

## BOOK NOTES

### WHEN VICTIMS HAPPEN TO BE BLACK NEOCONSERVATIVES<sup>1</sup>

REFLECTIONS OF AN AFFIRMATIVE ACTION BABY. By Stephen L. Carter.<sup>2</sup> New York: Basic Books. 1991. Pp. xiii, 286. \$23.00.

From the recent Senate confirmation hearings of Justice Clarence Thomas,<sup>3</sup> to the debate over "quotas"<sup>4</sup> in the Civil Rights Act of 1991,<sup>5</sup> to the bitter fights over student and faculty diversity at leading law schools,<sup>6</sup> traditional justifications for affirmative action have come under increasing attack.<sup>7</sup> In *Reflections of an Affirmative Action Baby*, Professor Stephen Carter of Yale Law School fuels this debate by arguing that affirmative action harms racial minorities<sup>8</sup> more than it helps them and that communities of color are too intolerant of dissenting viewpoints.<sup>9</sup> Although *Reflections* raises important issues that are often ignored in legal scholarship on race relations, it ultimately suffers from an incomplete analysis of affirmative action and from excessive reliance on misguided rhetoric.

Carter begins his book by stating: "I got into law school because I am black" (p. 11). As a young man, Carter was initially rejected by Harvard Law School. Several days later, he received an apologetic phone call from the admissions committee telling him that they had received "'additional information that should have been counted in [his] favor' . . . the color of [his] skin" (p. 16). Insulted, Carter

---

<sup>1</sup> Cf. Stephen L. Carter, *When Victims Happen to Be Black*, 97 YALE L.J. 420, 447 (1988) (arguing that society cannot understand how Blacks can be victims of violent crimes). Similarly, Professor Carter argues in *Reflections* that many people cannot understand how Black neoconservatives are victimized.

<sup>2</sup> Professor of Law, Yale University.

<sup>3</sup> See *Hearing of the Senate Judiciary Committee*, Federal News Service, Sept. 10-13, 1991, available in LEXIS, Legis Library, Nomine File (partial transcript of the Thomas hearings).

<sup>4</sup> See, e.g., Priscilla Painton, *Quota Quagmire*, TIME, May 27, 1991, at 20.

<sup>5</sup> Pub. L. No. 102-166, 105 Stat. 1071 (1991).

<sup>6</sup> See, e.g., Michel Marriott, *Unresolved: Role of Race in Law Class Admissions*, N.Y. TIMES, Apr. 28, 1991, § 4, at 5.

<sup>7</sup> See, e.g., Andrew Rosenthal, *President Tries to Quell Furor on Interpreting Scope of New Law*, N.Y. TIMES, Nov. 22, 1991, at A1 (describing the recent attempts of top Bush administration officials to end the use of racial preferences and quotas in federal government hiring).

<sup>8</sup> This Book Note uses the terms "African-American," "Black," "minority," and "person of color" interchangeably. For an interesting discussion of racial labels, see Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

<sup>9</sup> This Book Note focuses only on the intersection between minority dissent and the debate on affirmative action. Carter, however, discusses minority dissent more generally in *Reflections*.

snubbed Harvard and went to Yale. While in New Haven, he led a delegation of activists that stormed a Yale Political Union debate (immediately after the *Bakke* decision<sup>10</sup>) to prevent speakers from questioning the wisdom of race-conscious admissions plans (pp. 22–24).

Thirteen years later, *Reflections* is Carter's attempt to reopen the very discussion he had previously stifled. Carter advances three arguments in support of his thesis that affirmative action harms people of color. First, racial preferences reinforce, rather than eliminate, differences between minorities and nonminorities. Justifications for affirmative action based on diversity — that is, minorities add a special “[v]iewpoint, outlook, [or] perspective” (p. 32) — actually perpetuate ugly “stereotypes about the different ways in which people who are white and people who are black supposedly think” (p. 32). The proposition that skin color *always* stands for a single perspective leads to troubling results. Conservative Blacks such as Congressman Gary Franks are criticized for not thinking the “right” way (pp. 29–30), and white civil rights activists such as Jack Greenberg are boycotted by students for teaching a course on race relations (pp. 41–44).<sup>11</sup>

Second, affirmative action creates the assumption that people of color can be only the best in their group, but never the best, period. Carter relates how he was prevented from competing for a National Merit Scholarship in high school because he had already been chosen for the National Achievement Scholarship, an award exclusively for Black students (pp. 48–49).<sup>12</sup> Minorities such as Carter become trapped by the “best black syndrome” (p. 58) — their accomplishments are devalued by the assumption that they always compete under different and less demanding standards. Consequently, Blacks feel the need to prove themselves in a way that no white is ever asked to do. As Carter points out: “We cannot afford, ever, to let our standards slip. There are too many doubters waiting . . . [to] cry, ‘See? Told you!’” (p. 58).

Third, affirmative action diverts attention from the people who need the most help — poor Blacks who never have the opportunity to prove themselves under affirmative action in the first place. As Carter puts it, “*The most disadvantaged black people are not in a position to benefit from preferential admission*” (p. 80 (emphasis in

<sup>10</sup> See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

<sup>11</sup> Most recently, minority activists anguished over then-Judge Thomas's nomination to the Supreme Court. See, e.g., Steven A. Holmes, *Black Quandary over Court Nominee*, N.Y. TIMES, July 4, 1991, at A12 (describing activists who praised Clarence Thomas for his accomplishments as an African-American but criticized him for his philosophical and political views).

<sup>12</sup> Carter recently conceded that he had in fact competed for a National Merit Scholarship — and lost. Stephen L. Carter, Lecture at Harvard Law School (Sept. 26, 1991).

original)). Thus, affirmative action is merely "racial justice on the cheap" (p. 71).

Responding to these problems, Carter advocates a return to affirmative action's original agenda — "promoting progress by [allowing] people of color to show what they can do" (p. 84) — by increasing help for the poor at earlier stages of their lives<sup>13</sup> and decreasing help at later stages (p. 89). Specifically, he questions the effectiveness of race-based preferences and advocates abolishing affirmative action in the workplace (pp. 88–90).

Carter explains that he refuses to remain silent because the problems facing African-Americans today are so complex that "[w]e cannot afford the luxury of insisting, in the name of solidarity, that any of our problems has a single, unchallengeable answer" (p. 133).<sup>14</sup> Nonetheless, he laments that for Black intellectuals such as himself, dissent from the traditional civil rights agenda has led to ostracism<sup>15</sup> that is particularly painful because "[t]he attacks are generally far harsher than those launched against white opponents" (p. 113). One important way in which the Black orthodoxy silences dissent is by writing off dissenters as "neoconservatives" (p. 146). Carter remarks, "To be white and conservative is to be a part of the American mainstream. To be black and conservative is to be a part of the lunatic fringe" (p. 154).

Carter concludes by examining the larger problem of social advancement for Blacks. As a "compromise" to reconcile the rift between mainstream Blacks and Black dissenters, he suggests that racial minorities must aspire to maintain their special cultural and historical identities but nevertheless compete under the same standards as whites (pp. 227–32). Only then can true racial equality be achieved. Carter ends with his view of how the Black mainstream *should* understand his position: "[F]or the dissenter who happens to be black, the act of dissent can be even more [than an act of loyalty]. An avowal of race . . . . An act of love" (p. 253).

The ultimate question in this debate is whether the benefits of affirmative action outweigh the costs to people of color and to society at large. Unfortunately, Carter's incomplete analysis<sup>16</sup> mischaracterizes — and sometimes ignores — many of these benefits and costs.

<sup>13</sup> Carter recommends improved medical care and preschool education for poor children (pp. 82–83).

<sup>14</sup> Cf. Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1810–19 (1989) (justifying his criticism of minority scholarship on the grounds that he does more good by speaking out than by remaining silent).

<sup>15</sup> By way of example. Carter describes the experiences of Walter Williams, Glenn Loury, Randall Kennedy, Shelby Steele, Thomas Sowell, and Julius Lester (pp. 104–10).

<sup>16</sup> Perhaps *Reflections* was not intended to be a rigorous scholarly work. However, because Carter takes a strong position against affirmative action, this Book Note evaluates his arguments seriously.

For example, Carter seriously undervalues the benefits of workforce and student-body<sup>17</sup> diversity. He “proves” that arguments in favor of diversity (that is, minorities have a “special viewpoint”) are necessarily invalid because there is an imperfect fit between race and viewpoint. Carter’s reasoning fails, however, because as long as there may be a *significant correlation* between the color of one’s skin and the way in which one experiences the world,<sup>18</sup> race might be a reasonably accurate proxy (even if not a perfect fit) for perspective. By prematurely dismissing arguments in favor of workforce diversity, Carter sidesteps any discussion of whether diversity is an inherently desirable goal.

Carter undervalues another benefit of affirmative action by ignoring the experiences of the people who have the most to gain from preferential treatment. In his second argument, Carter focuses mainly on the plight of “best blacks,” minorities who presumably would have succeeded without affirmative action. He ignores the experience of the true beneficiaries of affirmative action — working class Blacks for whom advancement would not be possible under traditional standards.<sup>19</sup> Carter’s failure to recognize this obvious fact is particularly ironic to the extent he has characterized his book as one of the first honest and open accounts of affirmative action.<sup>20</sup>

On the other side of the equation, Carter overstates a cost of affirmative action by assuming that it is always a zero-sum political game for people of color. Carter’s third argument asserts that affirmative action diverts attention from poor Blacks.<sup>21</sup> He nevertheless fails to show, as a matter of economics or morality, why affirmative action cannot exist *along with* increased attention to the underclass. The issue is not whether affirmative action *prevents* additional resources from going to the poor, but whether legislatures have the political willpower to enact multiple programs.

Finally, Carter overstates a cost of the debate over affirmative action through his characterization of the Black orthodoxy. Although

<sup>17</sup> Although Carter rejects affirmative action in the workplace, he supports race as a criterion for university and professional school admissions. Carter himself acknowledges the logical problems with accepting only one form of affirmative action (pp. 84–89).

<sup>18</sup> See, e.g., HOWARD SCHUMAN, CHARLOTTE STEEH & LAWRENCE BOBO, *RACIAL ATTITUDES IN AMERICA* 139–62 (1985) (showing substantial differences between Black and white perceptions).

<sup>19</sup> Of course, it may also be argued that Carter undervalues the stigmatic *costs* of affirmative action by ignoring the experiences of these typical beneficiaries. That is, the psychological harm inflicted upon the typical beneficiary (from feeling *underqualified*) may very well exceed the harm inflicted upon the “best black.” The main point, however, is that Carter fails to discuss the experiences of working class beneficiaries at all.

<sup>20</sup> Cf. Peter Cicchino, *Taking Issue with Reconstruction*, 1 *RECONSTRUCTION* 70, 70 (1990) (criticizing Carter’s “preoccupation with [his] own . . . bourgeois introspection”).

<sup>21</sup> Liberal scholars have long criticized affirmative action on similar grounds. See, e.g., Derrick A. Bell, Jr., Bakke, *Minority Admissions, and the Usual Price of Racial Remedies*, 67 *CAL. L. REV.* 3, 14–16 (1979).

Carter portrays the Black mainstream as an omnipotent censor in its defense of the traditional civil rights agenda, his anecdotes do not show how the criticism of conservative viewpoints has led to actual silencing. In fact, the anecdotes demonstrate a dramatic *increase* in recent scholarship by Black dissenters (pp. 105-116). Furthermore, Carter fails to acknowledge that Black conservatives may actually have a more powerful voice than mainstream Blacks in today's political climate.<sup>22</sup>

Carter's incomplete analysis<sup>23</sup> ultimately allows misguided rhetoric to prevail over reason. Specifically, he relies on the rhetoric of victimization<sup>24</sup> to provide support for his arguments. Carter claims that members of the Black orthodoxy, traditionally the *victims* of racism,<sup>25</sup> become the *victimizers* of both poor Blacks and Black dissenters through their unyielding support of affirmative action. Although claims of victimization often force the alleged victimizers to reassess their positions, excessive use of rhetoric can turn marginalized groups against each other in disputes about resources and legal protection.<sup>26</sup> Deciding whether the benefits of internal division ultimately outweigh the costs requires looking beyond mere claims of victimization.

<sup>22</sup> See, e.g., Sylvester Monroe, *Does Affirmative Action Help or Hurt?*, TIME, May 27, 1991, at 22 (discussing the influence of the "small but widely publicized group of black neoconservatives" on the affirmative action debate).

<sup>23</sup> Carter also fails to discuss other benefits and costs of affirmative action. For example, he ignores the benefits of role modeling and corrective justice as well as the costs of white displacement and resentment.

<sup>24</sup> The "rhetoric of victimization" is a mode of argument in which the speaker invokes his status as a victim to attack those who have already achieved legitimacy through claims of oppression. Opponents of anti-harassment codes use this strategy to attack the "politically correct" for victimizing those with controversial points of view (pp. 169-91). Similarly, critical race theorists attack critical legal scholars for victimizing minorities through their rejection of rights. See, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 303-07 (1987). Other examples include the abortion debate, in which the woman becomes the victimizer of the fetus, and the gay rights debate, in which the homosexual becomes the victimizer of the traditional family. Most recently, Professor Anita Hill, the alleged victim of sexual harassment, became the victimizer when she was accused of using racist stereotypes against then-Judge Thomas. See Tom Wicker, *A Glorious Victory*, N.Y. TIMES, Oct. 17, 1991, at A27 (comparing the charges of "lynch[ing]" to the practice of blaming the rape victim).

<sup>25</sup> But see Sylvester Monroe, *Nothing Is Simply Ever Black and White*, TIME, Aug. 12, 1991, at 6 (interviewing Shelby Steele, who claims that too many Blacks see themselves as victims).

<sup>26</sup> For example, during the Thomas hearings, Black women were pitted against Black men through alternating charges of sexism and racism. See Brian McGrory, *Blacks Fault, Support Stereotyping Charges*, BOSTON GLOBE, Oct. 13, 1991, at 20. Other examples of the "more oppressed than thou" syndrome include the escalating violence between Jews and Blacks during the Crown Heights riots, between Asian-Americans and Blacks during the Korean grocery boycott, and between gays and communities of color during the current AIDS crisis. Ironically, all these groups are weakened.

Carter could sharpen his arguments if he paid greater attention to important studies about the status of minorities in our society. Conspicuously absent from both sides of the debate, as well as from recent Supreme Court opinions using the rhetoric of victimization,<sup>27</sup> is statistical evidence<sup>28</sup> concerning the positive impact of affirmative action on its beneficiaries and the negative impact on its "victims." Although it is impossible to quantify factors such as stigma or attitude, concrete data about minorities would help decisionmakers to characterize and evaluate the numerous competing costs and benefits of affirmative action. For example, studies comparing the percentage of Blacks with the percentage of whites in professional and managerial positions<sup>29</sup> continually raise doubts about Carter's assertion that affirmative action in the workplace is no longer needed.

Professor Carter correctly asserts that legal scholars and jurists must continue to rethink the American race problem and search for alternative solutions.<sup>30</sup> Scholars and jurists, however, should refrain from debating the merits of affirmative action solely on the basis of anecdotal evidence or the rhetoric of victimization; they must also examine *all* the competing costs and benefits in light of statistical data. Only then can decisionmakers begin to solve the serious racial problems that continue to polarize the nation.

---

<sup>27</sup> See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (opinion of O'Connor, J.) (arguing that affirmative action "promote[s] notions of racial inferiority").

<sup>28</sup> Cf. Bert Black, *A Unified Theory of Scientific Evidence*, 56 *FORDHAM L. REV.* 595, 597-604 (1988) (proposing a method for evaluating the validity of scientific evidence). *But cf.* Stephen L. Carter, *The Inaugural Development Fund Lectures: Scientific Liberalism, Scientific Law* (pt. 1), 69 *OR. L. REV.* 471, 481-94 (1990) (criticizing contemporary constitutional theory's obsession with empiricism).

<sup>29</sup> See, e.g., NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 312-14 (Gerald D. Jaynes & Robin M. Williams, Jr. eds., 1989) (showing little improvement between 1950 and 1982 in the significant disparity between the percentages of Blacks and whites holding professional and managerial jobs).

<sup>30</sup> Cf. ROY L. BROOKS, *RETHINKING THE AMERICAN RACE PROBLEM* 1-22 (1990) (arguing that African-Americans must rethink the American race problem along socioeconomic lines).

Copyright © 1992 by The Harvard Law Review Association. Copyright of Harvard Law Review is the property of Harvard Law Review Association and its content may not be copied or emailed to multiple sites or posted to a listserv without the copyright holder's express written permission. However, users may print, download, or email articles for individual use.