Discussion

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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. 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. 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-

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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

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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. 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," 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-

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.


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,* 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. 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.

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

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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. Johnson, 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.