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BOOK REVIEW

Thoughts About Pursuing Diversity in Legal Education for Pedagogical Rather Than Political or Compensatory Reasons: A Review Essay on Stephen L. Carter's "Reflections of an Affirmative Action Baby"*

J. CLIFTON FLEMING, JR.†

INTRODUCTION

Although I disagreed with some of Professor Carter's conclusions as they relate to affirmative action in higher education, I found his book rigorously reasoned, lucidly written and intellectually rewarding for anyone concerned about contemporary American issues.

This book is composed of eleven chapters which form three thematic units. In part one, Carter, a black faculty member at Yale Law School, partially rejected the favorable view of affirmative action programs espoused by the principal civil rights organizations. He delivered an unfavorable critique of the preferential admissions and hiring programs as practiced by American colleges and universities. The majority of readers will find this critique to be the book's most important component. It will be discussed in detail later. Parts two and three primarily deal with matters intramural to people of color.

INTERNAL CONFLICTS AND IN GROUP EXPERIENCES

In parts two and three, Carter describes the pressures felt by black intellectuals to follow the ideological "line" established by mainstream civil rights

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organizations. He explains the tendency of these organizations to fire *ad hominem* volleys at good faith black dissenters, instead of engaging them in honest debate. Carter further recounts the pain and isolation felt by dissenters such as himself. He also points out the injustice perpetrated by those who assume that there is a single set of views embraced by all "real" people of color. Carter explains that this is a particularly damaging premise because it leads to the further assumption that people of color are incapable of the diverse thought characteristics usually attributed to white America. This premise also suggests that minority individuals whose intellects carry them to heterodox conclusions must either be conscious traitors or minorities by pigmentation only, rather than "real" members of brown, black, red or yellow America. Such suppositions are, of course, patently unfair. Indeed, an encouraging element in the often discouraging picture of contemporary race relations is the involvement of people of color across the full range of American political life — as opposed to their being confined within a discrete philosophical camp whose political support can be taken for granted and whose views are predictable.

In the latter portions of this book, Carter also expresses deep love for his own racial heritage and community, and points out the important things shared by the community's members such as a common concern for overcoming the effects of present and historical discrimination. He asks that the community focus on those concerns, rather than dissipate energy in identifying and castigating heretics. This part of the book is well done and thought provoking.

However, parts two and three of the book are shaped by the experiences and viewpoints of a black intellectual who is partially disillusioned by organizations that have historically represented his group. In contrast, the lenses through which I, and many other readers, see the world were formed by different sets of experiences and membership in different groups. For such readers it is difficult to become viscerally engaged and to comprehend the subtleties in the same way as one who has lived inside, or very close to, the author's group.

AFFIRMATIVE ACTION

However, part one of the book is an entirely different matter. It deals with racially based admissions and hiring preferences¹ in higher education — a matter that engages the interest of all segments of America's racial mix. This is an important component of the larger affirmative action debate which occupies so much of contemporary political discourse. Professor Carter

1. The book also occasionally references gender preferences.

views the affirmative action steps taken by America's colleges and universities as largely misguided. Yet, before evaluating his views, four preliminary matters should be disposed of lest they muddy the waters.

RED HERRINGS

First, Carter openly admits that he would not have been accepted as a student at Yale Law School had the institution not operated a preferential admissions program for minorities. This may prompt some affirmative action advocates to contend that as a beneficiary of one such program, Carter is disqualified from broadly criticizing any of them. However, this is an absurd contention. If carried to its logical conclusion, this argument would also assert that since most white Americans have profited from historical race discrimination, they are out of bounds to attack such discrimination. Whether Carter benefitted or not from the programs he criticizes is beside the point. Instead, readers should focus on whether his analysis is rational. In my opinion, the analysis is flawed and not analytically sound.

A second pretextual consideration arises from Carter's privileged background and conventional success. His parents are both college graduates; his father was a Cornell faculty member and Carter himself is a tenured professor at one of America's elite law schools. Some will reject Carter's attack on affirmative action by asserting that his origins made it possible for him to achieve his now recognized success without a struggle. Therefore, his questioning of affirmative action, which benefits a group to which he cannot relate, is inappropriate. This argument strikes me as flawed for reasons similar to those stated above with respect to Carter's status as an affirmative action beneficiary. The issue is not how hard or easy it was for Carter to achieve success, but whether his conclusions are sound. Anyone seriously concerned about finding answers to America's racial problems should avoid quibbling over Carter's background and faculty position and, instead, should deal solely with Professor Carter's views on the merits.

LEFT V. RIGHT

A third preliminary point is that much of the debate over racial and gender preferences in higher education admissions and hiring is not about the intrinsic wisdom of affirmative action. The debate really involves thwarting or promoting a perceived leftist takeover of America's colleges and universities. The affirmative action controversy is often a smoke screen behind which ideologically driven participants hide their broader agendas. Thus, if the affirmative action beneficiaries in higher education were all Marilyn Quayles and Clarence Thomases, I doubt that some proponents would fight as hard as they do; and many prominent objectors would probably disappear. However,

racial and gender preferences in higher education involve important social justice and pedagogical issues. Such issues must be confronted regardless of how those preferences fit within larger ideological schemes. For this reason, I feel it is appropriate for Professor Carter's critique to mostly avoid the hidden agendas of the contestants in the macrocosmic left/right controversy. Although he fires a few political shots, Carter primarily deals with the more manageable issues of the benefits and costs of affirmative action in higher education. Such a focused approach is generally more helpful.

HIGHER EDUCATION V. THE ZERO SUM WORLD

A final prefatory point is that Carter's affirmative action critique is almost exclusively directed at admissions and hiring in higher education. The author expressly renounces any intention of commenting on other affirmative action areas and is largely faithful to his disclaimer. This is an important consideration because the sector that Carter has set out to examine is one of America's few vibrant areas. Thus, virtually anyone who is academically prepared to go to college and is capable of doing the work can get admitted to a credible institution. Virtually anyone with an undergraduate degree and a discernible heartbeat can obtain entry to a graduate or professional program. The principal effect of preferential admission practices is that students are rearranged within the academic strata. Some white students who might have gotten into a certain level of institution, but for affirmative action, drop down to the next lower stratum of colleges and universities. Yet, the lower stratum typically offers training comparable to that provided by the immediately higher institutions. Conversely, the affirmative action admittees, who usually have a fighting chance for academic success, get bumped up a level or two. Although the whites who are displaced in this process are disappointed, sometimes bitterly so, at having to accept something other than their first choice, it is difficult to argue that the consequences are tragic.² The vision suggested by some critics and politicians of potentially brilliant white male physicists having to spend their lives as convenience store clerks or parking lot attendants because they were foreclosed from university education by barely literate affirmative action admittees is simply not true.³ Indeed, hardly

2. See also Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. LEGAL EDUC. 103, 113 (1992); Charles E. Daye, *Of New and Old: Have We Oversold Affirmative Action?*, LAW SERVICES REP. (Law School Admissions Council/Law School Admissions Services at 2 (Dec. 1991)).

3. The situation in legal education is illustrative of this point. The 176 ABA accredited U.S. law schools admitted 44,104 first-year J.D. students for the 1991-92 academic year. Yet this enormous cohort was actually 0.1% smaller than the 1990-91 entering class and the 176 schools in question reported 43 unfilled seats for the 1991-92 year. CONSULTANT ON LEGAL EDUCATION TO THE AMERICAN BAR ASSOCIATION, ANNUAL REPORT 7, 13 (1991-92).

anyone sees an ounce of pathos in the case of a white student relegated to San Diego State because his place at UCLA or Berkeley was taken by a student with a lower high school grade point average who happens to pull down 14 rebounds per game. More importantly, difficulty exists in viewing whites as ever being "displaced" if the preferential admissions program is soundly conceived—a point detailed below.

Similar considerations apply to affirmative action faculty hiring. Although securing employment in higher education is more difficult than getting admitted as a student, almost anyone who is qualified for such employment can either obtain it at some level or find a meaningful position in government or the commercial world. Again, in faculty hiring affirmative action may cause disappointment to displaced white males, however, alternatives open to them make this result less than tragic. Moreover, if the preferential hiring is done in a way that furthers viewpoint diversity, displacement may not be a relevant consideration at all.

Things are very different, however, in the slow growth areas of the American economy, such as the construction trades and heavy manufacturing, which involve more people than does higher education. In these stagnant sectors, a zero sum game presently prevails. A white male displaced by affirmative action hiring may have to become a convenience store clerk or parking lot attendant and suffer a tragic income loss. Thus, when we move away from the higher education arena, the displacement issue becomes extremely critical. But on the other hand, economic sectors such as construction or heavy manufacturing are also the employment areas where the greatest numbers of white women and people of color can be readily placed. Stated differently, the zero sum sectors of the economy are often the areas in which women and minorities can make the quickest economic progress towards overcoming the historical discrimination that has unfairly burdened them and conferred inequitable advantages on white males. At the present time, U.S. taxpayers are largely unwilling to address these matters with programs that spread the correctional costs broadly throughout the general public despite the enormous societal benefits to be gained from such programs. This forces upon us the issue of whether it is fair to leave white women and minorities mired in the effects of America's past discrimination, while white males permanently benefit from that past, or to apply affirmative action in the zero sum areas of America's economy. If the latter option is chosen, the typical result is that white women and people of color who possess adequate qualifications will displace white men who rank higher in the conventional qualifications, yet who played no part in causing past discrimination. A more excruciating dilemma is difficult to imagine. Carter, however, confines himself to higher education and expressly declines to offer detailed prescriptions for the agony

of the much larger zero sum world.⁴ Thus, for the reasons just given, the debate between Carter and his opponents concerning affirmative action in higher education may not be relevant to the zero sum areas of American life. Conversely, conclusions about affirmative action in the zero sum sectors do not necessarily shed light on the efficacy of preferential admissions and hiring by colleges and universities.

COSTS AND BENEFITS

Professor Carter turns a censorer's eye on affirmative action within higher education. His criticisms advocate the position that (1) preferential admissions and hiring policies have high costs; and, (2) such practices yield few benefits. With respect to the first point, Carter asserts that affirmative action causes its beneficiaries to be stigmatized as second rate; causes their failures to be unfairly magnified and generalized to all women and people of color; and encourages its beneficiaries to seek ways of circumventing, instead of satisfying, appropriate standards. Concerning the benefits side of the ledger, Carter finds that because colleges and universities preferentially admit and hire only women and people of color who are identified as likely to succeed, the beneficiaries are mostly those who would find a place in higher education anyway, although probably in a lower stratum, while the members of the growing underclass trapped in America's cities are left to their own misfortune. He puts it this way:

The most disadvantaged black people are not in a position to benefit from preferential admission. No one seriously imagines otherwise. No rational institution of higher learning would act otherwise. A college does not want to waste its resources. Surely, in assembling a class, the school will select those most likely to succeed. And if the college indulges a special admission program for the benefit of disadvantaged students, it will select for admission through that program those disadvantaged students most likely to succeed.

The problem is that the truly disadvantaged are not likely to succeed in college: their disadvantage . . . has taken that opportunity from them. How is the elite college or professional school, under pressure to diversify its student body, to resolve the dilemma? Simple: make race a proxy for disadvantage and then, ignoring other aspects of their background, admit as students those among the nonwhite applicants who seem most likely to succeed. That way, there is less risk. Everyone is happy.⁵

A LIMITED ROLE FOR AFFIRMATIVE ACTION

This is not to say that Professor Carter finds affirmative action wholly inappropriate in the higher education world. He admits that it has a proper, but very limited role to play in giving the best prepared students of color an

4. STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 89 (1991).

5. *Id.* at 80.

opportunity to study at an elite group of colleges, universities, and professional schools that might otherwise be closed to them. He states the point as follows:

[A] degree of racial consciousness *in college and perhaps professional school admission* can plausibly be justified — but just a degree, and just barely. The educational sphere is the place for action because the proper goal of all racial preferences is opportunity — a chance at advanced training for highly motivated people of color who, for whatever complex set of reasons, might not otherwise have it. . . .

I call this vision of professional achievement and racial preference the affirmative action pyramid, and it works much as the name implies: The role of preference narrows as one moves upward. And although I do not want to say arbitrarily *This is the spot*, what is clear is that as one climbs toward professional success, at some point the preferences must fall away entirely. Possibly a slight preference is justified in college admission, not as a matter of getting the numbers right, and certainly not as a matter of finding the right set of hitherto excluded points of view, but as a matter of giving lots of people from different backgrounds the chance — only the chance — to have an education at an elite college or university. But when that opportunity has been exercised, when the student has shown what he or she can do, the rationale for a preference at the next level is slimmer. So an even slighter affirmative action preference for professional school admission, while possibly justified on similar grounds, is less important, and a little bit harder to defend, than a program at the college level.⁶

THE “BEST” APPLICANTS

I find Carter's catalog of the affirmative action costs persuasive, but I believe that he has inappropriately discounted the benefits and taken an unduly narrow view of affirmative action's proper role in higher education, particularly legal education. With respect to law school admissions, the factors weighted most heavily in determining applicant qualifications are the undergraduate grade point average and performance on the LSAT. But these factors, although highly important, may underestimate the achievement potential of applicants who bloom late because their disadvantaged origins have left them with more ground to cover than other applicants. Furthermore, test scores and grade point averages reveal almost nothing about an applicant's commitment to the common good or willingness to serve others. They also ignore the societal impact resulting from a person of color who becomes a role model through achievement or who returns to serve in a community of historically disadvantaged people.⁷ Surely when identifying the “best” applicants, law schools are entitled to take account of these factors for both whites and people of color, even if the factor weighing process lacks

6. *Id.* at 88-89.

7. Indeed, Professor Carter himself may be a product of the role model effect. According to the research of Professor J. Clay Smith, Jr., Carter is a third generation lawyer who was preceded in the profession by his father and grandmother, although whether they benefitted from affirmative action is unknown.

surgical precision. Needless to say, the "best" applicants are not exclusively those with the highest numerical indicators. Thus, it is appropriate for legal education institutions to look seriously at other relevant admission indicators in addition to test scores and grade point averages, as long as the schools refrain from relying on such factors to enroll students who are truly unprepared or lack the requisite abilities.⁸

THE DISPLACEMENT MYTH

Many people will consider such use of non-numerical admissions criteria to be an affirmative action approach. This is because in the aggregate, whites have higher test scores and grade point averages than historically disadvantaged groups whereas the latter groups are at least as strong as whites with respect to the non-numerical indicators. Thus, an admissions procedure which gives significant weight to non-numerical factors will somewhat discount the criteria on which whites do best; and, people of color will be disproportionately, although not exclusively, benefitted. Nevertheless, the displacement problem discussed above will be largely avoided because the whites who lose out under an improved applicant evaluation system cannot credibly complain that they have been unfairly deprived of an entitlement. In addition, the admitting institutions will themselves receive important benefits because they will obtain better measures of their applicant pools and will be able to enroll qualified students who ought not to be overlooked, but who might be ignored if admissions decisions are unduly driven by the traditional indicia of grade point averages and LSAT scores. This is an institutional gain that Professor Carter seems to have largely dismissed. Furthermore, it is a gain that can, and should, be captured by a broad range of law schools, not just the elite group that Carter identifies as the permissible affirmative action actors. Finally, society gains to the extent that non-numerical admissions criteria result in more service oriented graduates.⁹

Some similar points apply to law faculty hiring. Disadvantaged applicants who have the intellectual horsepower to succeed in the classroom and in research may, nevertheless, lack traditional academic honors because the ground they had to make up resulted in the "mere" completion of their degree programs becoming an unusually important achievement in its own

8. See *Davis v. Halpern*, 768 F. Supp. 968, 975-76 (E.D. N.Y. 1991). Carter acknowledges the validity of some of the preceding points, but only as part of his argument that affirmative action should play the limited role of boosting a few students of color into elite institutions. CARTER, *supra* note 4, at 85.

9. For a lengthier development of some of these matters, see Michael A. Olivas, *Legal Norms in Law School Admissions: An Essay on Parallel Universes*, 42 J. LEGAL EDUC. 103, 114-15 and Samuel C. Thompson, Jr., *A Response to Professor Haskell's Academic Plantation Theory*, 60 A.B.A. J. 1525 (1974).

right. Such individuals may be poised to bloom as outstanding teacher/scholars. Appointment committees will appropriately give serious consideration to the search for these people if they wish to avoid overlooking future stars. Again, the beneficiaries of this approach will be disproportionately people of color so that the program will be labeled affirmative action, but the institutions themselves will gain much by producing more qualified candidates for faculty positions. Furthermore, these gains are not limited to elite law schools; a broad range of institutions can potentially benefit.

AFFIRMATIVE ACTION TO ACHIEVE EDUCATIONAL ENDS

For me, however, the largest institutional gain from affirmative action comes from the diverse viewpoints that are added to the legal education process. Professor Carter, in contrast, finds increased viewpoint diversity totally lacking as an affirmative action rationale. This is because (1) he understands the argument for this kind of diversity as asserting that all people of color hold certain stereotypical left-wing opinions, (2) he finds the pursuit of increased diversity to be a disguised attempt to increase the influence of these left-wing sentiments in higher education communities, and (3) he believes that race is an unreliable proxy for identifying people whose viewpoints can leave the intellectual mix.

Professor Carter states his first and second objections as follows:

Viewpoint, outlook, perspective — whatever word is used, the significance is the same. We have come to a point in the evolution of our ways of talking about race when it is not only respectable but actually encouraged for public and private institutions alike to make policy based on stereotypes about the different ways in which people who are white and people who are black supposedly think. . . .

In this latter-day vision of affirmative action, black people in positions of prominence have become representatives of their people. Black people who have attained a measure of success in the white world are assumed — and, indeed, expected — always and everywhere to represent the race, not in the traditional and still-important senses of serving as role models for those who will come later or opening doors by proving their worth, but in a strange new sense of bringing excluded voices into the corridors of power, thereby articulating the interests of a constituency.

And what goes often unspoken yet clearly implied in all this is that people of color who do not hold or represent this special viewpoint (whatever it is) are not the right people to fill these representational slots. As Derrick Bell has put it, “the ends of diversity are not served by people who look black and think white.”¹⁰

This forceful statement is appropos, however, only when viewpoint diversity is employed to advance a non-educational ideology. But one can be committed to increased diversity purely for its educational effects and without

10. CARTER, *supra* note 4, at 32-33. See also Lino A. Graglia, *Race Norming in Law School Admissions*, 42 J. LEGAL EDUC. 97, 101 (1992).

having bought into any stereotypes. For example, admittees to American colleges and universities regularly include athletes, debaters, musicians, thespians, potential leaders, and students from geographically distant areas who would be turned away if admissions decisions were based purely on test scores and grade point averages or who would be effectively excluded by cost considerations if they did not receive preferential financial aid. This can be viewed as affirmative action in behalf of the beneficiaries. Nevertheless, few complaints are heard because it is generally agreed that institutions are permitted to behave in this nonideological way so that campus life and the educational environment can be enriched. Similarly, a law school should value the recruitment of students and faculty from diverse backgrounds because regardless of the political programs to which these individuals subscribe, the varied experiences they bring to the educational process and share with their colleagues contribute importantly to better illumination of the matters being taught and studied. Furthermore, a law school's recruitment efforts can reasonably include both the financial assistance required for disadvantaged students to overcome higher education's cost barriers and the payment of any market premium necessary to bid for the relatively scarce number of qualified faculty who bring increased viewpoint diversity.

Granted, the foregoing line of argument may not support the pursuit of greater diversity in an astronomy department, but, on the other hand, it may do so. As a non-astronomer, I feel compelled to confess ignorance on this point. In contrast, however, it is clear to me that law schools, being in the business of examining how the world of human affairs works, and how it ought to work, benefit from students and teachers who contribute diverse life experiences. Consequently, law schools should vigorously pursue viewpoint diversity.

REPARATIONS AND RIGHTS

This approach to diversity is not based on a rationale of providing reparations to the victims of historical discrimination even though I recognize that the discrimination occurred; that it is a shameful blot on America; and that the sufferers are real and numerous with compelling needs. However, I see overwhelming practical problems in any effort to link higher education admissions and hiring to a remedial scheme which rationally identifies the victims, measures the degree of injury and metes out appropriate compensation to the right beneficiaries.¹¹ Furthermore, I do not think that affirmative action in higher education is terribly effective as a compensatory device but I believe, instead, that truly meaningful action to repair the damage of race and

11. For an illumination of these problems in a broader context, see generally BORIS I. BITTKER, *THE CASE FOR BLACK REPARATIONS* (1973).

gender discrimination requires government action on a broad front — a point to be expanded on shortly. Finally, I believe that attempts to base higher education affirmative action on a reparation rationale alienate middle America and make progress more difficult.

I realize that some women and people of color view this noncompensatory approach as disingenuously weak and would prefer a rights-based defense of affirmative action.¹² Why this is so is not clear to me. I should think that an individual would feel better at knowing that he or she was part of an academic community because he or she was truly valued by that community and not because an entitlement was used to muscle in. More importantly, the rights based approach breeds such contention that it is likely to result in less concrete progress than a viewpoint diversity approach grounded on the objective of improving the content of higher education.

DIFFERENT EXPERIENCES CREATE DIFFERENT VIEWPOINTS

The diversity concept which I have described most emphatically does not assume that all women and people of color share common political ideologies which must be brought into legal education because those ideologies are underrepresented in American power centers. Instead, it contends that by and large, women and people of color have different experiences than white males and that when they and white males share their experiences as they study how the world of human affairs works and ought to work, greater understanding of the subject matter takes place for all who participate. This is not to assert, however, that inept or unprepared students and teachers should be recruited because their gender or ethnicity gives them diverse viewpoints that allegedly excuse their inadequate qualifications. Instead, the point is that once a recruitment pool of individuals capable of work which meets the institution's standards is identified through sound techniques, including the technique suggested above of looking at more than numerical criteria, it is appropriate to take diversity of life experiences into account as one important factor in making selections from the pool.

This brings us to Professor Carter's third objection. He does not believe that race, and presumably gender, are adequate proxies for identifying those who will inject viewpoint diversity into legal education. He refers to "survey data suggesting that on many, perhaps most, controversial policy issues, including those regarding foreign affairs, the views of people of color tend to be similar to, or to the right of, the views of white males"¹³ and then says that "if the views of people who are not white turn out to be just the same as the

12. See Richard Delgado, *Affirmative Action as a Majoritarian Device: Or Do You Really Want to Be a Role Model?*, 89 MICH. L. REV. 1222 (1991).

13. CARTER, *supra* note 4, at 31-32.

views of people who are, the case for using race as a proxy for viewpoint diversity collapses."¹⁴ These statements, however, are based on the assumption that viewpoint diversity is inevitably a component in a macrocosmic battle between left wing and right wing political forces — an assumption which I reject. As I have argued, the recruitment of persons from different backgrounds is appropriate, not for overarching political ends, but for achieving the more modest, but still important objectives of enriching legal education and making the learning experience more vibrant for both majority and minority participants. Since we still live in a time when women and people of color experience American life in significantly different ways from white males, members of the two former groups are quite likely to bring diverse experiences to higher education. Hopefully, the time will come when this is no longer so; but that day is not in sight. Therefore, gender and race appear to be appropriate for my conception of viewpoint diversity which is based on educational concerns.

Professor Carter's own situation illustrates the concept of apolitical viewpoint diversity in higher education. He is a mainstream American who hardly fits the stereotype of an angry black radical. Consequently, his presence at Yale Law School does not enhance the influence of marginalized voices within the American polity. In spite of his comfortable background, however, Carter recounts suffering discrimination as a member of a predominantly white Boy Scout patrol, harassment from a white passenger on a Washington, D.C., bus, racial epithets from white students, harassment from white motorists in Palo Alto and Atlanta, exclusion from consideration for a National Merit scholarship because he was black, and condescension from a law professor who told Carter that he was that teacher's best black student ever. The fact that Carter, a child of privilege, has suffered these indignities in post civil rights America arguably makes his life as instructive about our unfinished racial agenda as the urban underclass experience. Furthermore, the citations in the endnotes to his book show a degree of thinking and research about issues of race and law that white males are rarely motivated to match. Thus, in addition to his conventional credentials, Carter contributes a set of interests and experiences that are foreign to most white males and that enrich the higher education enterprise even though he is not a political radical.

STIGMATIZATION

Although I cannot empirically prove the point, I believe that the gains from viewpoint diversity greatly outweigh the costs of affirmative action.

14. CARTER, *supra* note 4, at 35.

Professor Carter contradicts this conclusion by, among other things, emphasizing the burden of stigmatization that he and others bear as a result of being affirmative action beneficiaries.¹⁵ Since I have never been in his position, I cannot call on personal experience to controvert his views. Nevertheless, I strongly suspect that Professor Carter's Yale law degree and the benefits flowing peculiarly from that elite certification, which he would not have received except for Yale's preferential admission program, are more than adequate compensation for any personal stigma that he suffers.

NUMERICAL PRESCRIPTIONS

Carter and I obviously disagree in that I grant affirmative action a larger role in academic life than he does. Nevertheless, we concur that there is no place for numerical requirements imposed by governments or accrediting agencies. With respect to both Carter's approach of using affirmative action to add well prepared women and people of color to the student bodies of a few elite institutions and my conception of nonideological viewpoint diversity, there is no way of knowing whether the numbers of women and people of color have reached the right level because there are no objective standards for determining if the elite schools are reaching to the proper depth in their numerically measured applicant pools or if institutions have achieved an optimum mix of life experiences in their faculties and student bodies. Stated differently, Carter and I see affirmative action as an exercise that is not limited to a single correct outcome or set of outcomes. Thus, the proper role of governments and accrediting bodies is to continuously exhort colleges, universities and law schools to examine their souls about what they are doing and to require them to demonstrate good faith efforts to recruit women and people of color. Numerical prescriptions, however, are inappropriate.

BEYOND AFFIRMATIVE ACTION

Carter and I also agree that although higher education affirmative action is intrinsically important, it is a relative sideshow when compared with the center-stage challenges of reversing the accelerating growth of America's underclass and truly eliminating the legacy of racial and gender discrimination from the full scope of American life. Indeed, Carter's position on these larger matters may give pause to those conservatives who have rushed to embrace him because of his affirmative action views. Although Carter does emphasize the importance of self-help and personal responsibility by minorities,¹⁶ conservatives misread him if they view his book as a generalized attack on gov-

15. See also Graglia, *supra* note 10.

16. CARTER, *supra* note 4, at 73-75.

ernmental efforts to cure America's racial ills. Granted, he extensively disparages affirmative action as a tool for achieving racial justice but he remains convinced that government has an obligation to develop and apply other and better tools. He states:

[W]hile the proposition put by such theorists as George Gilder and Charles Murray that an unfettered market will remove the barriers [to progress by people of color] without the assistance of government programs (and largess) has obvious political appeal, it is ultimately unpersuasive. Racial justice isn't cheap. We need, for example, vast improvements in medical care for poor children. It is inexcusable that our inner cities have infant mortality rates higher than those in much of the Third World. And if, as critics suggest, the problem is not the unavailability of services but the behavior of parents, then it is inexcusable that our society cares so little about educating parents to take better care of their children. We need educational improvement, especially at the preschool level. It is true, as the critics hasten to point out, that there is little evidence that money spent on new educational programs leads ineluctably to greater educational achievement. But there is plenty of statistically reliable evidence that better preschool programs produce better achievement later, especially in mathematics, and plenty more that education proceeds best in school environments that are stable and safe — two conditions that it costs money to bring about. And while it is also true that the most important determinant of educational achievement is family socioeconomic circumstance, this only points to improvement in the social infrastructure of inner-city communities as a bare necessity for progress — even if, obviously, a tremendously expensive one. . . .¹⁷

This is no manifesto for small government. Unless I am badly misreading the text, it is implicitly a call for training programs to produce teachers for inner city schools, security for those schools, job training, transportation from the inner city to suburban jobs, day care for children of working parents, health care, more vigorous enforcement of anti-discrimination laws, more vigorous drug law enforcement, food assistance, decent and safe housing, parental education, etc., all of which are expensive and typically require at least some degree of involvement by some level of government whether accomplished through vouchers, grants, mandated programs, tax credits, or other means.

Carter recognizes that in America's present circumstances it is unlikely that the money to implement his suggestions will be forthcoming. Instead, the country will probably content itself with steps such as affirmative action, which Carter calls racial justice on the cheap because its costs are invisibly shifted from society at large to displaced white males and because it largely bypasses our most acute racial problems. At some point, however, the lag-gard American economy will again produce the growing economic pie that causes voters to feel that they can afford decency and justice. I anticipate that Carter will then be a spokesperson for an activist social agenda, although not an agenda that relies on affirmative action in higher education. If that day arrives, Carter's present conservative admirers and black critics may speak of

17. CARTER, *supra* note 4, at 82-83.

his undergoing a liberal conversion when, in truth, he will only be pursuing a path forthrightly laid out in his 1991 "conservative" book. The labels of liberal and conservative seem truly inadequate to capsulize his views.

