is either to drag everyone back to an imagined traditional America (conservatives) or to push everyone forward to an imagined best America (progressives). It is easy to show that this vision-announcing function always and necessarily involves contestable values rather than simple truth. Those who oppose the courts’ inevitable visionary role claim that judges are and ought to be confined to a distinctly professional, legal, or rule-of-law vision. Making the case for that peculiar idea is an uphill battle indeed.

On June 28, 1993, the U.S. Supreme Court rejected the claim that the orthodox scientific community has a monopoly on scientific truth. The Supreme Court refused to give automatic deference to the dominant scientific community. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the justices held that courts of law have to accept scientific evidence as expert evidence even if the scientific method followed by the particular expert is not generally accepted in the scientific community. After *Daubert*, in each case even the most well-credentialed scientist must convince the courts afresh as to the merits of the particular contested scientific claim. The judge or jury, not the scientists, thus have the final say on what constitutes scientific truth for legal purposes. This is potentially important in product liability cases like *Daubert* itself, where well-funded drug companies and other corporate defendants often bankroll much of the scientific community’s research.
Law's truth-making role can help America's dispossessed enormously if lawyers relentlessly question the things law does every day. But only Negro Crits sustain this questioning. Superficially similar lawyers group within a strand of feminism known as "difference theory." But difference theorists call for each lawyer to pursue plural values individually and believe that these values can be harmonized through our openness to each other. While this sort of thing might perhaps serve well in a Himalayan ashram, it is less well suited to the American legal system, which imposes pain and death every day.

The difference school is built around a new-age "plea for judges to engage with perspectives that challenge their own." Yet their underlying desire, to approach nearer other people's truths, might be better advanced if the dispossessed spend energy on uncompromising expression of previously excluded truths rather than on trying to empathize with their oppressors. We might expect difference theorists' ideal of the judicial role to take account of the difference with which they are so concerned. Yet, in outlining the appropriate judicial role, a leading difference theorist, Martha Minow, slips away from her own best insights. Minow begins with the laudable suggestion that the plea for openness to difference is not a mere "call for sympathy or empathy, nor a hope that judges will be 'good people.' Sympathy, the human emotion, must be distinguished from respect, the legal command."

This good insight does not, however, last very long. Minow approvingly cites the view that

whereas sympathy involves an imaginative extension of our own person, our beliefs and perspective, respect heeds the distinctness of persons.... We can respect [another's] views without sympathizing with them. We can find them justified from his perspective, without believing that they would be ours in that situation.\(^\text{12}\)

But how can we find another's view "justified" if we would, even in her situation, have a different one? Minow's distinction between sympathy and justification is nonexistent. The distinction trades on a diluted sense of justification. Justification in a strong sense just is what we think right. It provides us with reasons for action. In a diluted sense, justification might mean something like, "I can see what you're saying but..." In this weaker case, justification simply might not provide us with a reason to act in accord with the other person's view. Moreover, this weaker sense of justification will be especially useless where controversy is especially intense. Minow neglects Stanley Fish's useful first law of tolerance dynamics: tolerance is exercised in an inverse proportion to there being anything at stake. Anyone with
strong views in a heated controversy would probably, if it were her choice
to make, withhold the legal command her opponent wants. And if she does
not withhold her opponents’ preferred command, it will be because she
doesn’t really feel strongly about the issue, or because she feels strongly that
exactly where one feels strongly about an issue, one ought to defer to one’s
opponents in certain circumstances. This latter view—that one ought
to defer to one’s opponents—represents a perfectly respectable ideology called
liberalism. The action it compels—award the legal command to one’s oppo-
nent in certain circumstances—is not manifestly absurd, but neither is it
universally desirable. There are times when we ought not to turn the other
cheek. Minow’s model only works among persons who are already unsepa-
rated by urgent moral and political differences—or among those who feel so
secure in their own position that permitting their opponent a victory on a
single particular occasion resembles philanthropy more than self-abnegation.
If this is this case we are, alas, thrown back upon the toothless empathy that
Minow thinks she has overcome by importing the notions of respect without
sympathy and of justification without belief. This is an important point
because empathy, while perhaps cathartic for the empathizer, is not a good
political strategy for the dispossessed:

For blacks, describing needs has been a dismal failure as a political activity. It has
succeeded only as a literary achievement. The history of our need is certainly moving
enough to have been called poetry, oratory, epic entertainment—but it has never
been treated by white institutions as the statement of a political priority.... Some of
our greatest politicians have been forced to become ministers or blues singers. Even
white descriptions of “the blues” tend to remove the daily hunger and hurt from
need and abstract it into a mood. And whoever would legislate against depression?
Particularly something as rich, soulful, and sonorously productive as black de-
pression.13

The astuteness of this observation is difficult to overstate. Negro Crit
scholarship has been alternately praised as “eloquent” and dismissed as
fiction. Thus, even where blacks enter political institutions, as lawyers,
judges, or otherwise, their views stoke emotion more often than set agendas.
During the mass eulogy that followed Justice Thurgood Marshall’s death, a
New York Times headline referred to the “plain-spoken, gut-wrenching elo-
quence of the Justice’s real voice.” The Times described Marshall’s voice as a
“sonorous instrument.” And the text of the article, consistent with this
cathartic hype, referred to Justice O’Connor’s remark that Marshall had
“influenced her most as a raconteur.”14 Yet, whatever this influence was, it
did not resemble a consistent pattern of concurrence with Marshall’s opinions. O’Connor’s transmutation of Marshall’s priorities into some kind of raconteur’s recital allowed her to strike an enlightened posture. She could praise the man even while withholding concurrence in his pattern of values—even while withholding the legal command. Empathy, thus, is bullshit. It does more for the self-righteousness of the empathizer than for the well-being of the dispossessed.