

THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS. By Kristin Bumiller.¹ Baltimore, Md.: The Johns Hopkins University Press. 1988. Pp. 161. \$19.95.

*William R. Beer*²

In *For Whom the Bell Tolls*, Ernest Hemingway has his hero, Robert Jordan, tell of a conversation with a Russian NKVD officer who sent Jordan on his mission to direct a guerrilla raid. The Russian says that in his homeland there are two kinds of fools, the summer fool and the winter fool. The summer fool walks down the street on a summer day, grimacing and waving his arms; it is easy for everybody to see right away that he is a fool. The winter fool comes to your home on a stormy day, and enters, covered with snow. He shakes the snow off his boots and removes them. He shakes the snow off his gloves and removes them. He shakes the snow off his hat after taking it off, and finally shakes the snow off his overcoat. Finally he takes off the overcoat and you discover, only after all that uncovering, that he is a fool.

Professor Kristin Bumiller reminds me of the latter sort of fool; underneath all the legalistic terminology, Marxist slogans, and talk about "Foucaultian" analysis and "Beccarian" ideas, hers is a very simple thesis, to wit: Laws are made by ruling classes, so laws claiming to reform society really only serve to perpetuate the very injustices they aim to erase. This is true, she argues, of American civil rights laws as they apply to blacks, and also of the situation of any number of other "oppressed" people, such as women, the elderly, Hispanics, and whoever else is the latest victim of the day. This is the sort of argument that could be made by the average college sophomore who has read *The Communist Manifesto*.

In order to advance her thesis, she indulges in a breathtaking perversion of everything that true social science stands for. Science, in the normally accepted meaning of the term, comprises a search for general rules of cause and effect through testing of hypotheses by empirical observation. Professor Bumiller's approach is, by contrast, so biased and selective that it cannot be distinguished from pamphleteering. In short, the book is an excellent example of Critical Legal Studies, and should be read by anybody who doubts just

1. Professor of Political Science, Johns Hopkins University.

2. Professor of Sociology, Brooklyn College of the City University of New York.

how far removed from reality today's left-wing legal scholars have become.

"My analysis," says Bumiller, "begins with the assumption that racism and sexism are prevalent, and is sympathetic to those who are impatient with the current rate of progress toward a more egalitarian society." If she is using "discrimination" in the ordinary sense, her basic assumption is false; a large majority of American women say they have never suffered from sex discrimination, and large majorities of blacks say they have never suffered from racial discrimination in hiring, housing, and education. Of course, one might surmise that they are wrong, either because they have been brainwashed or because the discrimination has been veiled in various ways. Such a theory would not necessarily be valid, but it would at least have a degree of plausibility. But individual experiences of sexual and racial discrimination are not what Bumiller means when she talks of racism and sexism. What she means—and in this she is joined by most leftist and liberal social scientists—is that there are *group* differences between the *situation* of blacks and that of whites, or between that of women and that of men: "discrimination" means inequality.

For example, commentators often cite statistical disparities in income and occupational mobility between females and males or whites and blacks. Now, when you start trying to prove things with statistics, you need some understanding of basic social science methodology. But Critical Legal Studies exemplars like Bumiller come crashing into the thickets of sociology without any clear understanding of what they are talking about.

Particularly absurd is her deliberate and repeated confusion of "women" and "minorities." That women constitute an enormously heterogeneous category with no internal cohesion is evident to anyone but a polemicist. What does she mean by "minorities"? Does she include Japanese Americans and Chinese Americans, who have higher median family incomes than any white ethnic group? Does she include white ethnic groups such as the Scotch Irish, whose incomes tend to be very modest in comparison to other white ethnic groups? What she probably means is black Americans and non-Cuban Hispanics, lumped together with "women" as some huge oppressed class for propaganda purposes. No honest social scientist can take this kind of confusion seriously.

Just as serious as Bumiller's conceptual crudity are the factual errors she makes. The book is chock-full of statements that are erroneous, unsubstantiated, or both. For example, she says that among groups who experience discrimination, there is "a sense of

how little things have changed." Any number of surveys provide objective data indicating that this is simply false. In the 1983 *New York Times* Women's Survey, in response to the question, "In the last ten years or so, do you think men's attitudes towards women have changed for the better?", 51% of the women responding said "yes." And 50% said that there had been a "great deal" of progress "in the movement of women into jobs that used to only be thought of as only jobs for men." Only 8% said there had been "not much progress." In a February 1988 Gallup poll, 47% of American blacks said their work situation had improved in the previous five years, 54% acknowledged improvement in their pay and 41% in their housing situation; these perceptions of positive change were virtually indistinguishable from the figures for whites. It seems evident that the lack of change is more in Bumiller's own mind than in the minds of those for whom she purports to speak.

She claims that there are "significant gaps in white versus black or female wages that are due to employers' 'taste for discrimination,'" but the facts are otherwise. When one controls for family structure, level of education, age, region and urban/rural residence, the differences in median black and white family incomes virtually disappear, and this has been so for over a decade. It is commonly acknowledged nowadays among social scientists that contemporary racial discrimination does not explain black social problems. As for male-female differences in income, even the authors of a study that explicitly sought to demonstrate that discrimination accounted for differences in male and female wages were forced to concede that definitive proof was lacking.³

Bumiller's interpretations of data are just as skewed as her "facts." She tacitly follows a simple rule: Anywhere there is a statistical disparity between a group and some hypothetical national norm, this is *prima facie* evidence of discrimination. No other explanation for different levels of achievement between groups is even briefly considered. If there are fewer blacks in the professions, if there are more black than white high school dropouts or felons, if fewer women enter mathematically-oriented occupations, if a certain ethnic group is predominant in a particular field, Bumiller cannot conceive of any other explanation than discrimination. Indeed, this pattern of thought has become so common in elite thinking that a statistical disparity is considered to be extremely strong evidence of discrimination.

Myriad factors besides discrimination can account for these group disparities. What impelled a group to come to the United

3. D. TREIMAN & H. HARTMAN, *WOMEN, WORK AND WAGES* (1981).

States (expulsion, ambition, involuntary servitude), what stage of economic development our society had achieved when the group migrated here, what level of education the group had prior to migration, whether or not the group's native language was English, whether the group was the beneficiary of welfare programs that may have undermined its communal and familial institutions, whether its religion encourages or discourages economic enterprise and/or education—these and many other factors influence the success or failure of ethnic groups. To be sure, discrimination unfortunately does play some role in producing statistical disparities between different groups' income levels, but only as one among many factors.

Bumiller attempts to prove her thesis by interviewing several people and assessing their statements about their experience with racial or sexual discrimination. This is a time-honored method, provided that the respondents are chosen in an unbiased way, the questions put to them are standardized and do not lead them in preconceived directions, their testimony is presented to the reader so that he can judge for himself, and no attempt is made to interpret the data beyond the scope of the experience of the respondents.

Bumiller, however, violates every one of these provisos. Her sample was deliberately selected to corroborate her own point of view. "I selected," she says, "a subsample of eighteen persons in Milwaukee and Los Angeles for in-depth interviewing," out of a total sample of five hundred sixty people interviewed by a research enterprise called the Civil Litigation Research Project in 1980. "The participants in the interviews were representative of those affected by the social inequalities and the pattern of discrimination in American society: six black and American Indian men." Such a sample is, of course, "representative" of nothing but Bumiller's own ideological agenda and, maybe, her travel plans—she says that the "selection was dependent upon the geographical constraints on the investigator." Competent social scientists take the notion of a "representative" sample seriously; there are statistical tests for precisely measuring this characteristic of a sample. Evidently Bumiller is ignorant of these procedures.

Bumiller does not simply interview her subjects; she interprets their answers for them because "[t]he reality of the subject does not allow for a social viewpoint distinct from the ideology of those in authority." To justify this interpolation she claims that the ideology of the ruling class is so pervasive that victims do not know how to answer questions in such a way as to express their true interests. Therefore, it is necessary to interpret what her interviewees say in order to express what they "really" mean. "I attempt to transform

the act of interviewing from ritual into meaningful exchange by formulating objectives that bring together the knowledge of the respondent with a perspective on legal ideology." Why does she follow this bizarre procedure? "This work is motivated by the desire to make social science research more responsive to the problem of social oppression and the stultifying realities of everyday life." Underneath all the pompous verbiage, the simple fact is that if scientific research doesn't uncover the oppression Bumiller knows is there, she will add some creative touches to make sure we see it.

All this would be shabby enough. But she then neglects to lay the full text of her respondents' statements in front of the reader. Bumiller cannot allow even this highly selected and polemically interrogated sample of subjects to speak for themselves. A phrase or two is quoted here and there, but the entire transcript of the interviews is digested by the author, and she simply tells us the gist (in her mind) of what each respondent said. The "victim" isn't allowed to speak for himself, and the reader isn't allowed to interpret for himself.

As social science, then, the book is laughable. It can be taken seriously, however, as an ideological statement, and in this respect it is instructive. From her point of view the Civil Rights Act of 1964 and its subsequent interpretations and implementations were undesirable because they expressed a reformist promise to the "oppressed" that peaceful change is possible under capitalism. In her words, "The deep logic of the law does not reflect the complex social reality of discrimination in society, but rather confines legal resolution to social problems appropriate for litigation." This is bad, because "the legal logic is directed to limiting social transformation rather than facilitating it." What she prefers is a solution in which the state intervenes at every level of citizens' lives, abolishing capitalism and bourgeois privacy. In her words, "The public policy tug of war stretches the line between high and low levels of governmental intervention, yet never questions the basic integrity of the economic market or the reality of personal lives." The policy debate is too limited because it "assumes that restructuring society to prevent the reinforcement of hierarchies is impractical or undesirable."

She is right that the civil rights legislation sponsored by welfare state liberals has been a failure. But the failure has resulted from methodological and theoretical problems she shares with the same social engineers whom she attacks. Their intellectual errors have had grievous social consequences. I will point out only one of many.

Treating "blacks" and "whites" and "women" and "men" and

“minorities” as if they were undifferentiated groups rather than individuals is more than just sociologically naive. It has led to the establishment of a quota system for ethnic groups that pervades public and private institutions under “affirmative action” guidelines. But the damage is not restricted to racial and sexual quotas. It extends to the area of Western culture itself. As the recent example of Stanford University shows, left-wing intellectuals are demanding the inclusion of works of women and “people of color” in courses on Western civilization, not by dint of their intrinsic quality but because of the race or sex of their authors. The end result is not simply the balkanization of American society but the balkanization of Western culture. Henceforth, we may expect that Leonardo Da Vinci will be subsumed under the category of “gay artist,” while Mme. de Stael will be part of the quota of “women writers.” The value of individual achievement, which is itself the greatest legacy of the West, is being rapidly wiped out by the civil rights society’s mentality.

One final aspect of the book is also of interest. A revealing look at the relation between elite institutions and the kind of academic radicalism espoused by Bumiller is provided by her acknowledgement of resources that supported her research. The book is based in part on a survey carried out by the Civil Litigation Research Project, under the auspices of the University of Wisconsin-Madison. While she was writing it she was supported by a graduate fellowship at Madison, by released time at Johns Hopkins University, and as a Liberal Arts Fellow in Law and Political Science at Harvard Law School. That such establishment institutions should support her illustrates, if illustration were needed, the extent to which the intellectual elite in the United States is in thrall to far-left ideology. It also contrasts grotesquely with her revolutionary pretensions. It must be tough to keep the stance of brave militant against the powers that be, when the powers that be are so entirely accommodating. What is more, that such august agencies should have supported such mighty labors to produce such a negligible book is ludicrous.

In summary, there is, as the saying goes among reporters, a good story here, but Bumiller has not written it. The “civil rights society” *has* failed, but not for the reasons Bumiller so murkily argues. The civil rights movement, in surely one of the great moments in American history, succeeded in shaking loose the foul encrustations of decades of racial segregation throughout the South. It succeeded so spectacularly that the federal government came to acknowledge that it had the responsibility to guarantee all citizens

the right to vote and to use public accommodations. But as soon as the government bureaucracy was created, something went disastrously wrong, and feminists, leftists, spokesmen for sundry ethnic constituencies, not to mention homosexuals and others, all leaped on the "civil rights" bandwagon. The result is a monstrous machinery of preferential treatment, quotas, and discrimination-as-revenge. The "civil rights society" is a thicket of contradictory and often incomprehensible legal and bureaucratic regulations that require everyone—employers, university deans, school admissions committees, and citizens themselves—to classify people on the basis of sociologically dubious categories of oppression. The Rehnquist Court is trying to change some of this, but it remains to be seen how much mere judges can do. Given the universities' willingness to employ the "diversity" subterfuge, and Congress's power to grant outright racial set-asides, it seems likely that our racial spoils system will endure.

The end result is to make all Americans far more cynical about civil rights. Some people have always been successful because they cut corners and used connections, but now the government itself explicitly and unashamedly cuts corners and makes connections for those who come from certain racial groups. Young people today know that more than ever success is a question of belonging to the right category—sex, race, ethnic group—and that such stacking of the decks is not only common but legal. That is the real tragedy that has resulted from the failure of the "civil rights society," but the full accounting of that tragedy has not been written.

THE TENTH JUSTICE. By Lincoln Caplan.¹ New York, N.Y.: Alfred E. Knopf. 1987. Pp. x, 340. \$19.95.

*Brian K. Landsberg*²

This is a book with a split personality. Dr. Jekyll provides a slightly romanticized but basically sound history, description, and analysis of the role of the Solicitor General. Mr. Hyde transforms the book into a polemic against the Reagan-era solicitors general, relying on journalistic techniques popularized by Woodward and Armstrong in *The Brethren*. Combining the two detracts from a generally informative book. One comes to feel the Dr. Jekyll por-

1. J.D., Harvard Law School.

2. Professor of Law, University of the Pacific, McGeorge School of Law. Chief, Appellate Section, Civil Rights Division, United States Department of Justice, 1974-1986.