Book Review

Politics and Passion: Theoretically A Dangerous Liaison

Reflections of an Affirmative Action Baby. By Stephen L. Carter.* *New York: Basic Books*, 1991. Pp. ix, 286. \$23.00.

The Alchemy of Race and Rights. By Patricia J. Williams.** *Cambridge: Harvard University Press*, 1991. Pp. 263. \$24.95.

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I dedicate this Review to the late Professor Muhammad I. Kenyatta; Harvard Divinity School, 1973-74; B.A., Williams College, 1981; J.D., Harvard Law School, 1984. He taught civil rights, history, and constitutional law. From 1966 to 1969 he was an editor for the Mississippi Freedom Democratic Party, which fought racial barriers to participation in Southern politics. He was also the community organizer for Head Start and a coordinator of the Southern Cooperative Development program and the Child Development Group in Mississippi. From the early 1970's through the early 1980's, he was vice-chairperson of the Pan African Skills Project, an international education program involving the United States, Tanzania, and Ghana. He represented the United Nations' Non-Governmental Organizations section from 1972 to 1978. During his studies at Harvard Law School, he became President of the Black law students association and led the controversial protest upon Derrick Bell's departure referred to in the body of this Review, *infra* text accompanying notes 110-11.

The ostensible neutrality of the law disguises the extent to which it is premised on the perspectives of the powerful; the narratives of those who occupy a comparatively powerless position are not only evidence of what has been excluded, but testimony to the law's relentless perspectivity.

—Kathryn Abrams¹

For Black Americans, the salient political lesson of the post-sixties era counsels toward guarded expectation and away from the illusion that progressive political gains have somehow raised the consciousness of the American public. Even conceding that legitimate questions of social, political, and economic justice surface with each generation, Americans of color have been prone to wonder why programs that enhance our social and economic well-being occupy so much of the spotlight, while policies that bring direct and substantive harm receive little or no attention. Having engaged in many of the same debates over and over again, now more than ever, I am pleased that two recent books by African-American legal scholars, *The Alchemy of Race and Rights* by Patricia Williams,² and *Reflections of an Affirmative Action Baby* by Stephen Carter,³ take up the challenge to reconceptualize the dilemma of Black America's social and political inequality. While the authors reach very different conclusions regarding issues of social/political accountability, their approaches do share some common ground. Each is a diary of sorts in which the author attempts—in the words of Derrick Bell—to “Get Real” about racial rights or remedies.⁴ Moreover, each manifests a spirit of cooperation and understanding sorely needed in a period of increased divisiveness among Black academics. Most significantly, both Williams and Carter invite their readers into a dialogue, one which I am happy to join.

I. INTRODUCTION

The Alchemy of Race and Rights is substantially, though not entirely, the diary of a Black female professor of law concerned with socio-legal and theoretical construction. In a profound critique of legal theory, Patricia Williams sets forth the long-term implications of law's manipulation of hypnotically powerful “rhetorical truths.” Her first chapter, entitled “The Brass Ring and the Deep Blue Sea,” purports to describe the process of learning to think like a lawyer. Williams defines rhetorical objectivity as the belief that one may use the alleged voice of another to objectify authority for one's own statement or

1. Kathryn Abrams, *Hearing The Call of Stories*, 79 CAL. L. REV. 971, 975 (1991).

2. PATRICIA WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

3. STEPHEN L. CARTER, *REFLECTIONS OF AN AFFIRMATIVE ACTION BABY* (1991).

4. Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990).

opinion.⁵ Williams also describes the myth of neutrality as a myth that hides the mediation of all voices and masks the widespread manipulation of public discourse on issues of social and political accountability.⁶ Williams' book is largely an attempt to explode the myth of neutrality and demonstrate that beneath the veneer of objectivity, law and its language continue to subordinate some at the expense of others.

Williams treats as a given that our tax dollars subsidize the wealthy on various levels, often in ways that directly injure our poor. Since, under her analysis, neither indigence nor wealth result from "freely exercised choice," she expresses deep consternation "about the way in which hunger, lack of education, and homelessness are devastating our communities, and particularly women, children, and black communities."⁷ Williams writes, "I am alarmed by the denial that the very right to survive is being withheld through untextualized constitutionalisms, governmental restraint, [and] states rights, to say nothing of indigency's being characterized as a matter of choice."⁸ Similarly, Williams challenges the rhetoric of qualification,⁹ which is often used to rationalize racial discrimination in the same way that the rhetoric of choice serves to rationalize class discrimination.

In perhaps her most vivid and powerful chapter, "Teleology on the Rocks," Williams explores how the traditional construction of racial images and stereotypes allows society to rationalize, and even welcome, what would otherwise be an unacceptable racial double standard. For responses to issues of racial accountability she focuses on Cain and Abel, Howard Beach, and Bernhard Goetz as examples of the "pernicious game of Victim Responsibility," a game that is itself a "slave to society's stereotypes of good and evil."¹⁰ Williams discusses the tragedy of what she calls spirit murder by pointing out that as a nation we are socialized to disregard many whose lives may "qualitatively depend [upon] our regard."¹¹ In her view, individual well-being and dignity are established largely by societal validation or recognition of our personhood. Williams creates a story of a Black gunman who was riding in a department store elevator that stopped on the third floor to admit a crowd of noisy white high schoolers.¹² In transit from the third to the first floor the man drew a gun and killed as many of the teenagers as he could. He later told police that the body language, shiny eyes, and big smiles of the kids told him that they wanted to play with him, like cats play with a mouse: one tried to panhandle money, and another asked, "How are you?" A similar greeting had preceded the vicious

5. WILLIAMS *supra* note 2, at 11.

6. *Id.* at 9-11.

7. *Id.* at 26.

8. *Id.*

9. *See id.* at 98-100.

10. *Id.* at 60.

11. *Id.* at 73.

12. *Id.* at 76.

beating of his father, a Black civil rights lawyer in Mississippi. Williams points out that "most white Americans would not hesitate to pronounce the severe contextual misapprehensions of the black gunman as a form of insanity."¹³ She presents the striking similarities of this fictional story to the videotaped confession of Bernhard Goetz, whose actions this society not only failed to condemn, but condoned and encouraged by suggesting that the real problem is a "failure on the part of public institutions not to engage in more such punitive activities."¹⁴

Beyond the focus of interpretive discourse, one of the goals of Williams' work is to give new voice to the voiceless, both for those whom we have failed to hear and those who cannot speak. In a chapter entitled "Crimes Without Passion," she examines the introduction of issues of race and gender into the classroom. She describes law school exams as a "genre of legal writing involving complex relations of power and influence."¹⁵ Reviewing a collection of exams, Williams concludes: "[T]hey use race, gender, and violence in ways that have no educational purpose, that are gratuitous and voyeuristic, and that simultaneously perpetuate inaccurate and harmful stereotypes as 'truthful.'"¹⁶ She describes an experience in which a reading group on race, gender, class, and critical thought discussed "The Race-Charged Relationship of Black Men and Black Women," a chapter in Derrick Bell's latest book, *And We Are Not Saved*. Williams found herself the object of everyone's attention after one participant declared: "But look, we have One right here—a single black female over the age of twenty-seven, from whom we haven't heard anything—let's give her a chance to speak!"¹⁷ Williams reminds us that "[t]he world is full of black women who have never really been heard from."¹⁸ She explains that "voices lost in the chasm speak from the slow eloquent fact of the chasm. They speak and speak and speak, like flowing water."¹⁹ Accordingly, Williams tells not only her own story, but the stories of women she will never meet and who will probably never know of the book's existence. We learn of Eleanor Bumpers, a sixty-seven year-old, 270-pound, Black woman who was "lawfully" murdered (shot twice) by a New York City police officer, during an attempted eviction.²⁰ We hear more about Tawana Brawley, a victim of rape, violence, kidnapping, and meta-kidnapping—the configuration of Black manhood and

13. *Id.*

14. *Id.* at 77; see also CARTER, *supra* note 3, at 173 ("A large chunk of the public, most of whom never set foot inside the courtroom and therefore had little information on which to judge, . . . accepted Goetz's story, even before the trial took place.").

15. WILLIAMS, *supra* note 2, at 85.

16. *Id.*

17. *Id.* at 191.

18. *Id.*

19. *Id.* at 201.

20. *Id.* at 136-44.

white justice, "trapped in the pornography of living out other people's fantasy."²¹

In her final chapter, "On Being the Object of Property," Williams discusses how a contract deadens its signatories by "positioning enforcement in such a way that the parties find themselves in a passive relationship to a document."²² As always, her scope is wide ranging—she examines market theory, commercial transactions, slavery, and reproductive surrogacy. She also shares a very personal account of the final hours before her godmother's death.²³ This last chapter is very much the diary of a Black woman who is privy to the workings of the "power structure" in ways that few outside of law can be. In this final section we get a more nuanced sense of the writer, as well as of the disquiet that drives her to give so much of herself so that we—her readers—can become empowered, in turn, to "participate in a meaningful and great-souled manner."²⁴

Reflections of An Affirmative Action Baby is primarily an invitation from Stephen Carter to rethink the nature and impact of current political strategies, as well as issues of representation and accountability among Black leaders and scholars. Two themes characterize his book: criticism of affirmative action and a request that all those committed to advancing racial equality join him in a dialogue regarding new solutions to old problems.

In the first chapter, entitled "Racial Preferences, So What?," Carter describes himself as "hardly an unabashed supporter of affirmative action" because he believes that affirmative action stigmatizes black professionals by needlessly calling into question their qualifications for high-level positions.²⁵ Moreover, Carter argues that racial preferences encourage an analytical structure that seeks and assigns reasons in the present world for disfavoring one group. Carter reminds us that preferences not only result in a *more* qualified white male being denied a job or education at the school of his choice, but that those white males who are disadvantaged by racial preferences have *least* benefitted from this country's racist legacy.²⁶ For a brief moment, when he applied to Harvard Law School, Carter stood in the shoes of such a white male. Assuming that he was white, the admissions committee rejected his application. A few days later the committee reversed its decision upon learning that he was Black.²⁷

Carter contends that affirmative action has evolved away from its original aspirations. He argues that affirmative action initially served to counter the "nation's odious legacy of racist oppression," by giving highly motivated Blacks

21. *Id.* at 177.

22. *Id.* at 224.

23. *Id.* at 229-30.

24. *Id.* at 94.

25. CARTER, *supra* note 3, at 50-54.

26. *Id.* at 19 & n.*.

27. *Id.* at 15-17.

a "chance to show what they can do."²⁸ Today's programs fall short of the mark, he contends. They have become extended versions of unjustifiable racial preferences that, akin to certain theories of diversity, serve to privilege racial oppression. Carter surmises that there has been a push by proponents of diversity to use race as a proxy for merit, a push that has burdened the beneficiaries of racial preferences. The rejection of current standards for determining merit, says Carter, is buttressed by affirmative action's insupportable assumption that "black people cannot compete intellectually with white people."²⁹ Carter's final criticism of affirmative action is that it helps only the most advantaged Blacks. He describes affirmative action as "increasingly dominated by the children of the middle class."³⁰ Carter believes that while the Black middle class may be scarred by racism, they do not bear the scars of disadvantage. He is disturbed by what he describes as the good "bargain on racial justice America is getting if programs of affirmative action are all that [it] is required to give."³¹ According to Carter, affirmative action fails to benefit those in greatest need of its help and in whose name the programs are often justified.³²

Beyond affirmative action, Carter is deeply concerned with the politics of race, particularly the racial politics of the academy. Carter condemns the silencing of neoconservatives (whom Carter interestingly calls "dissenters") within Black political and scholarly circles. Discussing the nature of political and scholarly debate about solutions to Black America's dilemma, he claims that full-scale debate about racial preferences, and their negligible impact on Black urban communities, has been stifled by a "rhetoric of justice" deemed the protected domain of "genuine radicals."³³ Carter takes great pains to point out that he is a self-identified critic and not an opponent of affirmative action.³⁴

Carter discusses how the biting insults that have become a standard form of scholarly critique have generated pressure to conform to a group identity. This potential for ostracism often results in the failure of Black scholars to acknowledge publicly their discomfort with some aspects of mainstream civil rights politics. While he blames the harsh rhetoric for producing a forced consensus, Carter also notes that the insults have divided the community of Black scholars, creating dissension and mistrust. Carter calls for unity as a

28. *Id.* at 33, 41.

29. *Id.* at 47.

30. *Id.* at 71.

31. *Id.* at 83.

32. *Id.*

33. *Id.* at 21.

34. In a recent statement, Carter wrote that he supports "affirmative action of the sort that helped me in my career—assistance in getting a foot in the door, a leg up, a shot at showing what one can do, whether in college entrance or professional school and, sometimes, at the entry level to a profession." Stephen L. Carter, *"Best Black" Syndrome: My Bitter Memory*, WASH. POST, Oct. 13, 1991, at C5. He also noted that, "I look forward eagerly to a day when [affirmative action] will no longer be necessary. Unlike some critics . . . I do not think that day has yet arrived." *Id.*

solution to the problems facing Black Americans. He feels that the impoverished dialogue among Blacks of every political persuasion dissipates our most valuable political and intellectual resources.³⁵ In an eloquent and forceful plea, Carter ultimately proposes:

We who are black, rather than establishing a hierarchy of "correct" or "more valuable" black views . . . should be having a conversation, not a monologue, and certainly not this bitter argument. We should talk to each other rather than at each other. We should make our shared love for our people the center of our belief, and use that shared center as a model for the possibility of a solidarity that does not seek to impose a vision of the right way to be black.³⁶

Scholars might characterize the books by Carter and Williams as a fundamental juxtaposition of legal perspectives on race in the United States, with one author "whose prose is mercifully free of jargon and is eminently readable,"³⁷ and the other whose readers "outside a small circle of post-structural theorists may be not only befuddled, but too alienated by her exclusive discourse to stay with it;"³⁸ or with one author coming from the right and the other from the left; or one informed by a predominantly male point of view and the other female. Even as I acknowledge the force of their respective stylistic, political, and gendered existences, I believe that readers of the books will ultimately conclude that Carter comes from a space of passion and Williams from a space of reason.

Williams criticizes rhetorical event as a core of social and legal theory that lacks a starting point of objective truth. Instead, it simply universalizes legal taxonomies, which affect all people³⁹—leaving the human condition up for grabs in the marketplace of categorization. She critiques legal discourse and the rhetoric employed to mask multiple oppressions and racially determined aspects of social engineering. Carter, on the other hand, speaks of rhetoric as a political tool, void of substantive value and abused by those cultivating partisan soil.

This Review explores two broad areas of inquiry relating to Black American politics and scholarly discourse. It evolves in large measure as a thematic response to important questions about Black consciousness, whose answers

35. Carter denies that he is conservative, but "[h]e makes a compelling case for them," and as one writer has stated, "Carter sometimes sounds like 'one,' even if he isn't." Fred Barnes, *The Minority Minority: Black Conservatives and White Republicans*, NEW REPUBLIC, Sept. 30, 1991, at 18.

36. CARTER, *supra* note 3, at 205.

37. David Holahan, *Another Side Of Affirmative Action*, S.F. CHRON., Sept. 22, 1991, at 4.

38. Wendy Kaminer, *Citizens of The Supermarket State*, N.Y. TIMES, May 26, 1991, at 10 ("How socially transformative are academics talking to one another in a code that may take several years of graduate school to crack? Secret words and grueling initiation rites make sure that the power to critique power will not be freely shared."). Williams explicitly and successfully challenges the force of exclusivity in legal discourse, while using her own somewhat exclusive literary style.

39. WILLIAMS, *supra* note 2, at 8-11.

ostensibly elude many proponents of its value. The difficulty, as I see it, does not arise from a lack of evidence or the mere recitation of principles derived from an amorphous brand of logic, but rather from a dearth of meaningful dialogue, which Carter characterizes as bitter dissension. I share his concern about grandiose posturing over who is the true keeper of the gate to Black freedom. The current battle stems from disagreement over the wisdom of affirmative action. It is on this topic, then, that I join the dialogue.

Part II of this Review provides a cost-benefit analysis of affirmative action. I challenge a number of Carter's fundamental premises, most notably that affirmative action has "high costs" that have been ignored by Black liberals. On the other side of the equation are affirmative action's benefits, which are grossly understated by affirmative action's critics. Finally, Part III suggests one avenue for moving beyond the name calling that has marred so much scholarly critique and that is particularly damaging to the resolution of highly charged issues such as race. Carter espouses what Williams demonstrates by example and precept: that the time has come for all writers to move beyond the virulent criticism and to create an above-ground passage for those who possess a nonracist sensibility.⁴⁰

II. AFFIRMATIVE ACTION UNDER A COST-BENEFIT ANALYSIS

The most critical issue raised by Carter's book is the future of affirmative action. Long a central feature of writing about race, the affirmative action debate has become even more heated with the emergence of Black critics such as Carter. Williams too has much to say about affirmative action, and while she is less expressly concerned with the issue than Carter, deep and persuasive commentary on the question of racial preference lurks within her analysis.

In this part, I take issue with many of Carter's thoughts and suggestions regarding affirmative action. Like Carter, I recognize both costs and benefits of affirmative action. Unlike him, I conclude that the benefits clearly outweigh the costs. Carter, I argue, has both exaggerated affirmative action's costs and underestimated its benefits. First, Carter overstates the costs by suggesting that racial preferences have caused a rise in anti-Black sentiment in the country and feelings of stigmatization and insecurity among Black professionals. I contend that it is this nation's longstanding ideology of white supremacy, and not affirmative action, that explains both of these phenomena. In so doing, I describe the manner in which both Blacks and whites, the wealthy and the impoverished, have internalized the white supremacist ideology. Second, Carter underestimates the benefits of affirmative action. They include social and economic advancement for Black Americans at every level and attenuation of

40. See *id.* at 129; see also CARTER, *supra* note 3, at 251 (calling for "open and robust dialogue" and for all to "work together rather than against each other to help move the race").

the cumulative force of stereotypes founded upon myths of racial superiority. The final, and perhaps most important, benefit of affirmative action may be its influence on the diversity movement. Carter and Williams are about as far apart as two people can get in their understanding of the need for diversity and the positive impact that "outsiders" can and do have in the academy. Yet, from my perspective, both authors, and their books, provide the ultimate testament to this movement's continued vitality and importance.

A. *The Costs: Backlash*

A principal element of the emerging critique of affirmative action is the claim that racial preferences inadvertently support racial stereotypes⁴¹ and fuel white resentment and retaliation.⁴² On the latter point, many critics, including Carter, cite as preliminary evidence the so-called "backlash vote": a theory used to explain the ability of men like Louisiana legislator and Ku Klux Klansman David Duke to garner substantial support at the polls.⁴³ However, I believe that an examination of hate groups, racist hate speech, and their sources makes clear that the argument, while convenient for those opposed to affirmative action, is ultimately flawed.

First, overt support for racist extremists, while somewhat startling today,⁴⁴

41. See, e.g., SHELBY STEELE, *THE CONTENT OF OUR CHARACTER* 111-21 (1990). Noting the doubts that many have traditionally had regarding the intellectual capacity of Blacks, Steele concludes that the "implication of inferiority that racial preferences engender in both the white and black mind expands rather than contracts this doubt. Even when the black sees no implication of inferiority in racial preferences, he knows that whites do, so that—consciously or unconsciously—the result is virtually the same." *Id.* at 117. Steele argues, "[Racial preferences] not only reinforce America's oldest racial myth but, for blacks, they have the effect of stigmatizing the already stigmatized." *Id.* at 120. Moreover, "In [the] crucial yet gray area of perceived competence, preferences make whites look better than they are and blacks worse, while doing nothing whatever to stop the very real discrimination that blacks may encounter . . . affirmative action revives rather than extinguishes the old rationalizations for racial discrimination." *Id.* at 121.

42. See, e.g., NATHAN GLAZER, *AFFIRMATIVE DISCRIMINATION* 200-01 (1975) ("The gravest political consequence is undoubtedly the increasing resentment and hostility between groups that is fueled by special benefits for some."); Dinesh D'Souza, *The New Segregation on Campus*, 60 *AM. SCHOLAR* 17, 28-29 (1991). D'Souza believes that racial preferences create tension on campus. He says:

When legitimate questions about equality and fairness are repressed by an atmosphere of accusation, intimidation, and censorship, they tend to ferment under the surface and finally erupt in perverse, rebellious, and outrageous expression. A close examination of the contemporary culture of racial humor on campus, as well as documented racial incidents, points to a large number that are directly related to the two-tier system of justice for racial groups, extending from admissions policy to life on campus, to the classroom.

Id. at 29.

43. See, e.g., CARTER, *supra* note 3, at 166-67.

44. See, e.g., SOUTHERN POVERTY LAW CTR., *THE KU KLUX KLAN: A HISTORY OF RACISM AND VIOLENCE* 39 (Sara Bullard ed., 3d ed. 1988). Bullard states:

[White supremacists] are farmers, secretaries, factory workers and professionals; they are male and female, young and old. They wear white robes or camouflage, or suits or blue jeans. They live in cities, suburbs and countrysides all across America. They call themselves, among other things, Klansmen, Nazis, nationalists or racialists, and belong to a wide variety of obscure and frequently-changing organizations. They would be indistinguishable from most Americans if it were not for the bitterness that fills their lives and finds its expression in an obsessive hatred for minorities and Jews.

is hardly a new phenomenon and certainly predates affirmative action. In the mid-1920's, there were five million official members of the Ku Klux Klan (KKK). As of 1988 there were significantly fewer—approximately twenty-one thousand members of the Klan and other white supremacist groups in the United States—not counting the “vast numbers of supporters and sympathizers who may read their literature and attend the rallies,” but decline to be listed on the membership roster.⁴⁵ Moreover, the backlash theory appears to rely on the assumption that white supremacists are the only candidates with an anti-affirmative action agenda. However, as Jesse Helms has demonstrated, one need not be affiliated with the Klan to stir up racial tension. In fact, it is a relatively simple feat during periods of local or national economic instability. Moderate whites opposed to affirmative action and increased taxation are not retaliating by voting for neo-Nazi and white supremacist leaders when they may pick from a menu of candidates who support those very principles. Indeed, perhaps Nazi leader Harold Covington lost his bid for attorney general of North Carolina because men like Jesse Helms satisfy the mandate of North Carolina voters.

If affirmative action bashing had not provided the requisite rallying cry, then certainly welfare reform, an age-old, tried and true tool for scapegoating, could have assisted David Duke in his quest. It may even be true that if economic subsidies to college-bound Blacks were to replace preferential admission policies, a measure that Carter favors,⁴⁶ Duke might have launched an all-out attack on the tax structure, warning working class white folks about the Afro-Zionist plot to take over America. Even widespread commitment to strong judicial enforcement of antidiscrimination policies could very well yield a Duke campaign platform attacking individual federal judges. Establishing a causal relationship between Klan support and affirmative action requires a more studied analysis. Critics of affirmative action making the charge are overzealous at best and careless at worse. That kind of reasoning gives violent hatemongers much more credit than they deserve, and it does little to support the critics' theories that overt racism is receding.

B. *The Costs: Stigma and Self-Doubt*

The backlash theory is neither the only nor the most subtle argument put forward by affirmative action's critics. One of the more disturbing aspects of Carter's book is that his arguments suggest that, taken as a whole, affirmative

Id.

Pat Williams avers that in the 1990's the Ku Klux Klan (KKK) has become the major union among prison guards. WILLIAMS, *supra* note 2, at 4. Unfortunately, not all courts have viewed the KKK as a particularly significant threat. See e.g., *Curle v. Ward*, 399 N.Y.S.2d 308 (App. Div. 1977) (reinstating guard-Klansman in New York prison with back pay and declaring that KKK affiliation was not proven to be danger to largely minority prison population).

45. SOUTHERN POVERTY LAW CTR., *supra* note 44, at 49.

46. See CARTER, *supra* note 3, at 88.

action for people of color might actually be producing more harm than good. His narrative is partly about what it has been like for him as a Black professional to "come of age in the era of affirmative action, a time when every professional who is not white is subjected to that extra degree of scrutiny."⁴⁷ He goes on to say that racial preferences have reinforced the "Best Black Syndrome": "It's everywhere, this awkward set of expectations. No matter what you might accomplish (or imagine yourself to have accomplished), the label follows you."⁴⁸ According to Carter, he can not be the best or among the best, only the best Black or among the best Blacks. He devotes considerable energy to lamenting the emotional costs for professional Blacks attempting to avoid racist stereotypes.

Williams would consider deliberate attempts to do so an ultimate lesson in futility. Blacks who perceive themselves as being treated differently are often assured by whites that they are being treated the same as whites, and if differently from other Blacks, then perhaps rightfully so. Williams speaks of a former colleague who told her early on in her career, "I don't think of you as black."⁴⁹ Yet when faculty hiring issues became a little sticky, this same colleague quickly confessed to Williams "that he wished the school could find more blacks like me."⁴⁹ Like who? Those among the best (Blacks), who survive the exacting scrutiny, who continuously demonstrate superior intellect?

Opponents argue that advocating affirmative action as a social necessity sends the message that Blacks cannot compete with whites on a level playing field. This message, they say, stigmatizes. However, critics of affirmative action continue to rely heavily on the "stigmatizing effect" argument despite their inability to establish a direct correlation. Yes, some will presume that Black professionals have advanced because of affirmative action, but it is doubtful that affirmative action has augmented the degree to which they are scrutinized and unclear that it weakens their chances of being named among the best.⁵⁰ A major feature of white hegemony has been that of relegating Blacks to the position of entertaining white folks. It is therefore no wonder that whites have been more than willing to concede Blacks the absolute best status in music and sports.⁵¹

47. *Id.* at 3.

48. *Id.* at 57.

49. WILLIAMS, *supra* note 2, at 10.

50. For example, I find it difficult to imagine that a nonracist white male who opposes affirmative action will resist the opportunity to learn and interact with me in the classroom simply because I am an affirmative action hire. Although many Black female professors are challenged in the classroom in ways that suggest the existence of some racial and gender animus, I have not seen evidence of such in my own classroom experience. *See, e.g.,* Robin D. Barnes, *Black Women Law Professors and Critical Self-Consciousness: A Tribute to Denise S. Carty-Bennia*, 6 BERKELEY WOMEN'S L.J. 57, 66 (1990-1991).

51. In areas where Blacks have been encouraged, not barred, they have done exceptionally well. For example, in the 1984 Olympics,

African Americans, who are only 13 percent of the American population, won 41 of the 57 medals garnered by Americans in track and field. Those levels of performance belie any assumption that Black people fear competition, and they speak for affirmative action in all walks

Affirmative action is a remedy for past discrimination for some of its beneficiaries and a reward for past valor for others. Blacks are not the sole beneficiaries of affirmative action. The existence of such programs is immaterial to whether racist expectations will continue to haunt Black professionals. I have yet to find a publication that discusses the stigmatizing effects on or increased stereotyping of white male veterans, who receive preferential treatment for hiring in the exact same way as Blacks. Many white females have also benefited from affirmative action. Yet few have shown interest in whether such policies contribute to the objectification of women or complained that affirmative action has called women's qualifications into question. It is different for Black Americans.⁵² Carter provides an accurate, if somewhat charitable, account of this historical experience: "Black people have always been the target of openly racist assumptions, perhaps the worst among these being that we are a stupid, primitive people. Every intellectual attainment by black people in America has been greeted with wide-spread suspicion."⁵³

Racist stereotypes and racial stigmatization have existed for centuries. Unfortunately, they will likely survive long after the dismantling of affirmative action programs. Of course, Carter is correct in saying that continual requirements to "prove" oneself can be an emotional, psychological, and intellectual drain. However, to borrow Carter's phrase, "So what?"⁵⁴ We are used to it. It amounts to a mere pebble in the shoe relative to the other problems facing Blacks.

C. *Finding the True Explanation for David Duke and the Stigma Attached to Black America: The Force of White Supremacy*

Carter's narrative is instructive as to the sense of insecurity that haunts him and some other black professionals, all of whom bear that special burden of belonging to a group that has been marked as socially, morally, and intellectually inferior. Yet his conclusion linking political "backlash" and the stigma of inferiority to affirmative action is ultimately unpersuasive. Fortunately, Williams' reasoning helps fill the breach. Williams' best insights explain the origins of the burden that Carter identifies. Racist stereotypes such as intellectual inferiority, lack of morality, and familial dysfunction are rooted in white supremacist ideology. In much the same way that support for intolerant leaders reflects nothing more than the reactionary politics of extreme bigots, the

of life. When the rules of competition in everyday American life are as fair as they are in the Olympics, there will be no need for affirmative action.

John C. Walter, *Affirmative Action: Is It Still Needed?*, SEATTLE TIMES, Sept. 15, 1991, at L2.

52. See, e.g., Gerald Horne, *Bias, Not Affirmative Action, Brings Stigma*, NAT'L L.J., Oct. 21, 1991, at 16 ("Obviously, focusing on African Americans is designed to play in centuries of racial resentment . . .").

53. CARTER, *supra* note 3, at 54.

54. See *id.* at 17 ("I got into law school because I am black. So what?").

stigmatization and stereotypes afflicting Black professionals develop from the same racism that spawned the Ku Klux Klan. Racism, like HIV, is found everywhere, easily spread, too little researched, and ultimately deadly. This racist ideology, not affirmative action, should stand trial.

1. *The Miscegenation Myth*

A fundamental feature of white supremacist ideology is the belief that genetic factors determine the innate ability of definable groups. There are two sides to this coin: miscegenation lowers the value of whites mixed with "Black blood" and elevates the status of Blacks transfused with white. Anybody under the impression that such crude theories of racial superiority and inferiority have lost their influence in American society should pay particularly close attention to Williams' argument.

Williams describes a young white couple who sued an in vitro fertility clinic for the pain and suffering they experienced after the birth of their "Black" baby.⁵⁵ The mother sought damages for emotional distress, as the anguish resulting from the racial taunting of her daughter was unbearable. Williams reminds us that this is not the usual case of wrongful life, in which a previously sterilized woman becomes pregnant. Rather, this is a suit about the emotional tragedy of a child "born into the pinnacle of [a mother's] unlove."⁵⁶ In a similar vein, Williams tells the story of Fred, a Stanford University student, who became so outraged at the mere assertion that Beethoven was mulatto that he defaced a poster of the composer and posted it outside the dormitory room of a Black student to mock claims he found totally preposterous. As part of the disciplinary action, Fred was ordered to read about the composer, and quickly discovered that Beethoven had "Black blood." From that point on, Fred's "relation to the music changed: he said he heard it differently."⁵⁷

I too have experienced the miscegenation myth. Last year I spoke with a new neighbor who was so impressed with my professional accomplishments that she told me and her husband that I must be part white.⁵⁸ This neighbor, with no more than a high school education, could not move beyond the *inherence* of it all. She seemed unable even to speculate that I might have grown up with certain so-called advantages, such as growing up in an all-white neighborhood, or being adopted and raised by a childless white couple, or being mentored by a white benefactor; none of which is true. This woman could only

55. WILLIAMS, *supra* note 2, at 186.

56. *Id.* at 187.

57. *Id.* at 112.

58. White Americans often presume to "compliment" people of color by encouraging a white self-identity. A recent conversation with the mother of a child in my daughter's theater group revealed that each time she was asked about her ancestry, she answered that she was one-half Native American and one-half Irish. She expressed her discouraging experiences with those who admonished her to be grateful that she was at least part Irish.

perceive me as part white. She could only believe that the source of my achievements was "in the blood." I then told her that my maternal great-grandmother was supposedly named Ada Mae Rosenberg, a South Carolina resident. She responded, "see, there you have it." She clearly felt vindicated and even more pleased that the ancestor was Jewish. When I expressed dismay at her assumptions, she told me that she had seen many Black people before but none like me. Knowing that she is a lifelong resident of our community and that she rarely travels far beyond the school in which she is a teacher's aide, I asked where she had seen these Black people, perhaps on television—all living in drug- and roach-infested ghettos? I assured her that she might serve her family well by getting rid of the television, lest she come to the inaccurate conclusion that no whites are on welfare, are addicted to crack, or worse, that those who are all have "Black blood" in them.

Not only whites embrace theories of genetic determinism. Blacks also frequently perceive Blackness and professional accomplishment as mutually exclusive. As Williams relates, when she decided to go to law school, her mother reminded her that her white forefathers were lawyers, saying, "you have it in your blood."⁵⁹ She goes on to reveal that it worked: "I got through law school, quietly driven by the false idol of white-man-within-me, and absorbed much of the knowledge and values that had enslaved my foremothers."⁶⁰ This passage was particularly relevant for me because the rumor of a Jewish ancestor in my own family surfaced some years after I reached adulthood and is in all likelihood untrue. When I was growing up, we simply accepted that no one knew who had given birth to my grandmother—who was adopted and then placed in a less than ideal family when her adopted mother died unexpectedly. However, I distinctly remember that the rumor was started by an aunt who fancies herself a shrewd and frugal businesswoman and claims to have investigated our ancestry. I am inclined to believe that the basis of her ready acceptance of the idea that someone named Ada Mae Rosenberg was indeed her grandmother was that she was quietly driven by the false idol of a stereotypical Jewish woman within her.

It takes a conscious effort to build up an immunity to false ideas that permeate our culture. For example, Williams forcefully concludes that "[t]he national repetition that white neighborhoods are safe and blacks bring sorrow is an incantation of powerlessness. . . . [I]t imports a concept of white safety that necessarily endangers the lives as well as the rights of blacks."⁶¹ Describing the force with which some Black Americans deny or rationalize away the "fullness of our public, participatory selves,"⁶² Williams raises important questions about whether the "lessons of privatized intimacies of self-hatred"

59. WILLIAMS, *supra* note 2, at 154.

60. *Id.* at 155.

61. *Id.* at 60.

62. *Id.* at 46.

have been "learned too well,"⁶³ when Black Americans seek, as we are often admonished, to look into the "'mirror of frightened white faces for the reality of [our] undesirability; and . . . conclude that [we] would not let [ourselves] in under similar circumstances.'"⁶⁴

This conclusion underlines perhaps the final testament to the strength of the ideology of white supremacy. Faced with stigma, feelings of inferiority, and fears of white backlash, many Blacks have chosen as the target of their criticism the one set of programs that has helped them to advance. White supremacy goes unchallenged, while affirmative action takes a beating.

2. *Libeling the Black Poor*

Another devastating impact of the ideology of white supremacy is the libelous images we see daily of the Black poor. The strongest messages in *The Alchemy of Race and Rights* surround the symbolic images of race and poverty. Poor Blacks are ripe for use as scapegoats for all of the nation's ills. Scapegoating is a viable political tool for legitimizing those who are visible, those who have identities in American society. As Williams points out, the current social and theoretical perception of Blacks in America is that we, as a people, have no independent will. The observation could scarcely be more lucid than when descriptions of inner-city Blacks, as part of the "underclass," delegitimize and disparage an already unpropertied community of inner-city families. Thus, "the 'bad black mother' is even today a stereotypical way of describing what ails the black race, [when] the historical reality is that of careless white fatherhood. Blacks are thus, in full culturally imagistic terms, not merely unmothered but badly fathered, abused and disowned by whites."⁶⁵

Last summer, a CBS Evening News program covered a press conference at which a bipartisan congressional committee studying children in the United States delivered its official report.⁶⁶ The reporter's words, accompanied by footage showing only inner-city Blacks, dripped with resignation and all of the usual topics: crime, poverty, teen pregnancy, single parent households, joblessness, and lack of morality. Then a congressman delivered the report, which amounted to a proposal that would substantially benefit white middle-income Americans. Thereafter, footage of single white mothers playing with their children in the park flashed across the screen, while tales of struggle and ambition filled the narrative. In my mind, a superimposed image of the rescue of Jessica McClure from a Texas oil well flashed across a reflective space, and was instantly replaced by the nameless little Black boy who was set on fire by

63. *Id.*

64. *Id.* (quoting Michael Levin & Marguerita Levin, *Letter to the Editor*, N.Y. TIMES, Jan. 11, 1987, at E32).

65. *Id.* at 163.

66. CBS Evening News (CBS television broadcast, July 9, 1991).

a crack dealer, without any interruption in our daily television programming. I then thought of the rhetoric that served to mask our feeble, if not feigned, attempts to rescue him and others like him, members of the "underclass," those without an identity.⁶⁷

3. *Libeling the Black Middle Class*

Is it plausible to assume that scapegoating really only affects inner-city Blacks because whites are quick to assure middle class Blacks, "Oh, I know that you're not like that"? Resisting for a moment the sway of Socratic sport: Just how many of "them" do you suppose to be like "that"? To what interpretive mode do I ascribe whites who, fairly substantial in number, say to Black children: "Oh, it's true most are exactly like that." This is the harm done to Black children, those in the inner-city and those like my nine-year-old, in predominantly white elementary schools, whose short lives are filled with examples of the voicelessness of the Black middle class.

Eight months ago my daughter Bethany (the only Black child in her class) told me of an encounter with the class bully, who, immediately after a discussion of Martin Luther King, Jr., precipitously stated that "Blacks suck" (when he's eighteen he will say, "Blacks aren't qualified"). I asked her who had heard him. Everyone, she replied. What did the teacher say? Well, she didn't hear him. When I asked my daughter why she didn't tell her, she said, "The teacher was busy, and anyway it was just his opinion." I thought to myself, how wonderful it would be if she really believed that, but her demoralization was evidenced by a faint chuckle that swooped down on her words accompanied by inquiring brown eyes that sought the safety that only her parents could give.⁶⁸

67. David Opont is the child's name.

68. A few weeks later her newest "best friend" from class went to the market with Bethany and Bethany's godmother. During the trip, the two girls raced to the car Bethany won, and Teresa (name changed) became angry and called Bethany a nigger. Bethany was stunned by the word and sadly recounted the incident. I suggested that she telephone Teresa's mother and tell her what transpired. A few days later, much to both of our surprises, I was on the phone with Teresa's mother. She explained, after a sufficient amount of small talk, that she had spoken to her daughter about name calling, the history of slavery, how the word probably hurt Bethany's feelings, and the hazards of using words when unsure of their meaning. She continued to assure me, prompted by her husband's concern that I would think they were prejudiced, that Teresa had heard the word on television, and further pointed out that every time the word was used, it was by someone Black. Her explanation lost whatever credibility it may have had initially, however, because rather than acknowledge that we live in a world where visions of superior white sugarplums dance around in our heads, she relied on the worn, tired, and totally false reasoning that 1) her daughter didn't know what the word meant, and 2) the word wasn't so damaging anyway (after all, Blacks use it). Of course, both my daughter and I knew that coming from an eight-year-old white child in the context described above, there was only one meaning behind the word nigger, and Teresa had every intention of imparting that meaning. This is not to say that she may not have been sorry afterward, or that she didn't learn a valuable lesson, perhaps historical if nothing else, but why engage in the rhetoric of innocence when we can simply opt to call a spade a spade?

During such times I keep my daughter close to me, while letting her know that I am proud to be Black, and hoping that she is too. I say to her, "Just remember what you learned when we saw the musical *Black Heroes in the Hall of Fame*." This stage production powerfully depicts famous African and African-American contributions to civilization, culture, and philosophy; my daughter was privileged to have experienced its magic—at twenty-five dollars per seat—only because of her socioeconomic class. I also remind her from time to time, especially during comparative discussions of South Africa and the United States, that throughout this nation's history a great number of white Americans have cared very deeply about racial oppression, many sacrificing their lives alongside many Blacks for our full rights of citizenship. I have yet to tell my daughter that constitutional rights of citizenship offer no guarantee of any equal treatment.

Of course, the libeling of the Black poor and the libeling of the Black middle class, while taking different forms, are closely related. During a conference, I responded to an article declaring the need to demand recognition of minority perspectives by stating that it is hopeless to expect that those who remain indifferent to the very right of Blacks to live will listen to arguments demanding recognition of our perspective. Therein lies the dilemma. As long as whites remain indifferent to the large number of Blacks, especially our children, who are dying in the streets—in inner-city turf battles, in Bensonhurst, from drug overdoses, from toxic waste poisoning, from police, Klan and neo-Nazi violence, and from what will surely be remembered as the plague of the twenty-first century (AIDS)—how can Black professionals go into employment settings expecting a presumption of qualification, respect, and professional competence; to be named among the best, when they are? Williams concludes, "'As a society adjusts to, or rewards, its accepted cruelties and continues to deny their consequences,'" it is rightfully charged with a "capital moral offense."⁶⁹

D. The Benefits: Remedying Discrimination

From my own perspective, the costs of affirmative action are relatively low when compared to its benefits. These include a measure of reparation (albeit small) for past injustice, greater economic efficiency by providing poor, working poor, middle class, and upper middle class Blacks educational, employment, and business opportunities, and improved opportunities for integration and diversity.

Williams, as a strong proponent of affirmative action, describes her absolute belief in affirmative action not merely in its programmatic form, but as a

69. WILLIAMS, *supra* note 2, at 78 (quoting Kenneth Clark, *In Cities, Who Is the Real Mugger?*, N.Y. TIMES, Jan. 14, 1987, at 19).

socially and professionally pervasive concept.⁷⁰ Affirmative action, under her analysis, is a justifiable method of remedying past and present discrimination. During a discussion of a hypothetical scenario in which *B* (Black) and *W* (White) are equally qualified for a position with an all white firm, Williams firmly believes that *B* should get the job.⁷¹ She reasons:

[If *W*], innocently or not, is the inheritor of another's due, then it must be returned. [Under applicable rules of law] if a thief steals so that his children may live in luxury and the law returns his ill-gotten gain to its rightful owner, the children cannot complain that they have been deprived of what they did not own.⁷²

Thus, she concludes, "the affirmative act of hiring—or hearing—blacks [and women] . . . is an act of social as well as professional responsibility."⁷³ Under the remedying discrimination analysis, affirmative action in the employment context appears quite appropriate. For centuries, this nation imposed the harshest quotas ever, 100% white men in every position of status, power, and authority, and 100% women and men of color in the demeaning, powerless, and subservient positions. Moreover, given the remarkably limited nature of affirmative action, claims of reverse discrimination must be taken with a large dose of salt. Williams recalls a seminar on employment discrimination in which the participants discussed various hypothetical situations to determine when *B* should get the job and when *W* should get it. One participant in the discussion asked, "How can you force equality down the throats of people who don't want it? You end up depriving people of their freedom, and creating new categories of oppressed, such as white men."⁷⁴ It would be a force of irony to allow claims of reverse discrimination to pass as morally viable constructions of today's remedial efforts, which, on the contrary, appear to be the only appropriate means of destroying the nation's evil legacy. As Williams states, "[T]he great paradox of democratic freedom is that it involves some measure of enforced equality for all."⁷⁵ Current programs do not allow hiring or admissions goals of 100% women and men of color; indeed, few exceed 15%. A policy of hiring or admitting *only* women and men of color would summon the corollary "two wrongs don't make a right." As it stands now, anecdotal reports might lead the unwary to believe that EVERYONE has a brother-in-law who didn't get THE job because it went to a Black. Statistically, that argument sounds much like a not-so-new version of the medley: "Let's blame Blacks for

70. *Id.* at 121.

71. *Id.* at 100-01.

72. *Id.* at 101.

73. *Id.* at 121.

74. *Id.* at 101.

75. *Id.*

the failure of whites."⁷⁶ The white Stephen Carter who didn't get into Harvard because of affirmative action policies might have had to go to Cornell; not a bad deal, after all.

It is difficult to deny that there is a sense in which affirmative action is absolutely necessary. As I understand the current programs, all of their beneficiaries—women, people of color, and the disabled—are entitled to the preferences not only to remedy past discrimination and abate the effects of today's exclusionary practices, but also to stem the tide of perpetual domination that has been the prerogative of the "normal" white male for all too long. Williams describes the underlying issue as "precisely the canonized status of any one group's control."⁷⁷

E. *The Benefits: The Black Middle Class and The Black Poor*

Few, if any, contend that affirmative action has been ineffective in benefiting the Black middle class. Reports show the stabilization of the Black middle class, and the number of Blacks exceeding the ranks of mere "middle class" is growing every day.⁷⁸ By most standards, this is a remarkable accomplishment given the recency of antidiscrimination and affirmative action policies.⁷⁹ Of course, future generations will probably inherit the benefits enjoyed by this generation of middle class Blacks. As Randall Kennedy once pointed out, "These breakthroughs engender self-perpetuating benefits: the accumulation of valuable experience, the expansion of a professional class able to pass its material advantages and elevated aspirations to subsequent generations, the eradication of debilitating stereotypes, and the inclusion of black participants in the making of consequential decisions affecting black interests."⁸⁰

A frequent criticism of affirmative action is that while racial preferences have benefited the most privileged Blacks, they are "stunningly irrelevant" for struggling Black Americans.⁸¹ Carter addresses this question of who is most damaged by racism and therefore entitled to recompense. He charges that

76. In the spring of 1990, John Kramer, dean of Tulane's law school, showed me a letter he had written to an alumnus, responding to an angry accusation that affirmative action prevented his nephew from being admitted to the law school. Kramer's letter merely pointed out that most of the so-called unqualified Blacks had higher admission scores than the nephew. Of course, the admission of the Blacks would have been justifiable under an affirmative action rationale even if the white applicant had scored higher, but the example illustrates the extent to which whites often use affirmative action to justify their own inadequacies rather than face up to the fact that many Blacks are able to outscore them *despite* the biased nature of the standards and society's history of racial discrimination.

77. WILLIAMS, *supra* note 2, at 121.

78. See, e.g., COMMITTEE ON THE STATUS OF BLACK AMERICANS, NATIONAL RESEARCH COUNCIL, *A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY* 274-77 (Gerald Jaynes & Robin Williams, Jr. eds., 1989).

79. James E. Jones, Jr., *The Origins of Affirmative Action*, 21 U.C. DAVIS L. REV. 383, 383 n.1 (1988).

80. Randall Kennedy, *Persuasion and Distrust: A Comment On The Affirmative Action Debate*, 99 HARV. L. REV. 1327, 1329 (1986).

81. CARTER, *supra* note 3, at 7.

affirmative action has failed to assist those he considers to be racism's "real" victims. Throughout his book, the victimhood issue looms large. Carter writes: "[A]ffirmative action has done nothing at all for the true victims of racism."⁸² Instead, Carter, as a privileged Black, highlights his personal experience as that of a "non-victim":

I have never been denied a promotion, a job, an education, shelter, or food. I have never been beaten within an inch of my life. I have never been arrested for something I didn't do, or treated with contempt by a system that refuses to believe. I have never gazed out at a bleak and uncaring world, certain that there is no place for me in it. I have never felt so overwhelmed by hopelessness or hostility or despair that I have turned to drugs or crime or some combination of the two.⁸³

Carter's description of his own racial well-being, while informative, is largely irrelevant to the question of whether affirmative action is or can be a useful tool in helping the Black poor. First of all, it strikes me as entirely plausible that many inner-city Blacks have escaped the agony Carter describes. Moreover, some middle class Blacks (and whites too for that matter) have felt such resignation in the core of their being. Despair is not the exclusive domain of inner-city residents. Carter's description, while passionate, ultimately impedes our understanding of what inner-city residents need most.

Carter's confusion regarding what programs the Black poor need stems in part from his uncertainty about the problems confronting this group. Affirmative action only makes sense if one believes that racism and its legacy still exert a powerful force in American society. Carter, however, seems not to have made up his mind regarding the role of racism in the continuing plight of poor Blacks. At one point Carter suggests that the "real enemies that are crushing our people" are "crime, drugs, inferior education and training, and real racism."⁸⁴ Today's "real racism," Carter later argues, is not "racist oppression" (which he believes "might no longer be an important barrier"), but merely "racist indifference."⁸⁵ Carter ultimately retreats from even this relatively benign characterization, suggesting that society's refusal to devote significant resources to alleviating the plight of poor Blacks "isn't racism—the word is overused—but it isn't *exactly a helping hand*."⁸⁶ Thus, in the course of one thin volume, Carter moves from "real racism" to "racial indifference" to "not a helping hand." Inner-city Blacks progress from the ranks of victims of real racism to the wounded castaways of societal indifference, until they are merely "down on their luck" in a nation that isn't exactly charitable. In fact, throughout

82. *Id.* at 233.

83. *Id.* at 77.

84. *Id.* at 139.

85. *Id.* at 242-43.

86. *Id.* at 243 (second emphasis added).

Carter's book, the shifting notion of what constitutes the "real enemies" becomes confusing, if not contradictory.⁸⁷

Even more problematic than Carter's shifting and contradictory explanations for the problems facing the Black poor is his failure to explain why affirmative action is inconsistent with his proposed solutions. If one of the problems facing poor Blacks is inferior education and training, do not affirmative action programs of the sort the Supreme Court approved in *United Steelworkers v. Weber*⁸⁸ offer a viable solution? If societal indifference or the refusal to lend a helping hand is the problem, should we not encourage rather than criticize programs aimed at extending that helping hand? If Carter's ultimate critique is that affirmative action does too little,⁸⁹ why is that an argument for scuttling, rather than expanding or supplementing, affirmative action? More fundamentally, if Carter's ultimate dream is a safety net ensuring that all poor Americans have basic minimum entitlements, should he not write a book about the importance of this, rather than criticizing programs that may not do enough, but do more good than harm?

Finally, even assuming, as Carter does, that affirmative action principally helps the middle class, critics of the programs fail to explain why that is reason to eliminate them. Eleanor Holmes Norton has stated: "Affirmative action is now essentially a tool for getting people better jobs," rather than for bringing the economically excluded into the system.⁹⁰ Perhaps so, but the former seems entirely consistent with the initial aspirations of those who devised the strategies.⁹¹ There was something about cleaning those toilets, mopping those floors, shining those shoes, and waiting on those white people hand and foot that made Black people, who were otherwise college bound, want better jobs. Those few members of the Black middle class who have benefited from affirmative action by getting better jobs need not feel guilty. The question is not whether we deserve to be where we are, but why more of us have not been able to get there. It would be a sad irony indeed if the angst of today's Black middle class concerning its relative privilege were to lead to the destruction of those programs that opened up many opportunities for the development of that small class in the first place.

87. I would be interested to hear more about exactly what Carter thinks inner-city families need that they are not getting. What are they entitled to, and whose responsibility is it to see that they receive their due? Furthermore, to what factors do we attribute the reality of their current existence? Cf. *id.* at 82-83 (calling for "vast improvements in medical care for poor children" and "educational improvements, especially at the preschool level").

88. 443 U.S. 193 (1979).

89. See text accompanying note 31.

90. William A. Henry III, *What Price Preference? Fears Mount That Affirmative Action May Cheapen Black Achievements While Failing To Help The Underclass*, *TIME*, Sept. 30, 1991, at 30.

91. Jones, *supra* note 79, at 395-97.

F. *The Benefits: Diversity*

The footage of the vote taken on the floor of the United States Senate following the Judiciary Committee hearings last fall will be forever emblazoned in my mind. Viewers of Justice Clarence Thomas' confirmation process witnessed a prime example of white male domination. Every member of the Judiciary Committee was a white man. Indeed, the Senate itself was all white and ninety-eight percent male. Of course, the Senate is hardly the only bastion of white male privilege. Of the nearly 150 appointments to the U.S. Courts of Appeals by Presidents Nixon, Ford, Reagan, and Bush, ninety-seven percent were white and ninety-three percent were white men. No women of color were appointed.⁹²

One of the principal challenges to this pattern of white male domination is the diversity movement. The diversity movement began on the theory that we can eventually have greater equality and justice in the world than has existed under centuries of white male domination. The movement is a natural outgrowth of affirmative action. It is also an independent justification for affirmative action, for it urges that the previously excluded be brought into positions of power not simply to remedy discrimination, but also to provide those institutions the benefit of the participation of all segments of society. Diversifying power, then, is one of the greatest benefits of affirmative action.

While the impact of diversity upon institutions of power has not been studied seriously, mounting anecdotal evidence suggests that diversity proponents are correct. Legislative and judicial diversity may have real consequences for some Americans. Take, for example, legislative differentiation between penalties for the possession of powdered cocaine versus crack-cocaine. Recently, five African-American defendants challenged a Minnesota statutory scheme that provided for 48 months imprisonment for crack possession and 12 months imprisonment for cocaine possession. According to the plaintiffs, because 96.6% of those charged with crack possession were Black, and 79.6% of those charged with cocaine possession were white, the statutes had a discriminatory impact on Blacks. An African-American woman, Judge Pamela Alexander, ruled that the state had made an insufficient showing with respect to the pharmacological differences between the two forms of cocaine to justify the disparate impact of the sanctions on African Americans.⁹³ While Judge Alexander's race did not determine the outcome of the decision, her experiences as a Black American undoubtedly heightened her sensitivity to the possible disparate impact.⁹⁴

92. Dwight L. Greene, *Abusive Prosecutors: Gender, Race and Class Discretion and the Prosecution of Drug Addicted Mothers*, 39 BUFF. L. REV. 737, 763-64 (1991).

93. See *State v. Russell*, 477 N.W.2d 886 (Minn. 1991) (affirming trial court decision).

94. Unfortunately, Judge Alexander is not representative of the bench. The overwhelming majority of recent federal appointees have been white males. See *supra* note 92 and accompanying text. "These Republican judges were not appointed to and do not appear to be providing justice to those traditionally excluded from the American Dream: the poor, African-Americans, Native Americans, Latinos, Asian-

I have seen the impact of diversity in the law school faculty hiring context as well. Not long ago I witnessed the process of filling a long-term adjunct position at a high-ranking law school. Three white male members of the hiring committee, all good liberals, had a white male friend that they honestly believed would have filled the position well. No doubt he would have. But for the fact that two women also sat on the committee, the friend might have received the position immediately, without any fuss. However, the women insisted that the committee hold the position open for awhile to consider women and persons of color, and ultimately prevailed. While these white male faculty members are guilty of no malice, what almost occurred would have been totally exclusionary, regardless of motive or intent.⁹⁵ Had these women—both beneficiaries of affirmative action—not been members of this committee, they would not have been able to negotiate for what men often take for granted, the mere *opportunity* for inclusion.⁹⁶

1. *A Different Voice?*

Of course, to accept the diversity rationale one must also accept the notion that Blacks and women have distinctive perspectives directly linked to their race and gender. Carter criticizes this notion, but he also seems to accept it, if only to a limited extent. He says, “[W]e should love and value *us*, black people in all of our diversity: rich, poor, gay, straight, religious, secular, left, right. For it is none of these distinctions that define our blackness; what defines us, rather, is the society’s attitude toward us—all of us are black before we are anything else”⁹⁷

Nevertheless, some continue to deny experiential knowledge. Critics of this approach advance two main arguments. The first questions the source and/or nature of unique minority perspectives. It challenges the view that “people of color have a distinctive voice, a vision of the world, that is not being represented in the [lily-white] places where vital decisions are being made,”⁹⁸ by asking

Americans, women and others. To some of these judges the problem of race in America is just somebody else’s history.” Greene, *supra* note 92, at 766-67.

95. Those who would charge harmless error, since the men sincerely believed that the candidate would have been perfect for the job and had previously demonstrated their sensitivity to the plight of those excluded, miss the point entirely. Impact is relevant here, not intent.

96. The true hope of affirmative action is, of course, that over time women will not have to be the sole lobbying force for other women, and Blacks for other Blacks. Hopefully, the presence of previously excluded groups will break down stereotypes and unconscious racism and allow all decisionmakers to see the true merits of a Black or female candidate. See, e.g., Kennedy, *supra* note 80, at 1331 (“The presence of blacks across the broad spectrum of institutional settings upsets conventional stereotypes about the place of the Negro and acculturates the public to the idea that blacks can and must participate in all areas of our national life. This positive result of affirmative action outweighs any stigma that the policy causes.”).

97. CARTER, *supra* note 3, at 204.

98. Stephen L. Carter, *I Am An Affirmative Action Baby*, N.Y. TIMES, Aug. 5, 1991, at 13.

who has this special voice, where does it come from, and how did they get it?⁹⁹ The second asserts that any theory of essentialism limits scholars of color and makes them fungible commodities, ultimately hurting minority intellectuals.¹⁰⁰ Academicians who believe that racial minorities provide unique perspectives have been characterized as, at best, romanticizing the notion that skin color manifests a particular social consciousness, and, at worst, engaging in militarizing discourse to advance hidden political agendas that ostensibly include passing off second-rate scholarship as meritorious.¹⁰¹

I understand diversity's proponents to be arguing that racial minorities have, at the very least, a dual perspective.¹⁰² On the one hand, we can see how "old-fashioned American values" foster success in this society. On the other hand, we also recognize the extent to which we, and/or countless members of our socially subordinated group, are being pushed to the edge to observe this success from the periphery.¹⁰³ If whites, particularly white men, have witnessed firsthand the extent to which they, and/or members of their socially elevated group, are being pushed over others toward center stage and receiving greater access to positions of power, they are not writing narratives describing these experiences. Unsurprisingly, those who are excluded *are* writing such

99. See, e.g., Randall Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745, 1778-87, 1801-07 (1989).

100. CARTER, *supra* note 3, at 33.

101. Kennedy, *supra* note 99, at 1767, 1769-70. These critiques are particularly amusing, given their source. I would venture to say that no diversity proponents doubted for a moment that Shelby Steele, Randall Kennedy, and Carter himself would not have enjoyed such widespread media attention during the past year if they had been whites espousing views that many perceive as disparaging of minority character, viewpoints, and agendas. Of the various topics these men have addressed, their "intellectual contributions" were never before extolled by the mass media until they expressed views many see as inconsistent with the progress of Black America. Of course, I consider the attention to their perspectives quite appropriate. It is true that one can never pigeonhole a person's views based on group affiliation or experiential knowledge, that most Black people are not saying anything that has not been said before, and that countless Blacks have responded to the same stimuli in diverse ways. At the same time, it is also true that people usually attempt to get information about an experience from those who have lived through such an experience.

102. Black consciousness develops not only from the things that we see to which many others are indifferent, but also from the things that we see to which others simply remain oblivious. On a tour of Harlem with a group of "young white urban-professional real-estate speculators," Williams describes her reaction to their guide's suggestion that the group might want to observe Easter Sunday in Harlem by entering the local churches:

What astonished me was that no one asked the churches if they wanted to be stared at like living museums. I wondered what would happen if a group of blue-jeaned blacks were to walk uninvited into a synagogue on Passover or St. Anthony's of Padua during high mass—just to peer, not pray. My feeling is that such activity would be seen as disrespectful, at the very least. Yet the aspect of disrespect, intrusion, seemed irrelevant to this well-educated, affable group of people. They deflected my observation with comments like "We just want to look," "No one will mind," and "There's no harm intended." As well-intentioned as they were, I was left with the impression that no one existed for them who could not be governed by their intentions. While acknowledging the lack of apparent malice in this behavior, I can't help thinking that it is a liability as much a luxury to live without interaction. To live so completely impervious to one's own impact on others is a fragile privilege, which over time relies not simply on the willingness but on the inability of others—in this case blacks—to make their displeasure heard.

WILLIAMS, *supra* note 2, at 71-72 (footnotes omitted).

103. See, e.g., BELL HOOKS, *FEMINIST THEORY FROM MARGIN TO CENTER* (1984).

narratives. Particularly in the university setting, diversity of people, viewpoints, and experiences in both scholarship and presence allows for more opportunities to influence decisionmaking. The opportunity for scholars, from the United States and abroad, to encounter other perspectives lies at the heart of academic freedom.¹⁰⁴

As Williams argues: "It's important to hire [blacks] because the presence of blacks within, as opposed to without, the bell jar of a given community changes the dynamic forever."¹⁰⁵ Carter also recognizes that "we do have background and experiences and visions that it is important to share."¹⁰⁶ Carter describes having unifying relationships with his Black students.¹⁰⁷ Carter only mentions his Black students and the reason, I think, speaks for itself.¹⁰⁸ Racism per se is encountered under predictable circumstances in the inner city, but as we attempt to move away from that boundary and into the mainstream many would agree with Carter's statement: "Racism has done more than touch me. It has helped to shape me, just as the modern diversity movement would insist."¹⁰⁹

Unfortunately, while recognizing the influence of racism in shaping consciousness, Carter singles out for criticism individuals who have responded to it. For example, he criticizes the Harvard student protest upon Derrick Bell's brief departure. When protesting students demanded a person of color to teach a civil rights course formerly taught by Derrick Bell, their actions did not, to my mind, express disdain for Jack Greenberg (a leading white civil rights lawyer and instructor), his commitment to social and political equality, or his competency as litigator.¹¹⁰ Members of Harvard's student body, alongside some of its affirmative action babies, simply wanted to voice their desire for Derrick Bell's distinct perspective on civil rights.¹¹¹

One of the more controversial issues raised by those who dissent from the minority viewpoint school is the emphatic rejection of theories that treat Blacks as a monolith. This argument notes that Blacks have varying religious, sexual, and political orientations, and myriad education and income levels. It questions

104. A Dutch exchange student came into my office recently to apply for a job as a research assistant. When I asked what she would be interested in doing, she offered to read and edit articles that I submitted for publication. She explained that reading my work would provide her a valuable opportunity to understand another perspective. What perspective was she looking for? American? I doubt it. Female? Perhaps. Professional Black female in a society that has relatively few? I believe so.

105. WILLIAMS, *supra* note 2, at 101.

106. CARTER, *supra* note 3, at 203.

107. *Id.* at 99-100.

108. I acknowledge that, while I can empathize with Jews, the Japanese Americans whose families were interned, Native Americans, and Latin Americans, I, like Carter, find my identification with other Black Americans, regardless of political persuasion, the most intense.

109. CARTER, *supra*, note 3, at 75-76.

110. *Id.* at 41-44.

111. Countless white students at various institutions have come to me to confess that they were ignorant of the ways in which certain issues affected Black Americans until they heard me speak. Judging by the questions they asked, I doubt that they believed my ideas applied to every Black American or in all eras. Yet they still desired, and were affected by, my perspective.

whether, in light of these differences, a shared skin color can make us all the same. The answer, of course, is that it cannot. Many Arab Americans and Mexican Americans have dark brown skin, and ostensibly their world perspectives differ from those of American slaves' descendants.

But while skin color alone means nothing, the shared experience that accompanies that skin color has great significance. Even middle class Blacks, many of whom operate in environments that are largely white, are aware of and share many of those experiences. How is it that, unrelentingly, four generations of women—my grandmother, my mother, myself, and my daughter—no matter what era we have lived through, region we have settled in, or life chances we have received, have all experienced almost identical treatment at each stage of our lives? Black Americans read, hear, and observe the experiences of other Blacks and think of corresponding incidents in their own lives and the lives of their families.¹¹²

2. *Williams and Carter: Demonstrating the Distinctive Voice*

Although Williams and Carter adopt somewhat different attitudes toward the racial distinctiveness thesis, one of the most remarkable features of these two books is the extent to which both authors, one explicitly and the other implicitly, provide strong evidence of a distinct shared perspective. I suspect that Pat Williams and Stephen Carter have much in common in terms of life experiences and "advantages." Yet they interpret their own experiences, and those of others, in very different ways. They reach radically different conclusions and use very different language. Despite these differences, a strong commonality binds the two, a commonality that must stem from race. In distinct ways, both Williams and Carter tell stories about being outsiders.

Williams recounts that a couple of years ago, during the holidays in New York City, she was pressing her "round brown face" up to the pane of glass at the door of Benetton's department store.¹¹³ She wanted to enter and look at a sweater for her mother. She remembers having a pink wad of rubber burst in her face as the gum-chewing-boy-clerk refused to buzz her in, past the locked door, at one o'clock in the afternoon. He told her that the store was closed. She could plainly see that other customers, all white, were shopping around for "sweaters for *their* mothers." Williams was enraged. She made a large poster describing the incident and taped it to the store's window after its actual closing. She describes the experience as devaluing, a removal not only from "the market but from the pseudo-spiritual circle of psychic and civic communion."¹¹⁴

112. See, e.g., *infra* note 113 and accompanying text.

113. See WILLIAMS, *supra* note 2, at 44-46.

114. *Id.* at 71. I understand the rage Williams felt as a result of her experience at Benetton's department store, for I have lived it. Last summer I was attempting to check out movies from a video store. Unsure

Carter also depicts outsider experiences. For instance, he describes himself as young, ambitious, and ready to prove himself in high school. He writes that during his senior year he received a phone call from an academic counselor informing him that he had won a National Achievement Scholarship for college, designated for high-achieving Black students.¹¹⁵ According to the caller, acceptance of this award would preclude him from receiving a National Merit Scholarship, designated for the highest-achieving students of any race. The recipients of this second scholarship, for which he and his white friends were competing, had yet to be announced. The caller responded to his questions about acceptance of the first award precluding him from the Merit Scholarship by stating that "people who get National Achievement Scholarships are never good enough to get National Merit Scholarships."¹¹⁶ Carter accepted the award only to discover, a short time later, that his standardized test scores were higher and grades comparable to those of white students who received what Carter assesses to be the more prestigious scholarship. As one who despises everything that implies that Blacks cannot compete with whites intellectually,¹¹⁷ Carter notes that, "I still wish the National Merit Scholarship people had given me the chance to prove it."¹¹⁸ Carter, throughout much of the book, describes the span of his career as a continuum along similar lines. He lashes out at being labeled. He complains of being boxed in, expected to provide the sideshow for the benefit of others: see the jig-a-boo dance the civil rights or neoconservative shuffle; he is among the best jigs we know.

Peering into the Benetton window, Williams saw her personhood excluded from the realm of visibility. Carter sees himself as an intellectual who has been placed into a box that others peer into—once they discover the color of his skin they attach whatever label they deem appropriate.¹¹⁹ He describes this as a threat to his individuality since he believes that it is now uncommon to look

of which register was open, I inadvertently walked past the coded sensor which buzzed my presence. Well, I certainly knew I had chosen the wrong exit when a salesclerk darted over with an impatient stride and without once acknowledging my presence, snatched three video tapes out of my hand. I stared at him in disbelief and rage. My brown-eyed intensity bore through, for he appeared dumbstruck and said, "I'm sorry," with such sincerity that I knew (absolutely) that he meant it—just as surely as we both knew that it would not have happened if I had been white.

115. CARTER, *supra* note 3, at 47-69.

116. *Id.* at 49.

117. Carter has stated, since the publication of his book: "[P]art of my book [the section dealing with notions that the best black minds cannot compete alongside the best white ones] has been described by many readers as bitter, and in some respects, I suppose it is." Carter, *supra* note 34, at C5.

118. CARTER, *supra* note 3, at 69. In fact, after the publication of his book Carter revealed that he had misremembered the incident and that he had not been precluded from consideration in the National Merit Scholarship upon accepting the National Achievement Scholarship. Instead, he was considered for, and failed to win, a National Merit Scholarship. See Stephen L. Carter, "*Best Black*" Syndrome: My Bitter Memory; Somehow, for Twenty Years, I Was Haunted by a Slight That Never Happened, WASH. POST, Oct. 13, 1991, at C5.

119. According to Carter, several labels have been affixed to Black professionals, among them are these: "CAUTION: BLACK LEFT-WING ACTIVIST, HANDLE WITH CARE OR BE ACCUSED OF RACISM," "CAUTION: BLACK NEOCONSERVATIVE, PROBABLY A NUT CASE," "WARNING! AFFIRMATIVE ACTION BABY! DO NOT ASSUME THAT THIS INDIVIDUAL IS QUALIFIED!" CARTER, *supra* note 3, at 2.

beyond skin color. Race is used as a proxy for whatever is convenient and consistent with the labeler's own political agenda.

Both authors share an awareness that, notwithstanding their individual characteristics, to outside observers they are first, last, and always Blacks. This shared racial consciousness between two such dissimilar authors is itself a deeply powerful argument for the diversity movement, and, ultimately, for affirmative action.

III. CONCLUSION: SILENCING AND SCHOLARLY CRITIQUE

Constitutional scholars across the nation have sounded the warning. As Linda Greene points out, recent Supreme Court decisions "contribute to the development of a legal structure in which racial inequities may be immune from legal redress."¹²⁰ We are, perhaps, in unfamiliar territory. Many are asking, "Where do we go from here?"¹²¹ Inevitably, we must confront our politics.

Characterization of the so-called movement for political correctness as an onslaught of censorship has served to fan the flames of political aggression. Emotions are running high, fueled by highly visible incidents of racial tension in many American cities and college campuses. As leaders in the forefront of these debates push to get their views across, it has apparently become fashionable among some writers to charge opponents as frauds, mentally ill, and seeking self-promotion or economic gain.

Likewise, critics on all sides of the debate resort to name-calling under the guise of criticism. For example, one writer discussing Carter's book asks: "Is this the kind of puerile publishing that recipients of endowed chairs at Yale Law School are expected to produce?"¹²² Another writer speculates that Williams may be crazy, that she shares with Tawana Brawley "a tendency to confuse private difficulties with racial affliction, and a complicity in racial spectacles that introduce unreality into public life."¹²³ Another indicator that condemnation is replacing communication is the increasing number of personal attacks on commentators' qualifications. As one writer notes, the "New York Times letters section seems to serve as a sort of bulletin board for resignation calls."¹²⁴ Carter rightfully condemns this and a host of other activities.¹²⁵

120. Linda S. Greene, *Race in the Twenty-First Century: Equality Through Law?*, 64 TUL. L. REV. 1515, 1517 (1990).

121. See, e.g., Alex M. Johnson, Jr., *The New Voice Of Color*, 100 YALE L.J. 2007, 2062 (1991).

122. Horne, *supra* note 52, at 16.

123. Jonathan Reider, *The Alchemy of Race and Rights*, NEW REPUBLIC, Oct. 21, 1991, at 39.

124. Walter Olson, *Reflections of an Affirmative Action Baby*, NAT'L REV., Oct. 7, 1991 at 38.

125. While he rejects political correctness and encourages social tolerance for diverse views, Carter nevertheless singles out certain views and implies that they ought not be expressed. For example, Carter bemoans the fact that "Christians who doubt that Scripture allows ordination of women are dismissed as misogynistic." CARTER, *supra* note 3, at 133. His critique suggests that he is accusing women of carelessly hurling about the misogynist label. The unprecedented levels of violence against women in this country give women good reasons to characterize misogynist behavior as a very real threat. See, e.g., Brenda Seery & Michelle Clossick, *Analysis*, MS., Mar.-Apr. 1991, at 36 (reporting that 75% of 4450 women surveyed

Carter is on to something when he suggests that Black academics and other professionals will make greater contributions by toning down the rhetoric, reducing the insults, and searching for common ground. Untoward behavior that crosses the bounds of propriety warrants special attention and sometimes censure. The hostile tone of disagreement between Black intellectuals on all sides of race-related debates may be a product of personality conflicts, of the frayed nerves that result from these trying social and economic times, or of the reality of co-optation. Whatever the causes, the drawing of battle lines to militarize discourse will never have positive results. Carter has stated what many seem to miss, that the spirit of intellectual inquiry and independence should not be defeated by labels reducing criticism to insult.

Nonetheless, part of our scholarly mission compels us to overcome what might otherwise be characterized as interactive tension. Piercing critiques need not fall prey to the "only true teaching" or name-calling syndromes, but may rather evince the multiple consciousness of different writers. A strict adherence to intellectual Darwinism may be the best way to keep the former in check while encouraging the latter. In this respect, Williams' writings set a fine example for all scholars to observe: character assassination has never been synonymous with compelling substantive critique.

The books by Carter and Williams will likely generate much dialogue in the foreseeable future. I welcome that prospect, particularly the contrast, because they both take great strides toward promoting precisely the type of dialogue that Black America, and the nation as a whole, so desperately needs as we move into the twenty-first century.

experienced and survived male violence, 83% of the responding women knew at least one woman who had been raped and 80% suspected that a female acquaintance was being victimized by domestic violence). The potential for being victimized by violence is a day-to-day reality for women in the United States. However, even assuming that Carter is not discounting the legitimacy of women's misogyny concerns, one still wonders why he has chosen this particular target for criticism. Is the name-calling the real threat here, or should we instead focus on the underlying harm that women have experienced and that causes them to be wary of misogynistic interpretations of Scripture? Finally, and perhaps most fundamentally, Carter does not make clear why he finds name-calling from the left so troubling, yet seems relatively unmoved by the claims that hate speech on university campuses constitutes a significant threat. On the contrary, Carter finds "something disturbing about the amount of emotional and intellectual energy that sharp and talented people of color have put into crafting and negotiating and debating" hate-speech regulations. CARTER, *supra* note 3, at 177. I submit to Carter that it is either yea or nay. He believes that Black folks should have the moral character to shrug off insults and roll with the punches. *Id.* at 171. Are we to assume that Christians should not do likewise?