

Panel I

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SYMPOSIUM

FOREWORD: THE CONSTITUTION OF RESPONSIBILITY

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Gary Lawson ††

The American legal academy is decidedly nationalistic. Comparative law tends to be a minor part of the law school curriculum, and discussion of alternative legal systems almost never finds its way into mainstream courses like constitutional law. As a result, much that is distinctive about American constitutionalism, and the American legal system in general, is often taken for granted. The federal Constitution, for example, says much about governmental structure, power, and limitations, but virtually nothing about the obligations of citizens to one another or to the government.¹ This feature of the American Constitution starkly sets it apart from many of its foreign counterparts. On the international scene, the responsibilities of individual citizens are a major topic of constitutional conversation.

A few examples will illustrate the point. The 1947 Italian Constitution expressly guarantees to citizens "the inviolable rights of man," but also "imposes the performance of unalterable duties of a political, economic and social nature."² More particularly, article 4 declares that "[e]very citizen shall undertake, according to his possibilities and his own choice, an activity or a function contributing to the material and moral progress of society";³ and Part One of the document, entitled "Rights and Duties of Citizens," proclaims a number of specific citizen obligations, such as the duty to support and educate one's children,⁴ the duty to vote,⁵ and the duty to con-

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¹ The one exception is the Thirteenth Amendment. There is plainly nothing about citizen obligations in the constitutional text or the Bill of Rights.

² COSTITUZIONE art. 2 (Italy), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 47 (Albert P. Blaustein & Gisbert H. Flanz eds. & Gisbert H. Flanz trans., 1987).

³ *Id.* art. 4.

⁴ *Id.* art. 30.

⁵ *Id.* art. 48.

tribute to public expenditures in proportion to one's resources.⁶ The 1978 Spanish Constitution similarly contains a section on "The Rights and Duties of Citizens,"⁷ which specifies such civic obligations as the duty to work,⁸ the duty to support one's children,⁹ and the duty to preserve "an environment suitable to the development of the person."¹⁰ And perhaps the best-known example is the constitution of the former Union of Soviet Socialist Republics, whose 1977 version proclaims that "[t]he exercise of rights and freedoms is inseparable from the performance by the citizen of his duties"¹¹ and lists such obligations as the duties to "safeguard and strengthen socialist property,"¹² to be "intolerant of anti-social behavior,"¹³ to "protect nature and safeguard its riches,"¹⁴ and to "promote the development of friendship and cooperation with peoples of other countries and the maintenance and strengthening of world peace."¹⁵

The obvious conclusion is that the American Constitution is less concerned with responsibility than are the fundamental documents of other nations. The obvious conclusion, however, is wrong. One should not expect our Constitution of 1787 to speak openly of citizen responsibilities, even of responsibilities that are more consistent with Western liberal traditions than some of the more extravagant obligations described in European or Communist constitutions. The American charter is a constitution of *government* rather than a constitution of *society*—unlike some of its twentieth-century foreign counterparts which self-consciously seek to define

⁶ *Id.* art. 53. See also *id.* art. 52 (duty to defend the country); *id.* art. 54 (duty of fealty).

⁷ CONSTITUCION, tit. I, ch. 2, § 2 (Spain), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 49 (Albert P. Blaustein & Gisbert H. Flanz eds. & Gisbert H. Flanz trans., 1991).

⁸ *Id.* art. 35.

⁹ *Id.* art. 39.

¹⁰ *Id.* art. 45. See also *id.* art. 30 (duty to defend the country); *id.* art. 31 (duty to contribute to public expenditures according to economic capacity).

¹¹ KONSTITUTSIJA SSSR art. 59 (Union of Soviet Socialist Republics), translated in THE CONSTITUTIONS OF THE COMMUNIST WORLD 352-68 (F.M.J. Feldbrugge & William B. Simons trans., 1977).

¹² *Id.* art. 61.

¹³ *Id.* art. 65.

¹⁴ *Id.* art. 67.

¹⁵ *Id.* art. 69. See also *id.* art. 59 (duty to uphold law and comply with standards of socialist conduct); *id.* art. 60 (duty to work); *id.* art. 62 (duty to defend the State); *id.* art. 63 (duty to serve in the military); *id.* art. 64 (duty to respect the national dignity of other citizens); *id.* art. 65 (duty to help maintain public order); *id.* art. 66 (reciprocal duties of parents and children); *id.* art. 68 (duty to preserve historical monuments and cultural values).

the entire social fabric.¹⁶ But precisely for this reason, one should not mistake silence for disregard.

The Framers made no such mistake. While they sought to structure the federal government to avoid reliance on the good motives of either the citizens or the governors,¹⁷ the Framers recognized that their constitutional order *presupposes* concepts of responsibility. George Washington eloquently expressed these sentiments in his farewell address in 1796, in words that still have power even for those who do not share his view of the connection between morality and religion:

Of all the dispositions and habits, which lead to political prosperity, Religion and Morality are indispensable supports. In vain would that man claim the tribute of Patriotism, who should labor to subvert these great pillars of human happiness, these firmest props of the duties of Men and Citizens. The mere politician, equally with the pious man, ought to respect and to cherish them. A volume could not trace all their connexions with private and public felicity. Let it simply be asked, Where is the security for property, for reputation, for life, if the sense of religious obligation *desert* the oaths, which are the instruments of investigation in Courts of Justice? . . .

It is substantially true, that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government. Who, that is a sincere friend to it, can look with indifference upon attempts to shake the foundation of the fabric?¹⁸

The fact that these moral values did not find expression in the federal Constitution does not detract from their importance. Without a general cultural insistence on a sense of personal honor—and, more importantly, on a sense of shame—any form of social organization is doomed. This obviously does not mean that one should charge the federal government, or government at any level, with fostering a social ethic of individual responsibility; private institutions like families and churches are surely the appropriate conveyors of social values. Much less does it mean that the *content* of individual obligations should follow the Italian, Spanish, or Soviet models. But one at least would hope that the government, through the legal system,

¹⁶ The preamble to the 1977 Soviet Constitution declares that the document's purpose is to "affirm the foundations of the social system and the policies of the USSR, establish the rights, freedoms, and obligations of citizens, and the principles of organization and the aims of the socialist all-people's state, and proclaim them in this Constitution." *Id.* pmb. Modern European constitutions are a bit subtler, but on the whole follow that path to a much greater extent than does our own Constitution.

¹⁷ See THE FEDERALIST Nos. 10 & 51 (James Madison).

¹⁸ George Washington, Farewell Address, in DOCUMENTS OF AMERICAN HISTORY, vol. I, 173 (Henry S. Commager & Milton Cantor eds., 10th ed. 1988).

would not actively undermine the fundamental sense of individual responsibility that is the necessary precondition for a civilized legal order.

We suspect, however, that the modern American legal system has become, and is becoming, increasingly hostile to the idea of individual responsibility in a wide variety of private and public law contexts. The possible causes of such a movement are many: undue focus on the federal Constitution as the foundation for public life; relativism and nihilism, especially among the intellectual classes; and the fascination of intellectuals with socialism, which supports a view of law as a device for central planning rather than law as a tool for facilitating coordination. This Conference will test our suspicions against a broad range of legal topics. If we are right about the extent and consequences of the erosion of individual responsibility in the law, identification of the problem is the necessary first step towards rescuing the concept of individual responsibility implicit in the Founders' legal and constitutional order.

“A DEPENDENCE ON THE PEOPLE”

Senator Orrin G. Hatch†

This society has chosen a propitious moment to explore the link between individual responsibility and the law. In the last month, we all witnessed world-historic events in what—we can thankfully say—used to be known as the Soviet Union. As that empire dissolves and formerly captive peoples grapple with the monumental task of establishing limited government amid the human, spiritual, economic, and environmental wreckage left by seven decades of totalitarian rule, there will be some in this country eager to offer their advice—solicited or otherwise—about constitution-making. Before offering such advice, it behooves us to first reflect on the first principles of limited government. It seems to me that individual responsibility is not only *a* first principle of limited government, it is *the* first principle of limited government.

The Framers of the American Constitution had no illusions about human nature. Because the experience of man taught—and I should add, still teaches—that to concentrate governmental power is to invite tyranny, the Framers divided power horizontally among a unitary executive, an independent judiciary, and a bicameral legislature, and vertically between the national government and the states in the form of federalism.

Americans are justly proud of their Constitution and its two centuries of continuous operation. Too often we fail to remember, however, that the Framers did not consider the Constitution to be the primary guarantor of our liberties. Publius, in the 51st *Federalist*, characterized the architectural features of the Constitution as “auxiliary precautions”¹ for the preservation of liberty.

If the authors of the *The Federalist Papers* saw the Constitution itself consisting of mere “auxiliary precautions,” what then did they consider the *principal* guarantor of liberty and limited government? Publius answers in the 51st *Federalist* that “[A] dependence on the

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¹ THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

people is, no doubt, the primary control on the government."² In the 55th *Federalist*, Publius somewhat offhandedly explains limited government's "dependence on the people" even as human nature counsels against dependence on self-restraint by the rulers:

As there is a degree of depravity in mankind which requires a certain degree of circumspection and distrust, so there are other qualities in human nature which justify a certain portion of esteem and confidence. *Republican government presupposes the existence of these qualities in a higher degree than any other form.*³

The Federalist Papers contain few, if any, other references to this "dependence on the people" for the "primary control" of the government. Apparently the *sine qua non* of a virtuous citizenry for limited government was so self-evident that there was no need for further discussion of the proposition. Whatever their disagreements with Publius about constitutional architecture, the Anti-Federalists would have agreed with Publius that the whole undertaking was futile if the people themselves were not fitted for self-government.

Thus, as Professor Forrest McDonald has observed, the Framers were guided by the principle that "the extent to which limited government is feasible is determined by the extent to which the people, socially and individually, can govern themselves."⁴ Professor McDonald puts that more simply for the sake of emphasis: "If citizens can behave themselves and make do for themselves, they need little government; if they cannot, they need a great deal of government."⁵

What qualities of character in the people did the Framers presuppose? Founding-era documents give us a very clear picture. The Virginia Bill of Rights, drafted by George Mason and adopted in 1776, provided that "[N]o free government, or the blessings of liberty, can be preserved to any people, but by a firm adherence to justice, moderation, temperance, frugality and virtue, and by frequent recurrence to fundamental principles."⁶ Similarly, the Massachusetts Bill of Rights of 1780 drafted by John Adams declared that "[A] constant adherence to . . . piety, justice, moderation, temper-

² *Id.*

³ THE FEDERALIST No. 55, at 346 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added).

⁴ FORREST McDONALD & ELLEN McDONALD, REQUIEM: VARIATIONS ON EIGHTEENTH-CENTURY THEMES 10 (1988).

⁵ *Id.*

⁶ The Virginia Bill of Rights (June 12, 1776), in HENRY S. COMMAGER, DOCUMENTS OF AMERICAN HISTORY 103, 104 (9th ed. 1973).

ance, industry and frugality, are absolutely necessary to preserve the advantages of liberty, and to maintain a free government.”⁷

The Northwest Ordinance of 1787, which was adopted by the Congress under the Articles of Confederation while the Constitutional Convention was meeting in Philadelphia, prescribed the manner states from the Northwest Territory were to be admitted into the Union, and like the Declaration of Independence, the Constitution and the U.S. Code is still part of the “organic law” of the United States. Article 3 of the Ordinance proclaimed that “[R]eligion, morality, and knowledge [are necessary for] good government and the happiness of mankind.”⁸

In his farewell address in 1796, President George Washington admonished his countrymen that:

Of all the dispositions and habits which lead to political prosperity, religion and morality are *indispensable supports*. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness—*these firmest props* of the duties of men and citizens. The mere politician, equally with the pious man, ought to respect and cherish them. . . .⁹

When Alexis de Tocqueville toured America in the 1830s, he found a citizenry that seemed mindful of Washington’s farewell admonition of four decades earlier. He observed that in America,

Everything in the moral field is certain and fixed, although the world of politics seems given over to argument and experiment. So the human spirit never sees an unlimited field before itself; however bold it is, from time to time it feels that it must halt before insurmountable barriers. Before innovating, it is forced to accept certain primary assumptions and to submit its boldest conceptions to certain formalities which retard and check it.

* * *

Up till now no one in the United States has dared to profess the maxim that everything is allowed in the interests of society, an impious maxim apparently invented in an age of freedom in order to legitimize every future tyrant. Thus, while the law allows the American people to do everything, there are things which religion prevents them from imagining and forbids them to dare. Religion, which never intervenes directly in the government of American society, should therefore be considered as the first of their political institutions, for although it did not give them the taste for liberty, *it singularly facilitates* their use thereof.¹⁰

⁷ The Massachusetts Bill of Rights (1780), in COMMAGER, *supra* note 6, at 107, 109.

⁸ *Id.* at 131.

⁹ GEORGE WASHINGTON: A COLLECTION 521 (W. Allen ed. 1988).

¹⁰ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 269 (Mayer ed. 1966) (emphasis added).

After touring America and observing its citizens and institutions, de Tocqueville concluded that what made America a singularly stable and prosperous country was not its geographical advantages, nor the particular structures of its government and laws, but rather the character of its people, which he attributed to their mores:

I am convinced that the luckiest of geographical circumstances and the best of laws cannot maintain a constitution in despite of mores, whereas the latter can turn even the most unfavorable circumstances and the worst laws to advantage. The importance of mores is a universal truth to which study and experience continually bring us back.

* * *

If in the course of this book I have not succeeded in making the reader feel the importance I attach to the practical experience of the Americans, to their habits, opinions, and, in a word, their mores, in maintaining their laws, I have failed in the main object of my work.¹¹

In his discussion of the importance of the mores of the people in a free government, de Tocqueville asked a question that is relevant to us today: "How [can] society escape destruction if, when political ties are relaxed, moral ties are not tightened?"¹² Professor Harry Jaffa answers that rhetorical question this way: "A free, self-governing society, more than any other kind, depends upon the qualities—the virtues—of its citizens. * * * In a Republic, the sobriety of the citizens replaces the force of authority as the principal source of order."¹³

Over the last three decades or so in this country, we have seen a considerable relaxation of the societal moral constraints formerly imposed on individual conduct. As these moral constraints have relaxed, we have seen an explosion of social pathologies, which in turn has driven an expansion of government to respond to these pathologies, proving Professor McDonald's dictum that individuals who are unable to govern themselves need a great deal of government.

Take one but very important example: the family. The leading social problem in this country today is the breakdown of the American family. Put more precisely, it is the failure of families to form. In 1989, the latest year for which statistics are available, one out of

¹¹ *Id.* at 283-84.

¹² *Id.* at 71.

¹³ HARRY JAFFA, AMERICAN CONSERVATISM AND THE AMERICAN FOUNDING 34 (1984).

four children born in this country were born out of wedlock.¹⁴ A substantial portion of these children will never be supported by their fathers, but instead, will be supported by the government.

This fall, the Supreme Court will hear argument in a case that presents the question of whether a State violates the federal Constitution by permitting a rabbi to give an invocation during a school commencement ceremony.¹⁵ I would suggest to you George Washington would be astounded that under the same Constitution that he swore to preserve, protect, and defend, such a practice would be deemed to require adjudication by the highest court in the land, at a time when many school districts routinely dispense contraceptives to high school and even junior high students, and others teach AIDS prevention to preschoolers.

In closing, whether we choose to offer our advice to those abroad about the best way to establish limited government, we, as individual citizens, would do well to try to re-establish limited government at home by heeding the lines of the second stanza of *America the Beautiful*, which in their simple way capture the essence of George Washington's farewell address:

America, America
God mend thine every flaw
Confirm thy soul in self-control
Thy liberty in law.

¹⁴ National Ctr. for Health Statistics, U.S. Dep't of Health & Human Serv., Advance Report of Final Natality Statistics, 1989, 40 Monthly Vital Statistics Report No. 8(5), published Dec. 12, 1991, at 1, 8.

¹⁵ *Weisman v. Lee*, 908 F.2d 1090 (1st Cir. 1990), cert. granted, *Lee v. Weisman*, 111 S. Ct. 1305 (1991).

PANEL I ENTITLEMENTS, EMPOWERMENT, AND VICTIMIZATION

Wm. Bradford Reynolds†

INTRODUCTION

When I was asked to participate on this panel, I could not help but reflect back almost ten years to the fall of 1981 when I became a rather noticeable player on the debate circuit. The debate then was much narrower and indeed much more one-sided. Entitlements was the topic, but back then the tag was “affirmative action”—whether you are for it or against it. At that time the phrase had sufficient respectability. Associated with terms such as goals, quotas, preferences, and set asides, the phrase was used without any embarrassment whatsoever.

What a difference a decade makes. The debate over race- and gender-based preferential treatment has been joined, and joined very energetically. Affirmative action programs, once seemingly well entrenched, came under increased scrutiny. Goals, quotas, set-asides, preferences—the stock in trade of the civil rights agenda throughout the '70s and into the '80s—started losing their luster. This shift in attitude toward affirmative action extended beyond political circles, as the '80s progressed, into the courts as well. Serious questions emerged, and continue to emerge, about some of the past civil rights policies and where, if anywhere, they were destined to lead.

This panel discussion is a logical outgrowth of the past decade's questioning of the evolving precepts—questioning that became a very real part of the civil rights orthodoxy of the past. It is not about the extent of racism or discrimination in society today. All of us on the panel believe this country has a long way to go to remove the

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blight of discrimination on a variety of fronts: race, gender, religion, national origin, disability. I expect as well that the members of the panel share with me the rather disquieting feeling that a polarization—indeed we hear it said in some quarters, a balkanization—of the races is becoming more evident. So this is not a debate on whether racism or discrimination is prevalent today. It is also not an exchange of views about affirmative action, *per se*, although that clearly will be one aspect of the discussion. Instead, the dialogue this afternoon is really going to center largely on what makes sense for the future.

The traditional civil rights focus views preferential treatment (i.e., entitlements) as still alive, if not terribly well. The Supreme Court has thrown “affirmative action” a remedial lifeline—once all alternative race- or gender-neutral remedies have been tried and failed so long as the preferential remedial program is narrowly tailored and of limited duration.

Proponents of such programs defend them by saying “it is the least that we can do to chip away at years of systemic discrimination.” Those opposed to preferential affirmative action retort that “such programs serve only to perpetuate the divisiveness of discrimination and to debase the accomplishments of the racially preferred; they do nothing to treat the real societal problems that are continuing to tear at the fabric of many American communities.”

If you sense in that debate the body language of victimization, stay with us, because in a very real sense, victimization is a central theme here. It has a number of overlays. Those minority families—overwhelmingly, I would suggest to you, the middle-class families—who have actually been touched by affirmative action programs, have a victimization story to tell. That story goes hand-in-hand with being identified, often erroneously, as the affirmative action student, employee, promotee, government official, or even Supreme Court nominee.

They who are among the nation’s most impoverished, who have been identified as lower class in the economic sense, and who have never been touched by affirmative action programs—and this is by far the overwhelming majority of this country’s minority population—also have a victimization story to tell. The more of those stories that emerge from policies that promote the concept of preference, the more they are told. The more they are told, the more debilitated the prospects for any meaningful change become. If you repeatedly tell a group of people enough times that its membership is composed of society’s victims, eventually the stigma of inferiority settles in. The members begin to believe, even if only intuitively, that they are second class citizens for whom preferences

are the only means of achieving equality. In this regard, the social welfare mentality that swept across this country in the '60s and '70s, and lingers still today, helps, in some respects, to explain the persistence among those still pushing for entitlements.

On the other hand, a new policy shift is clearly emerging—one that currently travels under the banner of empowerments and that is grounded in the work ethic, in self-help programs, in economic self-sufficiency, in freedom from governmental intervention, in community cooperation, and in educational choice. Empowerment programs are not being promoted as the wholesale solution to the problems that confront so many communities across the land. The fight against discrimination in law enforcement is still an essential piece of the puzzle. The effort to reach out affirmatively to those competitively qualified is another important piece of the puzzle. But the empowerment philosophy brings to the table a new and exciting set of policy considerations that may well hold the greatest promise we have yet seen for a meaningful equal opportunity agenda.

POVERTY: A COLLECTIVE DIFFICULTY, A COLLECTIVE CHALLENGE

Randall L. Kennedy†

I would like to thank The Federalist Society for the opportunity to share some ideas. My premises are as follows. Our society is beset by major problems. The most urgent of these problems is poverty. This problem is a collective difficulty. It is not simply the problem of people in Southeast Washington, D.C., or South Central Los Angeles, or Roxbury, Massachusetts. It is *our* problem, a collective challenge—just like war constitutes a collective challenge. The poverty that envelopes so many of our fellow Americans should cause us pain. Moreover, apart from causing us moral pain, poverty should also give rise to alarm because the evils that typically accompany severe deprivation—crime, ignorance, resentment, etc.—pose a threat to us all. Another of my premises is that, with respect to what I have said thus far, there will be wide (though not total) agreement on this panel and within this audience.

Now for disagreement. Dr. Keyes makes the all too fashionable assertion that government intervention aimed at addressing poverty and its attendant problems is more harmful than helpful. He offers no evidence to substantiate his claim. Rather, falling victim to a tendency that besets many who feel that they are speaking to the converted, he simply announces conclusions. The fact of the matter is, however, that many thousands—many hundreds of thousands—of people have had their lives significantly bettered by the intervention of government assistance, especially assistance from the *federal* government. I speak particularly of interventions focused upon the elderly. In 1960, prior to the creation of the much maligned Great Society programs, one in every three persons over the age of 65 was impoverished. That poverty rate declined to one in four in 1970 and one in eight by 1987. Much of this progress is attributable to government intervention.¹

Dr. Keyes maintains that government must always attend to the basic humanity of the governed, that it ought never act in a way that diminishes individuals' capacities to use freedom enjoyably and productively. I, of course, agree with all of that; government programs

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¹ THEODORE R. MARMOR ET AL., *AMERICA'S MISUNDERSTOOD WELFARE STATE: PERSISTENT MYTHS, ENDURING REALITIES passim* (1990).

that have such consequences ought to be abolished (except, of course, if doing so would lead to even worse results such as death by starvation). What I would like for Dr. Keyes to do, however, is identify with particularity the programs that impose the harms about which he speaks. That would be far more useful than the overgeneralized condemnations that he has articulated thus far. Moreover, Dr. Keyes should go beyond merely recognizing that government programs, created with the best of intentions, *can* (not *must* but *can*) enslave people. He should also recognize that poverty, too, can enslave people. As that great American president Franklin D. Roosevelt declared: "Necessitous men are not free men."²

² Franklin D. Roosevelt, Message to Congress, Jan. 11, 1944, cited in E. CORWIN, LIBERTY AGAINST GOVERNMENT 4 (1948).

THE PRESERVATION OF LIBERTY

Alan Keyes†

My introductory remarks in this discussion begin with reference to natural law and Madison's famous phrase in *The Federalist Papers*; my initial point being that "[j]ustice is the end of government [and] the end of civil society. It has been and ever will be pursued until it [is] obtained or until liberty be lost in the pursuit."¹ Throughout my career dealing with public policy I have often recalled this phrase because it aptly summarizes the challenge our society faces when confronted with questions involving principles of right and justice. This challenge requires us to understand that though justice, as a goal, has a substantive relevance to any regime, in our regime it is related to, and possibly may threaten, the "real" motivating goal of society's existence: the preservation of liberty.

In our society, liberty is understood to be a part of justice. It is the first, and perhaps most, fundamental entitlement of our political structure. As we discuss questions of justice, liberty becomes a kind of limiting concept that we must always be mindful of as we progress further down the road—especially in discussions of distributive justice—and are reminded that, for us, justice has not only a distributive, but also a substantive meaning. You cannot do justice without a respect for the essential dignity of the human beings with whom you deal. Understanding this concept, however, requires reconciling the pursuit of justice with the perpetuation of self-government. Obviously one can imagine a regime in which one or several all wise beings order things in a way that everyone gets what they deserve—a regime whose only requirement in return would be that all the individuals surrender their capacity and opportunity to make decisions, even bad ones, for themselves. I have always assumed that if someone offered me that bargain, I would reject it because I would rather make bad decisions and suffer the consequences than be enslaved to good masters—the goodness of mastery never being the question for me, but rather its existence and implication for my person of slavery.

I go through this illustration because it is the best way to remind us about the limits we, as citizens of a regime concerned with freedom and self-government, should place on our more abstract

† Alan Keyes is a candidate for U.S. Senator from Maryland.

¹ THE FEDERALIST No. 51 (James Madison) (Clinton Rossiter ed., 1961).

discussion. We are not simply concerned with how well individuals may fare in the distribution of society's goods, resources, services, opportunities, and so forth. For us there must be, along with those kinds of concerns which can exist in any regime, a profound and fundamental concern for the maintenance of freedom and self-government—two peculiar and particular characteristics of this regime.

This is very important because it settles a lot of issues (or at least provides a clue as to how to deal with them) that we discuss at great length in this society. It means that no matter how much good we may wish to achieve, we do not have the right to achieve that good at the expense of others' freedom.

When I use the word freedom, I do not mean it in the licentious sense of people out there doing whatever they please. Rather, I use freedom in the sense of creating, preparing, and maintaining a society in which individuals capable of freedom can develop that capacity and exercise it in a way which is consonant with the perpetuation of the society's existence. Freedom has direct implications for all kinds of entitlement programs and I will just talk about a couple as examples.

We understand liberty to be an entitlement, but only with reference to some principle which transcends human choice, government fiat, and even the Constitution. Despite contrary belief, the Constitution is positive law, and the founders of our regime quite clearly indicated to us that when positive law goes wrong, you have the right to do various things, up to and including rebellion, in order to rectify it. The founders never understood that Constitution with a big "C" would ever be god. What they understood was that our *Creator*, not the Constitution, endowed us with certain inalienable rights and that those rights, those entitlements, transcend positive law and positively established human governmental institutions.

You can refer to the source of the inalienable rights as whatever you like. You can attribute their existence to whatever mystical source you may wish to conjure up, but at the end of the day, the form of words that you use to justify human entitlement to freedom will always have some reference to natural law. Even the statement, "you shouldn't treat human beings that way" is a reference to human nature, to what accords with human nature, and to what accords with that mode of being which governs our human nature, which you can refer to as a law. All of our common ways of speech imply this way of thinking though we do not like to admit it. A lot of people are too ignorant even to know that they are talking in this language, but our founders determined us in such a way that we cannot help but talk in this language.

Talking in this language puts us in an odd position when thinking in terms of affirmative action. Those who are in favor of affirmative action but against quotas have a sound basis for their position because the one can be pursued with respect for the dignity of the individuals that we are dealing with while the other cannot. Quotas reduce individuals to an abstract statistic and takes no account of their intrinsic worth or intrinsic capacity to take responsibility for themselves. That is why desire to do good must be limited by an understanding that any good which contravenes an individual's capacity to take personal responsibility is not good at all.

Quotas in fact do justice in a way that incurs the most profound injustice, if I am a black person. Quotas set me in a position in life without regard to my individual merit, worth, and qualities. You will be able to achieve what you abstractly understand to be a socially desirable goal or balance in society. But you have achieved your understanding of justice at the expense of my individual worth. And your desire to do good has stood the goals of the civil rights movement on their head.

For some people this is hard to understand, particularly those who have what I call the apartheid approach to affirmative action; that is the group rights approach to affirmative action. It is not widely known in our society that apartheid was not just a racist instinct. It was actually a fairly well developed ideology at one point. And that ideology was, and still is in the minds of its strongest proponents, based on the idea that rights inhere not in individuals but in groups of people. Blacks have rights as blacks; Indians have rights as indians; Whites have rights as whites; Women have rights as women. We figure out what they are, delineate them according to some sort of system, and everybody gets their due, based upon belonging to that group or class.

This is all well and good if you are going to impose an external understanding of justice on every individual and distribute goods in society according to that external understanding. But such an imposition eradicates the existence of the individual's worth and in doing so you have done what all tyrannies do: you have treated human beings as if they are mere instruments of societal and governmental power in the pursuit of some good. Now if you are a real tyrant, that good is going to be your own narrow little good; the good that is defined by your appetites. If you are a more benign ideological tyrant, then the good will be defined in a more abstract way. But you will still treat human beings instrumentally, violating not only what we understand, but even what such abstract thinkers as Kant understood to be one of the prerequisites for decent human relations: that you must never treat human beings as if they were simply in-

struments to your ends. Unhappily, the statistical understanding of affirmative action treats human beings precisely in this way.

Sadly speaking, some of the other well-motivated, but misguided approaches to dealing with human problems in our society do the same thing. In fact, this same mentality is at the heart of a very common approach to welfare—to dealing with what we view as the problems of poverty, economic advancement, and development in this society. Look at the statistics. We have a lot of poor people. We feel compelled to find some way to rectify that poverty through the manipulation of external things, such as the flow of money. We do not, however, take account of the impact that our action will have on the internal, intrinsic, and subjective situation of the individuals we deal with. We treat them as if they were numbers—classed according to income or lack of income. In doing so, once again we treat human beings as if they were instruments, not ends. Admittedly, their internal worth is sacrificed as a misguided means to achieving a noble purpose; that of producing a just society. But even if it means waiting a little longer for that kind of a just society, it is important to understand that human beings have an internal worth which must be respected as we go about our purposes.

For this reason, the empowerment philosophy, as it is called, is a necessary alternative in our society to the more abstract pursuits of justice that, until recently, were common. Empowerment by its very nature requires that we ask ourselves about the human being's capacity to do for him or herself and that we understand each of our actions have a relation to the development of that capacity. If we simply rectify an injustice in an external sense but do not develop that capacity, then we have done the individual wrong. To avoid this wrong, we must examine every program and we must especially examine everything we do with respect to a simple question: What does it do to the individual's sense of responsibility?

Empowerment does not mean just the capacity to do for oneself; rather it means the motive and the will to take the responsibility for one's own destiny. This is the essence of self-government. That which promotes this will is good. That which destroys it, however laudable the results might be, is bad. It is better to have a poor person who is capable of freedom than to have a person not poor whose soul has been bereft of that capacity. Systems that destroy this will in the name of justice, even if they produce good results, have in the name of distributive justice bred passivity, dependency, a lack of motivation, and a sense that someone else was responsible for one's conditions. Such a system, regardless of its results, is intrinsically unjust. That is where the issue has to be engaged in principle. I am not arguing with people, though I could, over whether

or not certain approaches produce more or less poverty. That is not, in this case, the only question. I am arguing about whether certain approaches to producing more or less poverty, produce more or less capable individuals in terms of their capacity for freedom.

That leads me to a final point which, in light of the discussion I have tried to present, would lead one to redefine victimization. I know that we often understand victimization to mean that I make a victim of you on account of my negative and nasty passions, hatred, resentment, prejudice, or racism. That in pursuit of those passions, I victimize you, take your life, deprive you of some good, deny you opportunities and advancement in society. This definition is helpful when we look at individuals and try to rectify the injustices done to them.

At the same time, however, when we look at groups within society, victimization takes on another meaning. It means defining a whole class of people as victims, treating them with remedies that, in the name of improving their situation, lead this class of people to understand themselves as victims. This kind of victimization, though it serves the purposes of sociologists and social engineers, constitutes a fundamental act of injustice. If we define individuals as victims and then treat them with remedies that perpetuate this self-concept, we deprive them of the most important motive for securing their freedom as individuals: the sense that they are responsible for and to themselves. Without this feeling, the peasant never revolts, the slave never lifts his eyes to look upon the brutality of the master, and the oppressed never strike a blow toward liberation. Frederick Douglas once said that those who would be free themselves must strike the blow. If we take away the will that lifts the arm which strikes the blow for freedom, we have destroyed the free citizen's most important good.

BLAMING THE VICTIM: A CRITIQUE OF ATTACKS ON AFFIRMATIVE ACTION

Nadine Strossen†

Randy Kennedy helped focus the discussion when he said that on the level of principles we all agree, but we disagree about the means for pursuing those principles. Without being disparaging, I would say that we all agree on the level of platitude. First, we are all in favor of individual liberty. Second, we abhor racism and poverty as disproportionately impeding certain segments of our society from enjoying the benefits of liberty. We disagree, though, on what remedies will effectively foster our shared goals of promoting liberty on an equal basis.

Dr. Keyes stressed the fact that we have rights as individuals rather than as members of groups. That is certainly true. An equally true fact, though, is that, throughout our history, people have been denied liberty disproportionately, and to this day are being denied liberty disproportionately, based on their membership in particular groups. In the same vein, I completely agree with Dr. Keyes that people should be treated not as numbers but as individuals. However, it is irresponsible for us to ignore the shockingly disproportionate extent to which the liberty of people who belong to certain groups is violated.

Bearing in mind the useful general focus that Randy provided, I would like to narrow the focus even further. I would like to concentrate on one particular critique that Dr. Keyes made, and that I have heard in similar gatherings, about one particular means for addressing the ongoing crisis in this society's maldistribution of liberty on the basis of race. I am referring to affirmative action.

In his opening remarks, Brad Reynolds talked about the "good old days" when people were not embarrassed to talk about affirmative action. Well, I stand here before you and say I still am not embarrassed to be an advocate of affirmative action. Brad also referred to a civil rights orthodoxy. Perhaps he and many of you see affirmative action as an outmoded part of this orthodoxy that should now be rejected. I agree that we should not simplistically look upon one

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particular remedy as a panacea. This is particularly true when the remedies encompassed by the term "affirmative action" include a wide panoply of measures, some of which may be more appropriate than others. Still, I do not think it is appropriate, in a knee-jerk fashion, to reject the entire concept of affirmative action.

Just as Brad Reynolds cautions against what he views as outmoded orthodoxies, so too, I think we also must guard against questionable new orthodoxies. A term that seems fashionable in these circles describes another remedy that should not be viewed as a panacea: the notion of "self-help." As I listened to Dr. Keyes invoke that seemingly magic buzzword, I was reminded of a statement that Dr. Martin Luther King, Jr. made many years ago. He said it is a cruel hoax to tell a man he should lift himself up by his bootstraps when he has no boots. So, just as affirmative action may not be a panacea, let us not overestimate the efficacy of alternative measures such as self-help.

The specific critique of affirmative action on which I would like to focus is the idea of victimization. I see it as a sort of blame-the-victim phenomenon. The argument is that the intended beneficiaries of affirmative action programs are really stigmatized by these programs. Dr. Keyes made the argument that they are diminished, they are disempowered, they are made to feel their inferiority. I echo Randy Kennedy's request for evidence to demonstrate this supposed phenomenon. It is asserted as though it were a self-understood truth, and yet I am unaware of any empirical studies that prove this is, in fact, a psychological impact of affirmative action programs.

Like Randy, I too looked into the empirical evidence. During my search, I came across an interesting article in *Law & Policy* by a psychologist named Rupert Barnes Nacoste, who analyzed the studies that had been done on the psychological impacts of affirmative action.¹ He was responding to what he perceived as widely stated but never empirically demonstrated conclusions that beneficiaries of affirmative action programs experience self-doubt, that non-beneficiaries experience resentment, and consequently, that these programs cause an increase in interracial tensions. The evidence did not support conclusions that these adverse psychological effects are the inevitable consequences of affirmative action programs.² Rather, the evidence strongly suggests that psychological responses are contingent on the accuracy or inaccuracy of the information and

¹ Rupert Barnes Nacoste, *Sources of Stigma: Analyzing the Psychology of Affirmative Action*, 12 *LAW & POL'Y* 175 (1990).

² *Id.* at 190.

the understanding that a person has about affirmative action.³ This does not strike me as surprising.

Dr. Nacoste concluded that people's psychological reactions to affirmative action depend in particular on two variables.⁴ The first factor is the nature of the specific program involved.⁵ One of the problems with the current public discussion of this subject is that it often does not address the many reasonable, well-conceived, and fairly implemented programs in effect all over the country. Instead, the term "affirmative action" is often used in a sweeping, condemnatory way, and discussions will often focus on particular ill-advised or bizarre examples that masquerade under that term.

In this respect, the phrase "affirmative action" reminds me of another current buzzword about which Professor Kennedy and I have previously debated—"political correctness." That term has taken on a pejorative meaning because too often it is associated with a few extreme and exaggerated applications of policies that, at bottom, reflect some positive impulse toward important, laudable goals of diversity and equality. The same thing has happened with respect to affirmative action. The surveys to which Dr. Nacoste referred showed that most people, if they associated affirmative action with quotas, opposed it.⁶ Unfortunately, recent political discussion has tended to equate affirmative action with quotas. In fact, in the recent political discourse about affirmative action, it is not only the people who are allegedly benefited by these programs who are said to be stigmatized but, even worse, the whole notion itself has become stigmatized in a way that obscures meaningful analysis and debate.

According to Dr. Nacoste, the other variable factor that affects the perception of affirmative action, and whether or not it has negative psychological consequences for the intended beneficiaries and the rest of society, is how well people understand and accept the underlying rationale.⁷ In particular, he found that beneficiaries did not feel stigmatized and non-beneficiaries felt more positive when they understood that the target group was in fact needy and that it was receiving just compensation for actual past harm.⁸

Dr. Nacoste also found that statements by top political leaders had a profound influence on how people perceived these programs.⁹ So, not surprisingly, certain political leaders who have re-

³ *Id.* at 188.

⁴ *Id.* at 183.

⁵ *Id.*

⁶ *Id.* at 187.

⁷ *Id.* at 183.

⁸ *Id.* at 188.

⁹ *Id.* at 187.

lently associated "the Q word," "quota," with affirmative action have played a major, unconstructive role in obscuring the debate about the underlying merits of affirmative action. If people truly understood the actual facts about the disproportionate denial of liberty on the basis of race throughout our history to this day, neither the intended beneficiaries, nor the rest of society, could rationally attach a stigma or a resentment to those programs.

This morning I re-read the brief that the American Civil Liberties Union filed in the *Bakke* case,¹⁰ and I was struck by how timely many of those statements, written in 1976, are today. I find that very sad. The ACLU supported the affirmative action program that the University of California at Davis had adopted in that case, on the rationale that the program promotes the individual equality necessary to the enjoyment of individual liberty. I would like to read part of the introduction to that brief:

[T]he major civil liberties issue still facing the United States is the elimination, root and branch, of all vestiges of racism. No other asserted claim of right surpasses the wholly justified demand of the nation's discrete and insular minorities for access to the American mainstream from which they have so long been excluded.¹¹

I read the foregoing passage because I know some people in Federalist Society circles see a disparity or tension between the values of liberty and those of equality. I believe, though, that both sets of constitutional values are inextricably intertwined for the reason explained in the quoted passage.

Consistent with the foregoing statement in the ACLU's *Bakke* brief, Justice Blackmun's powerful dissenting opinion in that case said that, given the then current state of deprivation of rights and liberties on the basis of race in our society, affirmative action measures were justified in terms of fundamental social justice.¹² Hoping that racial injustice would mark only a passing phase in our social history, Justice Blackmun expressed the view that affirmative action measures should be only temporary.¹³ He voiced the hope that these measures would help us to attain a state of equality of opportunity that is not maldistributed on the basis of race.¹⁴

Justice Blackmun speculated in *Bakke*, back in 1976, that a decade might be the limited period during which affirmative action

¹⁰ Brief of the American Civil Liberties Union, The ACLU of Northern California, The ACLU of Southern California, *Amici Curiae*, *Regents of the Uni. of Cal. v. Bakke*, 438 U.S. 265 (No. 76-811) (1978).

¹¹ *Id.* at 2.

¹² *Regents of the Uni. of Cal. v. Bakke*, 438 U.S. 265, 403 (1978) (Blackmun Justice, dissenting).

¹³ *Id.* at 403.

¹⁴ *Id.*

remedies would be necessary for meaningful progress toward racial equality.¹⁵ We have long since passed that ten-year mark. The current year, 1991, is 15 years after *Bakke* was decided and, unfortunately, we have not substantially progressed toward racial equality. Justice Blackmun would probably acknowledge this fact, and the ACLU certainly does.

Along with other ACLU leaders, I believe that the most pervasive, overarching civil liberties problem in this country continues to be racial discrimination. Among all the victims of civil liberties violations that the ACLU represents, regarding a wide range of issues, people of color are disproportionately included. Therefore, if affirmative action is a remedy that is only going to be necessary on a temporary basis, we are still in that temporary phase.

In sum, there is a compelling social justice rationale for race-based affirmative action programs. Why should they be seen as more stigmatizing than other group-based programs? Indeed, we have many group-based preferences that are not intended to be compensatory and that do not have the compelling social justice rationale that affirmative action has. When I read the ACLU's brief in the *Bakke* case this morning, I was reminded of two such preferences.

Allen Bakke, the white medical student who sued the University of California at Davis because he was denied the particular preference that accrued to members of racial minorities, was also denied two other group-based preferences that were meted out by the medical school, neither of which he challenged.¹⁶ One was a preference for applicants who intended to practice medicine in northern California following their graduation.¹⁷ The other was a preference for applicants whose spouses were enrolled in the medical school.¹⁸ It is telling that Allen Bakke did not challenge those non-racial preferences. Too often, race-based affirmative action is singled out as the only type of group-based preference in our society that should be seen as connoting the beneficiary's inferiority, thus making the beneficiary into a victim who bears a stigma.

There is a racist cast to this disparity in societal attitudes toward different kinds of group-based preferences. Preferences designed to help traditionally oppressed racial minorities are said to be stigmatizing, but nobody questions whether the many other group-based preferences prevalent in our society are stigmatizing. Let me read

¹⁵ *Id.*

¹⁶ *See supra* note 10, at 5.

¹⁷ *Id.* at 5.

¹⁸ *Id.*

you a passage which forcefully makes this point. It is from a book by Philip Green, written in 1981:

Do all those corporate directors, bankers, etc., who got their jobs, first, because they were somebody's son, second, because they were male, third, because they were Protestant, and fourth, because they were white feel demeaned thereby? It would be interesting to ask them—and to ask the same question of the doctors who managed to get into good medical schools because there were quotas keeping out Jews, the skilled tradesmen who were admitted to the union because two members of their family recommended them and so on. Implicit in this critique of affirmative action, clearly, is a notion that whereas it's never painful to be rewarded because you are in the majority or the established elite, it's always painful to be rewarded because you're in the minority or a marginal group.¹⁹

Indeed, should those of us who are unintended but actual beneficiaries of years of racial discrimination or gender discrimination in this society feel stigmatized? Should we feel victimized because we have, in fact, reaped the benefits of past discrimination?

Another argument that has been raised against affirmative action, which is akin to the notion of stigmatization and victimization, is the idea that it breeds passivity and leads to a lack of will. Dr. Keyes made this point. Again, I am not aware of any psychological studies that support this assertion. Indeed, some of the evidence Professor Kennedy described seems to call that conclusion into question.

It also seems a matter of common sense that a group of people who know they are to be systematically denied certain opportunities would become discouraged, and such discouragement would breed a lack of will, a lack of motivation, a lack of incentive. Systematic discrimination should be expected to breed passivity. A corresponding inference is that the awareness of future opportunity should be expected to bolster one's resolve and ability to help oneself in meaningful ways.

In conclusion, if affirmative action is fairly understood as a matter of basic social justice, two other, important realizations should follow: first, that there are no special, undeserving, victimized, stigmatized beneficiaries, but that all of society is a beneficiary; and second, that any stigma should attach to those who unfairly criticize such a basic tool for pursuing social justice rather than to those who benefit from the removal of traditional barriers to their full and meaningful participation in this society.

¹⁹ PHILIP GREEN, *THE PURSUIT OF INEQUALITY* 186 (1981).

DISCUSSION

REYNOLDS:

I, too, favor affirmative action, so long as the phrase is defined in a way that eliminates the quota feature. It is the preferences and the quotas that make affirmative action offensive and rebut a significant portion of Nadine's analysis about the more general "affirmative action" term. Affirmative action can mean all things to all people. It seems that the primary stumbling block to meaningful discussion occurs when someone suggests that Justice Blackmun in his *Bakke* dissent got it right when he said we can use race to get beyond racism.¹ It is this feature of affirmative action that seems to run head first into all the other beneficial considerations that people would like to think go along with an affirmative action program that is not preferentially based.

With that as an observation, let us go back in the order that we started; Dr. Keyes can have the first shot.

DR. KEYES:

The first place to begin might be by pointing out, that while the founders said we hold certain truths to be self-evident, it took several thousand years for those self-evident truths to be recognized by anyone. Just because something is obvious does not mean that it is going to be understood. Thus, even after society had recognized the basic principles on which Americans agree, it did not protect the individual from the fact that by and large in our practice of life, people neglect those principles' existence, in both action and discussion.

I am deeply gratified, therefore, to see that the speakers agree that liberty should be understood as what Kant would call a limiting analytic for our discussion of this kind of justice. If that does, in fact, become the case, we should see some giant leaps forward in social policy and in reasoning. I must confess that so far I am not very impressed with the understanding of this concept that the subsequent speakers displayed. That was in part because they responded to a speech they thought I had given rather than the one I actually gave. My speech was less about self-help than about the more important concept of self-government, which lies at the heart of our understanding of liberty, and which therefore has a great deal of relevance to our critique of programs that go beyond the simplis-

¹ *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun Justice, dissenting) ("In order to get beyond racism, we must first take account of race.").

tic question of how well or ill they work. Like Thomas Soul, Walter Williams, Charles Marrier, and countless others, I too can engage in the business of critiquing program results, but I have never pretended to be an empirical scientist. I am more comfortable with principles than with the interpretation of statistical results.

Sometimes those engaging in empiricism need to be guided in the questions they ask. It is really surprising how often useful information is overlooked simply because we are not looking for it. Since, for example, we do not look for statistics on the degradation of character for self-government, we did not find it. I would therefore recommend that, both as an academic and a practical pursuit, we use devices similar to environmental impact statements for every social policy decision. From now on, all social policy ought to be accompanied by self-government impact statements which would articulate a program's impact upon the character for self-government.

An illustration of this problem might be helpful. I would never pretend that the denial of participation on the basis of race in our society is not pervasive. I suspect that my father would have been Chairman of the Joint Chiefs of Staff long before Colin Powell if there had been proper respect for real capacity in this country that was not governed by race. This observation notwithstanding, I am unwilling to say that in order to remedy that denial of participation, we must establish a system that will arbitrarily decide results.

Suppose, for example, that there is a great race which has been run throughout history, such as the Olympics. Suppose further that on the basis of race, black people have been systematically denied the right to run in these Olympics for several decades. Since I am a black person, I cannot run in this race. Then someone comes along and says we are going to remedy the denial of past participation and declare the race open. This is good; I am glad to join the race. But this is not enough for my benefactors. They cannot just let me run. They say that if I place sixth, that is the equivalent of winning the race.

Some are satisfied that this scenario remedies past discrimination. But what it really does is establish a standard that will prevent me from ever remedying the effects of past discrimination. The only way the effects of my lack of access to the race can be remedied is if I am forced to run the race, to run it hard, and to run it to the highest standards, until my capacities develop in such a way that I place first by my own right. Everyone is ignoring this impact, and that is what I mean by the impact on victims.

While it would be nice to do psychological studies to see how people feel about themselves, this misses the point. The point is that if I am admitted to law school on a lower standard of scores,

shepherded through law school with a lower standard of performance, and if I come out at the other end a product of this system, how many firms in this country are going to tolerate a lower standard of results and promote me to partnership and give me perquisites and privileges not commensurate with the clients I bring in and represent? I will tell you how many—not a single one. That is a problem. The effort to compensate past denials has produced a remedy which perpetuates the incapacity created by those denials. This is not justice; this is feel good social engineering. Society will feel good because it looks as if injustice has been remedied, but I and all blacks will remain the victims, not this time of the injustice, but of society's misguided remedies for it.

Many people appreciate this because they think it is possible to become a good runner by watching other people run. This is not the case. There are some things in life you get good at only if you do them and do them up to standard. Freedom is one of the most important of them.

Professor Strossen used a phrase that I found interesting, yet a little disturbing. It was the phrase, "the maldistribution of liberty." In my speech, I distinguished between distributed justice, which refers to things, and substantive justice, which refers to the qualities—if that term is appropriate—of human beings. Liberty falls in the category of quality, not in the category of goods to be distributed in this way, because liberty is like a good running body—you can only develop it by exercising. Liberty cannot be distributed. You cannot hand me my liberty and say "Here, have some liberty, now go out and enjoy." Liberty is an innate strength. It is not simply the opportunity for choice, nor is it simply the end result of choice. It is the development of that strength, that capacity, that wisdom, that common sense, that instinct, whatever it may be that allows one to use choice in a way that perpetuates the ability to choose. In other words, liberty is the use of freedom in a way that sustains it and that produces good results for oneself, based upon one's own exercise of it. This means you cannot distribute liberty. You can try to get out of the way and let people develop it—but you cannot hand it out. This misunderstanding has led to all kinds of awful domestic and international projects where we think we can actually give people their freedom. I am a great admirer of Abraham Lincoln, but Abraham Lincoln did not emancipate black people in this country. Black people, as most people who really look at history know, had to struggle for many decades to emancipate themselves.

Both of the other speakers made a mistake that I believe is at the heart of this whole dispute over social justice, at least with respect to economic things. The problem is saying that poverty some-

how equates with slavery, or is the same thing as slavery. I have a problem with this notion, because it would seem to imply the obverse, but the obverse is not true. If I am well off, it does not make me free. If I am poor, it does not necessarily make me a slave. Self-government does not mean the ability to build a building if one desires; such a materialistic definition is not useful here. The capacity for self-government has to do with one's ability to properly use those opportunities for choice that one has. That is why the history of black people in America contradicts Professor Strossen's implications that poverty breeds passivity and dependency.² Black people in America were extremely poor people throughout most of our history. That poverty was not only a matter of economic hardship; it was also the effects of all kinds of awful barriers tossed before them: legislative segregation, discrimination, and so forth. With this as a background, I would ask Professor Strossen whether, as a result of that poverty and that legislative discrimination, she would argue with the fact that all of the Frederick Douglass's and all of the unsung heroes who went to work every day, maintained their families, rode up and down in the elevators, took in other people's washing and so forth, also raised young people who valued their education, went to school, improved themselves, and, in many cases improved themselves for the sake of opportunities they would never enjoy in that generation, because they understood intrinsically that the pursuit of their own qualities was an end in itself, regardless of the results it produced. Understanding of one's own dignity is not lost in poverty. The challenges of poverty can increase understanding until it reaches the kind of strength that it reached in the black community in the 1960s; a strength which provided the spark for a nonviolent movement that moved society where no one thought it could go, and did so without the awful violence that many feared accompany it. As much as this country's majority congratulates itself upon its great largesse and understanding of the need for justice, I beg to differ. We avoided a blood bath in this country because of the quality of souls of black Americans, not because of the majority's wisdom or generosity. We avoided it because though we chose a course that was more demanding of our character, it was also better for our country.

One final point needs to be emphasized. Poverty does not breed depravity, nor does it degrade the poor. This view is at the heart of much misguided policy and consequently we have been willing to accept degradation in the name of eliminating poverty when we have a whole group of people before us who should re-

² See Nadine Strossen, *Blaming the Victim: A Critique of Attacks on Affirmative Action*, 77 CORNELL L. REV. 974, 979 (1992).

mind us that it is possible, despite poverty, racism, and injustices, to maintain those qualities of soul that become beacons for this nation in its time of crisis and need. Martin Luther King, Jr. is but one illustration of this proposition—that we must be careful not to equate poverty with slavery, and not to adopt those remedies for poverty that will destroy the capacities and qualities of soul, family, heart, courage, and spirit that years of poverty and discrimination never tarnished.

As for empiricism, I have not done any empirical analysis either of the effects of affirmative action or social welfare programs. I did, however, take a ride-along the other night in the District of Columbia, and if you want empirical evidence of the impact of these problems and the misguided solutions to them, try doing such a ride-along. You will see some of the bad effects of affirmative action. The police officers with whom I spoke told me about the deleterious effects of lowering the standards for admission at the police academy. They told me how difficult their job on the streets has become because of those lowered standards and how affirmative action has generally degraded the standards of performance of the police force. These comments came, by the way, from black, not white, officers; thus race was not a factor.

Doing such a ride-along will show you another effect of these problems and the misguided solutions to them. Driving through some of these neighborhoods, you will see trash all over the front stoops, lawns never mowed and young children wandering the streets unguided and unsupervised. When I was growing up, my family was poor, but my mother had a maxim: you cannot do what you cannot do, but you can do what you can do. This is one of those obvious things which everyone agrees with once it is said. These people were not doing what they could do. Their failure has nothing to do with poverty; it has to do with inner will. That inner will is sapped by those remedies that tell you that poverty is an excuse for degradation. There is no such excuse. This, if anything, has been the lesson of our black experience in America.

PROFESSOR KENNEDY:

Dr. Keyes continues to invest more energy in warding off what he perceives to be the problems of governmental intervention than in addressing himself to the misery that surrounds impoverished people. Indeed, in his last comments, one might get the impression that poverty was a positive good. Sure, there have been people who have surmounted poverty without government assistance. Frederick Douglass overcame slavery. But so what; some people will triumph over any obstacle. Does that mean that we should cease, as a soci-

ety, to remove socially-created obstacles that cripple people in their pursuit of happiness?

And what about children? Dr. Keyes has put a lot of emphasis on "choice." Sure, there are people all across the socioeconomic spectrum who choose to be slovenly. But what about the child, one day old, who is born to parents who are impoverished, who have no skills, who have grown up in horrible circumstances, and who have not had people around to help show them a better way? That is just a matter of luck—bad luck—being born in such circumstances. And in these United States of America, if you are born in such circumstances, chances are you are going to end up living a life confined by all sorts of terrible obstacles.

PROFESSOR STROSSEN:

In responding to my speech, Dr. Keyes seized on the point I made concerning "the maldistribution of liberty." Perhaps that was not the most descriptive phrase. I agree with Dr. Keyes in some abstract, philosophical sense that liberty cannot be distributed; it is something that all of us innately possess. Whether one describes this notion of inherent rights as an aspect of natural law, or calls it human rights, we all endorse it in some sense. We must, however, distinguish between the theoretical liberty which belongs to all of us equally, as a matter of philosophy, and the actual liberty which, as a matter of practical experience, is differentially available to each of us.

In its abstraction, Dr. Keyes' point ignores some very crucial realities of life in late 20th century America. The ability to exercise liberty, which Dr. Keyes recognizes as crucial, is profoundly affected by government intervention and government patterns of resource distribution. We cannot ignore that fact. Also, the deprivation of liberty by government agents and private actors is profoundly and disproportionately felt by certain groups in our society.

Dr. Keyes emphasizes the conceptual notion that we all have liberty, all human beings from the richest to the poorest, those of us who are gathered in this luxurious hotel as well as those who are sleeping outside on the sidewalk. He stresses that, in an abstract sense, we are all equal in our liberty. But such an abstract sense of liberty is impoverished and sterile. It reminds me of the biting observation by Anatole France, that "the law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."³ Our society has a richer, more

³ Quote originally from *LE LYS ROUGE* (1894), ch. 7, reprinted in *FAMILIAR QUOTATIONS* JOHN BARTLETT 655 (Little Brown Co., 1980).

meaningful, concept of liberty, which seeks to assure equal opportunities to actually exercise rights.

To those of you who think that the government should not be involved in facilitating or impeding people's ability to exercise their liberties, I suggest that you are blinking reality. For better or for worse—probably many Federalist Society members think it is for worse—the fact is that our government is interventionist, and has distributed resources, including resources that could fairly be viewed as fundamental prerequisites for the meaningful exercise of liberties, in very unequal ways.

For example, many theorists agree that for people to experience fully the blessings of liberty, and to participate in self-government, a fundamental prerequisite is education. Yet we all know how maldistributed public resources are in terms of education. The American Civil Liberties Union is currently involved in cases all over this country, including some that are now before the United States Supreme Court, where all parties agree that governmental resources are allocated disproportionately to public schools on the basis of race. Throughout this country, in large cities as well as in rural areas, schools with predominately African American student bodies have fewer resources in terms of books, teachers, and all other criteria.⁴ Thus, thirty-seven years after the Supreme Court's landmark ruling that the Constitution was violated by racially segregated public schools which had been defended as "separate but equal,"⁵ our nation's public schools are separate *and unequal* on the basis of race.

The educational situation illustrates the fact that, in our society, government is a powerful actor that severely limits the ability of some people to exercise their liberties fully, while at the same time substantially enhancing the ability of other people to exercise their liberties fully. There is a racial pattern to this disparity. Let us not ignore this reality.

Just as government facilitates the exercise of freedoms on a racially unequal basis, so too government deprives individuals of liberty on a racially unequal basis. Likewise, private actors invade liberties in a racially disparate fashion. I will give only a few of the innumerable examples that could be provided.

In terms of governmental action, the government's greatest opportunity to deprive people of liberty most directly is through the criminal justice system. Study after study shows that throughout the entire criminal justice process, the targets of governmental invasions tend disproportionately to be people of color. Disparate treat-

⁴ JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICAN SCHOOLS* (1991).

⁵ *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

ment begins with who is stopped on the street, who is questioned, who is subjected to the sweep searches, and other surveillance techniques that the Supreme Court has upheld. Such invasions of liberty frequently occur when people of color are dressed in certain ways or are in certain neighborhoods where they “don’t belong,” or are driving expensive cars, and so on.

Over and over again we see racially discriminatory patterns of police brutality, which is a particularly dramatic form of governmental deprivation of liberty. People were shocked when they witnessed the Los Angeles Police Department’s videotaped beating of Rodney King on television. Statistics about nationwide patterns of police behavior show that it was no coincidence that the victim of that beating was an African-American man.⁶ Throughout the country, police brutality is disproportionately inflicted on the basis of race.

And the same pattern occurs in private victimization. The most complete deprivation of liberty is the taking of life itself, and we are all familiar with the terrible statistics that homicide is the leading cause of death among young black men.⁷ Those who are not killed are disproportionately incarcerated and subject to the death penalty. So we cannot ignore the fact that there is a dramatic, racially-based maldistribution of liberty in this society.

Next, I want to address Dr. Keyes’ question about Frederick Douglass. Echoing what Randy Kennedy has already said, of course it is wonderful that certain extraordinary individuals can triumph over even the ultimate race-based deprivation of liberty—slavery. But how many other “Frederick Douglasses” have never fulfilled their potential, to the detriment of not only themselves, but our whole society, because they were not able to take that enormous step of surmounting slavery and other forms of incapacitation? Of course, it is hard to prove a negative. That is a challenge I often face when I talk about free speech. Defenders of speech regulations frequently note that, despite these regulations, some people still are expressing themselves. But we all believe that for every person speech regulations fail to deter, there are many others who experience what we refer to in the free speech context as a “chilling effect.” A parallel phenomenon obtains in the context of racial discrimination.

⁶ Andrew H. Malcolm, *Change in Enforcement is Said to Cut Violence Between Police and Public*, N.Y. TIMES, Sept. 2, 1990; Elaine Rivera, *Minorities Feel Singled Out; They Account for 92.6% of 1990 Killings*, NEWSDAY, March 12, 1991.

⁷ Sharon Shakid, *We’re Saying If We Don’t Try Something New, We Are Doomed*, USA TODAY, Aug. 15, 1991; Lynne Duke, *Conference Studies Plight of Black Males; Scholar’s Portrait Shows Endangered Population*, THE WASHINGTON POST, May 23, 1991.

Tragically, we will never know how many other "Frederick Douglasses"—and, might I add, "Frederica Douglasses"—might have emerged had it not been for discrimination. I use that latter example advisedly because I recently saw a staged version of Virginia Woolf's wonderful book, *A Room of One's Own*,⁸ in which she recounts the fictional story of Shakespeare's sister. She imagines the difficulties that would have confronted a female Shakespeare—a woman who had all of the talents and yet none of the opportunities available to male writers in Elizabethan England. Surely there were many women who could have been inspired and inspiring writers, but sadly, we will never have the opportunity to read their plays and poetry.

Finally, I want to end by addressing the first point that Dr. Keyes made with the metaphor of a footrace. He said that it is not helpful to declare that somebody who comes in sixth has won the race. I submit that merely unshackling somebody who has been enslaved, and putting him at the starting line for the race, also does not help. In that vein, I would like to quote a powerful statement about the moral imperativeness of affirmative action which, coincidentally, uses the footrace metaphor that Dr. Keyes invoked. It is from a speech by President Lyndon Johnson at Howard University in 1965.⁹ He said:

Freedom is not enough. You do not wipe away the scars of centuries by saying: Now you are free to go where you want, and do as you desire, and choose the leaders you please. You do not take a person, who, for years has been hobbled by chains, liberate him, bring him up to the starting line of a race, and then say, "you are free to compete with all the others," and still justly believe that you have been completely fair. Thus it is not enough just to open the gates of opportunity.¹⁰

Thank you.

REYNOLDS:

I do not need to offer the observation that this has been a wonderfully enlightening and invigorating discussion. I thank all the panelists. Since I am the moderator, I will exercise a prerogative to have the last word on one or two brief points.

With respect to "casting the net wider," I cannot let Mr. Kennedy's challenge pass. I did make the comment, and I believed firmly in it. When I suggest as an appropriate solution "casting a

⁸ VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* (First Harvest/Harcourt Brace 1989) (1929).

⁹ Commencement Address at Howard University: "To Fulfill These Rights," President Lyndon B. Johns, Pub. Papers II, 635 (June 4, 1965).

¹⁰ *Id.* at 636.

wider net," it is not to exclude individuals already benefitting from outreach programs, but to include others not being solicited for available job opportunities. Employers must cast the recruitment "net" as wide as they can so that all may be considered in an even-handed and fair manner for whatever opportunities exist. One of the real mischiefs of employment practices is that the good-old-boy network fills available positions so quickly that many qualified people do not hear about the position until long after it has been filled.

When I was head of the Civil Rights Division, I knew that in order to make affirmative action meaningful, we had to break down this system. Casting the net widely into those communities that ordinarily never hear about many job opening until the vacancies are filled enables the people in those communities to be considered for the job. I was not suggesting that this be done without consideration for others who are certainly interested in the available jobs. Rather, it was my desire to ensure that *all* who were interested had the chance to be considered. It was in that sense that I made the remarks about casting a wider net.

I would also simply add an observation to Nadine's last comment about Lyndon Johnson's well-known and often-cited speech. It is important to keep in mind there are shackles which many people bear. One of the most urgent public interests is to find ways to remove those shackles and allow individuals to realize their full capacity. I have maintained, and continue to maintain, that it is a cruel hoax to bring people to the starting gate and line everybody up, but then fail to remove the worst of all shackles: selection by race or skin color. Hypocrisy of this sort constitutes one of the real problems with affirmative action preferential programs. These programs effectively tell minorities that they are now in the race and that they can run. Yet, as affirmative-action runners, the one shackle that weighs heaviest binds their ankles. No matter how hard they run, the affirmative-action selection process leans on the same discriminatory feature that we have for so long been trying to eliminate.

One final observation. While listening to these panelists, it struck me that the discussion we have had today under the heading "Entitlements, Empowerment, and Victimization" is similar to other discussions I have heard in perhaps different contexts but over and over again when the issue of affirmative action comes up. The ills and concerns that everyone focuses on, understands, and recognizes are those which all agree still exist and need to be addressed. The solutions, it seems, break down along the same predictable lines, the contest is between equal opportunity versus equal results, between

individual rights versus group entitlements. We heard the same themes today. It is for each of you to pick the side with which you feel most comfortable.