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RALPH K. WINTER, JR., professor of law, Yale Law School: We are gathered tonight to discuss one aspect of what may be the albatross of any large heterogeneous pluralistic society—discrimination. For as long as people have perceived differences, however irrelevant they may seem to any pertinent judgment, some forms of discrimination, hostile or benevolent, have tended to appear. Our own history of slavery has particularly aggravated the issue of discrimination when we ask the core question: what kind of society are we?

Twenty years ago, the question whether private discrimination on the basis of race, ethnicity, or sex was against the policy of the United States was an open question. Momentous court decisions and radically new legislation have intervened but, even now, it cannot be said that the basic issue of principle has been resolved.

Twenty years ago we asked, should government stop private parties from discriminating against women and ethnic and racial minorities? Today we ask, should government force private parties to help bring about equality for women and minorities—and, if so, how? Should efforts be made merely to increase the pools of available women and members of minority groups for particular jobs or student bodies? Should we do more than require employers and universities to reexamine the criteria by which they hire and admit people? Or should we permit or require preferential treatment of designated minorities? The issue arises in a number of ways.

The celebrated DeFunis case raised the issue of pref-

erential admission to a state law school. Most of the controversy, however, has focused on what has come to be known as affirmative action, and that, too, seems to have arisen most frequently in the university context. Thus, in late 1974, Peter Holmes, director of the Office of Civil Rights of the Department of Health, Education and Welfare [HEW], issued a memorandum to universities that many believe severely weakened the affirmative action programs previously undertaken by the department. On the other hand, earlier that year, Professor Richard Lester of Princeton prepared a report for the Carnegie Commission on Higher Education warning that affirmative action programs threatened to weaken the academic standards of our universities by compelling the hiring of unqualified faculty.

To understand the discussion, one must understand the differences between antidiscrimination legislation and affirmative action programs. Basic antidiscrimination law usually requires that a complaint be made or that some evidence of a violation exist, and that the complainant or the government prove that the defendant actually was guilty of discrimination.

Affirmative action programs differ in several important respects. First, they apply only to employers or universities having federal contracts; second, they require that, without any complaint or prior evidence of discrimination, the contractor undertake an analysis of the composition of each department and compare it with the relevant available pool of women and of designated minority groups. To the extent that the composition reveals significant underutilization of the pool of women and minority groups, the contractor is required to establish certain goals, usually put in terms of statistical changes in the composition of the work force reflecting an increase in the percentage of female or minority employees.

The price of federal contracts is compliance or near-compliance with these goals. Three basic questions emerge, which will be the subject of our discussion: First, are affirmative action programs prudentially sound policies for the society? Do they, for example, entail quotas?

Even among the targets of the programs, there is no agreement on that issue. Thus, Murray Schwartz, dean of

the UCLA Law School, has said: "Sure, we have a quota; all of the law schools do. They have to or they won't know where to stop. At UCLA, the quota is 73 minority students in a class of 350." On the other hand, Derek Bok, president of Harvard, has said: "In essence, affirmative action simply requires that institutions make special efforts to identify candidates from underrepresented groups and that the ultimate choice be made without regard to race or sex."

Whether or not affirmative action programs constitute quotas, many believe these programs are the only means to redress unjustified disadvantages in the society and to break a cycle of inequality as well as to eliminate hiring practices such as "buddy systems"—systems that are neutral on the face but discriminatory in fact. Such programs also serve as a symbol of hope and of society's good faith to members of groups that suffer from discrimination.

But others argue that affirmative action is likely to help those members of minority groups who are the least disadvantaged while injuring others who are no better off. Such programs, they say, abandon principles of individual merit and fairness and are a form of discrimination themselves.

A second major issue is whether such programs, particularly those that involve preferential treatment, are constitutionally permissible. Is racial or sexual classification per se unconstitutional, as Mr. Justice Douglas suggested in the DeFunis case? Or can it sometimes be used for benign purposes?

A third major question goes to our structure of government. At least in their most stringent form, affirmative action programs have at best a shaky legislative foundation. Many have suggested that they are inconsistent with the Civil Rights Act of 1964. In any event, some ask, why should bureaucrats in HEW—no matter what the merits of their decisions—have the power to resolve questions bristling with profound prudential and constitutional implications?

Finally, and often lost in the debate over the merits of affirmative action, is the extent to which the federal contracting power ought to be used to intervene in university decisions. Kingman Brewster, president of Yale, has

expressed his fear of "a growing tendency for the central government to use its spending power to prescribe educational policy"; he fears, for example, that governmental support for physics compels conformity to federal policies on women's athletic facilities. He noted that such power can be abused and cited among other instances a White House attempt to cut off contracts to MIT because its president had opposed the missile program.

I will now turn to members of the panel for their initial statement. First, Owen Fiss.

OWEN FISS, professor of law, Yale Law School: I think the term "affirmative action" has come to be a code word, a buzz word without any real descriptive meaning. This tendency is, in part, evidenced by the statements that Ralph Winter quoted in his opening remarks.

To clarify our discussion, I would like to make a distinction between two different meanings of the term affirmative action. Both of these senses are linked in that they are "result-oriented"—there is a special concern with numbers: How many blacks do you have on the work force? How many women do you have in the student body? How many Chicanos are teaching in the university?

In the first sense of affirmative action, however, the numbers are only used as a policing technique. The government says: "Your obligation, employer, is to hire without regard to race or color or sex, but we will use numbers to determine whether you are fulfilling that obligation."

The second sense of affirmative action is also concerned with numbers, but in this instance as a statement of primary obligation. The government now says: your obligation is not simply to hire without regard to race or sex, but to increase the number of blacks or women in your work force.

The major controversy surrounding the concept of affirmative action is not with the first use. That use—as a policing technique, as an enforcement technique—is problematic only because of the risks of a mistake: we never really know how many blacks or women will wind up in the work force if an employer hires without regard to race or sex. The major controversy, I suspect, centers around

the second use of the term affirmative action—as a means for stating the primary obligation of the employer. And a code word is used because this obligation to increase the number of blacks or women in the work force appears to be at odds with what most would assume to be the primary obligation—not to discriminate or to prefer people on the basis of sex or color.

Now, if you are working with a specific statute—say, an antidiscrimination statute that commands the employer not to discriminate on the basis of race—it is very difficult to justify a policy or program that casts the employer's primary obligation in terms of increasing the number of blacks or women regardless of qualifications. But if you are working with a much broader textual provision, such as the Constitution's equal protection clause, then it strikes me that it is quite permissible for a university, such as the University of Washington, a state university, to decide, as it did in the circumstances leading up to the DeFunis case, to give preference to minority members in its admissions process or in its employment practices. That question of permissibility—not obligation—is the only question involved in the DeFunis case, and I contend that the Fourteenth Amendment does not prohibit that activity.

PROFESSOR WINTER: Professor Posner?

RICHARD POSNER, professor of law, University of Chicago Law School: If affirmative action means affording preferences or benefits to people on the basis of racial identity or sex or national origin, then I think it is a form of discrimination and an evil practice.

I don't think the way to fight the discrimination that we don't like is with more discrimination. One of the reasons why we have a problem of discrimination in this country is a habit of thinking about people in terms of types. You look at a person and what you see is a type—a black or a Jew or an Armenian; you don't see an individual. And when you begin ascribing characteristics to all individuals on the basis of this one element that the person has, you are prejudiced, you are bigoted.

Affirmative action, or reverse discrimination, is just

an extension of this stereotypical thinking. Once again you are looking not at the individual but at his type. If a person can prove that he or she has some percentage of Negro ancestry, or the right number of chromosomes to be a woman, or what have you, that person is automatically entitled to some benefits: preferential admission, a better job, and so on. That is discriminatory thinking. The individual disappears behind his type. To reinforce stereotypical thinking in the name of fighting discrimination seems to me to be wrong and foolish.

Beyond that, it seems to me impossible in practice to distinguish the discriminations we like from the ones we don't like, the benign from the invidious. Every time you discriminate in favor of one group, you are pushing out another group. And every time you begin looking in a sophisticated fashion at the benefits and the costs incident to a particular form of discrimination, you are simply opening the door to rampant discrimination of a sort that you don't like.

Go back a few years. People never defended Jim Crow laws on their real basis—that they were a means by which the white community increased its welfare at the expense of the black. Instead they would make all sorts of plausible —not convincing, indeed hypocritical, but plausible— points about the practices being better for both races. Similarly, you can make all sorts of arguments that if you limit the number of X in a profession or the number of Y in a community, it will be for their own long-run good.

I think we ought to avoid that kind of sophistry by adopting the principle that we won't impose the burdens or accord the benefits of government—benefits such as money, jobs, or admission to state schools—on the basis of these irrelevant racial and ethnic characteristics. In Europe, many countries have long had a system of minority rights. Germany had it before World War II. Yugoslavia, Belgium, and other countries where there are sharp ethnic or linguistic divisions have it today—a system based on the idea, the notion, that the pie is going to be divided up on the basis of groups. I think that such a system is inconsistent with some of the finest achievements of this country in breaking down ethnic barriers and forging a

country based on individual merit and individual achievement.

It is very unlikely that aptitudes, talents, tastes, and preferences for various jobs are distributed in proportion to a group's percentage in the population. It is thus doubtful that in a system of zero discrimination (in the bad sense, the old sense), it would magically turn out that every profession had the same percentage of each sexual or racial or national-origin group that that group had in the national population.

Reverse discrimination therefore implies substituting for a merit principle, or an individual-achievement principle, reserving a certain number of jobs or educational places or other benefits for these groups. And, of course, as this process develops, more and more groups will spring into existence; people who had forgotten that they were Croatian-Americans will become conscious of their ethnic identity in order to assert their claim to the pie.

So I think that, in the long run, the concern with affirmative action or reverse discrimination is simply going to exacerbate the differences among American subgroups, make people more conscious of the ways in which they differ in background or appearance from other people, and undermine the individual-achievement or melting-pot philosophy of American society which, despite the criticisms to which it has been subjected, seems to me to remain its outstanding characteristic.

PROFESSOR WINTER: Ms. Glaser.

VERA GLASER, columnist, Knight Newspapers: I happen to think that affirmative action has served at least two very useful purposes. It has brought more awareness of discrimination in our society, discrimination which is very widespread against blacks, minorities, and women. And it has improved to some extent—but only to some extent—the access of blacks and minorities and women to education and to jobs. At the same time, affirmative action does suffer from some very serious deficiencies. And these deficiencies, of course, explain why it is now coming under fire.

First, if you believe the recent findings of the General Accounting Office, our government has been so lax in enforcing the executive orders that require government contractors to follow nondiscriminatory employment practices that, to paraphrase GAO, there is almost a pattern of nonexistent enforcement action. And, of course, that is dangerous because it leads government contractors to think that there is no intention to enforce the antibias regulations.

And, second, almost everyone agrees that, where it has been administered at all, the affirmative action program has been very, very badly administered. Ironically, one of the worst offenders has been HEW, which is responsible for implementing the antibias orders in a very broad area of our economy, the educational community.

Some of that is also the fault of the college or university administrators who, in some cases, have misunderstood the federal requirements. But having said that, I believe it would be unfortunate—no, it would be tragic—for the rights of all of our citizens if we confuse the failings or incompetence of HEW, to use one example, with defects in the laws and with the orders themselves, because we need affirmative action and we need firm, even-handed enforcement. Doing so is like saying that, because some police are inefficient or incompetent, we should abolish the laws that they are supposed to enforce.

Now, obviously, the least controversial part of affirmative action lies in the recruiting function. There doesn't seem to be a great deal of objection to publicizing job openings so that the information reaches minority groups, women's groups, and other sources of qualified personnel. And, as we heard from Professor Fiss, the most controversial part is probably the concept of numerical goals and timetables, and on that I would like to clarify one point because numerical goals are often confused with quotas. Sometimes the terms are used interchangeably; but the government and the courts have made a very clear distinction: Quotas, clearly, violate the Constitution and the federal statutes; they keep people out. Goals are targets. They are targets for the inclusion of people who have previously been excluded, and they are an attempt to esti-

mate what an employer's work force would be like if there were no illegal discrimination based on race, religion, sex, and so on.

The courts have indicated that affirmative action and numerical goals in employment are legal, that they do not constitute a preference when they are undertaken to remedy the results of past discriminatory practices. And let us remember that no institution is required to hire minorities and women on the basis of sexual or racial preference; they are required to show a good-faith effort to recruit them. So affirmative action is not aimed at creating preference. Affirmative action is aimed at ending the preference for white males which has always existed in the business and academic worlds.

PROFESSOR WINTER: Mr. Raspberry.

WILLIAM RASPBERRY, columnist, *Washington Post:* I will be almost embarrassingly brief. I think it is fair to point out that we are not talking about manufactured ethnic divisions or imagined discrimination. I wouldn't draw any conclusions, for instance, from figures that show that blacks preferred brick masonry while whites gravitated toward carpentry, or that blacks were predominant in sheet-metal work while whites were in pipe fitting or Indians in steeplejacking.

But, given the history of this country, I assume that when whites move toward the best-paid, most prestigious jobs, and blacks gravitate toward the low-paid drudge work, something other than natural selection is at work. That "something" is very clear to me: it is racial discrimination. Institutions tend to reproduce themselves unless something interferes with that process; build an institution white for racist reasons and it will tend to continue white even when the racism that founded it abates—unless, again, something interferes with that process. That outside interference is what I think of as affirmative action and I'm prepared to defend it.

PROFESSOR WINTER: Professor Seabury.

PAUL SEABURY, professor of political science, University of California at Berkeley: Sitting here on the extreme left, I have the advantage of being able to act as an incontrovertible summarizer of what has already happened.

I would like to sharpen a couple of points because it takes an awfully long time, given the nature of the language that is employed in these debates about affirmative action, before some of the basic issues and principles become clear. As was previously brought out, the phrase "affirmative action" itself well shows this confusion: it is a form—kind of an Orwellian expression—and can mean many things to many people. But you know to certain people affirmative action does mean discrimination, and reverse discrimination. It seems to me that the issue that the federal government, the universities, and perhaps the business and professional worlds have been struggling with as well, has been what kind of equality we are talking about in American life.

Are we talking about equality of opportunity or about equality of results? This is a very important issue, because the idea of equality of opportunity has always meant, as Mr. Posner stressed, a concept of merit, by which an individual is judged according to his or her qualifications —the skills, the inner qualities; and these don't always have to be those of intelligence alone, as some simple-minded people believe. But equality of results is a very different thing and here we begin to get into the numbers game. What is it that we are aiming toward? How do we want the race to come out? These questions, of course, take us well into the depths of the metaphysical view of the notion of equality.

We have an affirmative action program oriented toward equality of results, and we can be sure that the victim is going to be equal opportunity because these things are very difficult to square. For example, when a contract is made with HEW, as was done a couple of weeks ago at Berkeley, the university commits itself to so-called goals, hiring goals. Nobody, incidentally, was happy when they heard the outcome of this agreement: the women were mad; the minorities were mad; the bureaucrats and university administrators were frustrated; and the faculty

thought that the university had capitulated to a satanic system of federal public-utility regulation. In any event, the principle that was adopted here is one based upon the notion of equality of results. Under that principle, one sets a timetable for certain things to come to pass.

And it has never been clear to me how anyone—especially a bureaucrat—can accurately prophesy the outcome, if the processes are followed fairly. How can you tell how this particular ethnic or sexual category is going to come out if you are treating people fairly on an individual basis?

Now, it isn't really the case that a goal is not a quota. I once looked it up in the dictionary, and the word "quota" means a part of a whole. And if one plays around the goals that are in the contracts, such as we have at Berkeley, those goals are numerical and they are part of a whole; therefore, they are quotas. I have invented two animals to illustrate this point: one is called a "go-ta," which is a fast-moving form of discrimination, and the other is called a "qu-oal," which is a very slow form of moving towards a goal.

I think we have got to face this issue because it is fundamental for the future patterns not only of our university life but of the whole quality of our culture. Does the value of individual merit have any intrinsic meaning in a culture which is dominated by collective group rights, and group rights expressed in these fashions?

PROFESSOR WINTER: Thank you. I take it one major area of disagreement is not only over what we call the contracts containing statistical goals—whether they be goals or quotas—but over exactly what they mean. I wonder if I might turn to Ms. Glaser and ask her whether Professor Seabury's description of what is happening at the University of California at Berkeley is consistent with her conception of what affirmative action programs ought to be.

MS. GLASER: I think that that was very badly handled. I'm in the group that you described that simply feels that HEW messed it up, and I'm not really as qualified to com-

ment on the Berkeley plan as Professor Seabury is. But, before this program started, Mr. Seabury, didn't you say that Berkeley agreed to bring in thirty women and minorities in the next thirty years?

PROFESSOR SEABURY: Give or take a little.

MS. GLASER: Well, all I can say is that I just don't know why it's a hardship on you fellows, or constitutes reverse discrimination, to bring in one a year.

PROFESSOR SEABURY: Can I explain something here? I'm not trying to defend the integrity of HEW, but I do think that we ought to bear in mind that HEW is very concerned to develop at Berkeley a model that could be used more widely. I think that's critical, because what is the model? The model is not the numbers; the numbers are trivial. In fact, some departments, like electrical engineering, or chemical engineering, are off the hook forever, I suppose, according to this criterion.

The issue is the procedure, the notion that this mechanical model is going to be employed in all major universities from now on. That, I think, is what we've got to bear in mind, because we are really becoming a public utility now. HEW can change the ground rules. There is nothing in the law of the land that says that they can't eliminate those categories of preferred minorities—simply throw them out and start off with another group. And we'd be doing this for centuries.

MS. GLASER: Do you think that, if left alone, Berkeley would not pursue a discriminatory course?

PROFESSOR SEABURY: Well, I haven't stopped beating my wife lately, so I can't answer that. HEW never charged the university with discrimination.

MS. GLASER: Well, charges of discrimination have been brought against the entire California university system. I don't think that any area of our life today has had as many charges brought against it as the academic com-

munity, particularly for sex discrimination. Thousands of cases have been filed—

PROFESSOR SEABURY: Oh, individual cases—

MS. GLASER: Yes, and class cases. Women have filed discrimination charges against something like 600 universities, including Harvard and Michigan and all of the top ones, about 1,600 cases under Title VII of the Civil Rights Act, and perhaps a thousand under the Equal Pay Act, so discrimination certainly would appear to exist.

PROFESSOR SEABURY: I think this action in the courts is a symptom of a much wider kind of problem. I'd like to know what the outcome of the cases were. For example, in the case brought against my department, in the federal court of San Francisco, there has yet been no adjudication—

MS. GLASER: Yes. Still, these charges indicate a lack of representation of minorities and women.

PROFESSOR FISS: I think that when you used the word "mechanical" in referring to the numbers that might be set by HEW, you were understating the difficulties inherent in not using numbers.

Let's seriously consider an enforcement regime which never uses numbers at all to measure compliance. Suppose you wanted to find out whether the University of California at Berkeley discriminated against women. The charge would be that the university—say, the political science department—did not hire any women at all; that every time a woman applicant presented herself, certain people in the department voted against her because she was a woman. Now, we know how faculty meetings are run. We know how the employment decision is made—

PROFESSOR WINTER: This is a family program, Owen. [Laughter.]

PROFESSOR FISS: —and we know that the criteria used

are extraordinarily vague and ambiguous: who shows the greatest intellectual promise, who would be the most effective teacher, who would write the most creative book. I think you can see that, if you were a victim of that type of discrimination, the problems of proving it would be extraordinary.

PROFESSOR POSNER: Speaking as an antitrust lawyer, I think you exaggerate. Any time a wholesaler or retailer is cut off by his supplier, he has a potential claim under the antitrust laws of monopolistic or discriminatory or conspiratorial action. Many such suits are brought, and people find it possible to discover evidence of monopolistic behavior when it has been engaged in. The fact of the matter is that it is very difficult to maintain conspiracies without detection. If a faculty of twenty or thirty has adopted—whether implicitly or explicitly—a policy of excluding women, or any other group, some evidence is going to be generated.

It seems to me we're awfully loose, Ms. Glaser especially, in tossing around charges—serious charges—of federal violations, some of them criminal, on the part of major employers such as universities, and government departments themselves.

MS. GLASER: Dick, aren't you aware of the number of charges that have been filed?

PROFESSOR POSNER: Well, in our system a charge is not an adjudication of guilt. A charge is an accusation.

MS. GLASER: Let's make it clear. I didn't mention a criminal charge.

PROFESSOR POSNER: Filing an accusation is not proving guilt.

MS. GLASER: These are filed with the Office of Federal Contract Compliance, which monitors firms holding government contracts, and there are thousands of such charges against universities.

PROFESSOR POSNER: Yes, we had a lawsuit against our school.

MS. GLASER: For some reason, nobody believes that these citadels of enlightenment are biased—

PROFESSOR POSNER: Well, you must make a distinction between a charge and a determination of guilt. Now, our law school was sued by women for violation of the Civil Rights Act, and the case was litigated, and the university won the case. Now, where do you count that? Is that another example of discrimination by universities?

MS. GLASER: No. I am counting the charges filed with the Office of Federal Contract Compliance.

PROFESSOR POSNER: What about the disposition of the charge by the office?

MS. GLASER: They are still under negotiation with the Office of Federal Contract Compliance. Very few have been disposed of.

PROFESSOR POSNER: Well, then, why don't you suspend judgment until they decide whether it is discrimination or not?

MS. GLASER: Well, I am suspending judgment. I'm simply saying these charges have been filed and, like the Berkeley situation, they have not yet been resolved.

MR. RASPBERRY: Is it too far out to suggest that there is some evidence of racial discrimination in employment, in the universities and elsewhere? I think maybe we can buy that much, that it has happened, at least until yesterday. Now, there are a couple of ways to attack the thing, assuming good faith on the part of those people involved in it.

One is to try to construct an absolutely fair and color-blind and perfect recruiting and hiring system, theoretically. You start off from the theoretical end—with what would

likely produce certain kinds of results—and you try to build that kind of system as fairly as you can. I'm not suggesting that that's a bad thing to do. But there is another way to attempt it, and that's from the opposite end. You try to figure out what the results would be if there were no discrimination—what our work force would look like—and using that kind of construct, you project goals—not quotas, but goals—something to shoot at, and see if that produces some results.

You see, if you assume that there is racial discrimination, and you build your perfect mousetrap to recruit and it doesn't catch any mice over a long period of time, what is there to tell you that the mousetrap isn't any good? I think you have to wind up with some mice, or a very good explanation of why you don't have them.

PROFESSOR SEABURY: When Frederick the Great was trying to get his Pomeranian guards—the palace guard that had to be six feet, two and a half inches tall to qualify—and he couldn't find enough in Berlin who would volunteer, he sent his policemen all over the state of Prussia, trying to kidnap young boys who looked as if they were growing rapidly.

Something of this sort has been happening in higher education, for example, with minorities, in the last few years. I don't want to say that this is a national phenomenon; it certainly is a ubiquitous one in the top universities, where this search for qualified minority candidates has resulted in incredible opportunities for blacks. For example, there are very few Ph.D.-accredited blacks, and everybody is looking for them; everybody is playing Frederick the Great, right now, with that category. I can well agree with you about past performance, but I do think that this search for qualified blacks began long before HEW got into the "mechanical" business.

PROFESSOR FISS: Well, why do you get so concerned about their enforcement techniques? Perhaps they are hiring someone who is not qualified, who is not six-foot-two. On the other hand, they may be hiring the black or the woman because this happens to be the best person. We

have antidiscrimination laws, and the question is how most effectively to police them and enforce them.

Ralph Winter gave us one model of how that might be done, which Dick Posner reaffirmed: a series of individual charges, an evidentiary presentation, an adjudication of guilt or innocence, appeals. That is an intelligible, a very respected model of law enforcement. However, the alternative seems to me to be equally respectable. That is, you try to construct what the outcome would be if you did not have discrimination. It's a much more efficient enforcement mechanism. There may be mistakes, because there may be no six-foot-two teachers; but, certainly, under the enforcement model that HEW has been utilizing, the university is given the opportunity to explain: "I'm sorry, the best-qualified mathematician happens to be a man and not a woman."

MS. GLASER: But there is nothing that says that the university should not hire the best-qualified person. There is nothing in any executive order that says, "You must hire a lesser-qualified black or woman."

PROFESSOR POSNER: Yes, but that's not how things work out, because if you're faced with the possibility of losing several million dollars in government grants, or if you're a building contractor and face the possible loss of a government contract, the easy way out is to hire the quota of the minority group in question, even if they are less qualified. Ask AT&T or any of the others: that's less costly than having to litigate endlessly with HEW or some other government department. I think it is an insidious thing. I think everybody in the university world, and people I've spoken to in companies, says that double standards have emerged for women, for blacks, for other minorities.

MS. GLASER: I thought we had always had them.

PROFESSOR POSNER: This is a different kind of double standard. This is a double standard with lower requirements, less stringent requirements, for the member of the minority group.

PROFESSOR FISS: Dick, look, there is always a risk of overenforcement; that you may, by this enforcement mechanism, create incentives to hire on the basis of race or sex. But neither you nor Professor Seabury seems to confront the risk of the alternative model, and that is the risk of underenforcement—the risk that you may, by using this traditional law-enforcement technique, simply leave a great deal of sex discrimination or racial discrimination undetected, unestablished, and uncorrected.

PROFESSOR POSNER: I think you're right. There are reciprocal risks. The first has materialized—the overenforcement you mentioned. But experience with other areas of the law suggests to me that if you have a law against discrimination, it will be vigorously enforced, either by the government or by private parties through class actions and the like.

There are large monetary rewards to this sort of litigation, and it is not impossible to extirpate discrimination by the conventional means, without resorting to the creation of group rights. It is relevant here that while discrimination exists in this country, it seems to be diminishing, which makes the task of legal action against the remaining discrimination a good deal easier than it would have been twenty or thirty years ago.

PROFESSOR WINTER: Mr. Raspberry?

MR. RASPBERRY: It's fair to say, I think, that no university, with or without an order from HEW, is going to pass up a chance to hire Albert Einstein to head its physics department. It simply is going to hire him, if it can have him. We're not really talking about choosing between incompetent professors and truly outstanding ones. What we're really talking about is choosing among generally competent applicants. The superstars will be hired, if you can have them; the incompetents will not be hired, under any circumstances. Most people are in-between; that is to say, the people who apply for an opening in the English department will have, perhaps, a doctorate, perhaps a few

years' experience here or there doing different kinds of things, and they may have written a book or two.

The truth is that it's simply not possible to weigh merit and come up with an 89 for one and a 92 for the other. You can't give meaningful answers to questions such as, Is one book better, or are two pretty good books better than one excellent one? Is four years' experience in the Midwest the equal of three years' experience in the South or in the East? What in fact happens, as I understand it, is that the merit criteria really are not spelled out. The basic qualifications, yes; those extra merit points, no. So you look at applicants, and then you start to assign merit criteria, and it's not surprising that the person chosen tends to look like the people who are doing the choosing.

PROFESSOR POSNER: I don't agree that individuals are interchangeable within a large range, and I don't limit that observation—goodness knows—to professors. Whether you're talking about workmen, carpenters, or whoever, the fact is, in any job, people are on a continuum. There are the less good, the better—but there are not just three groups: geniuses, incompetents, and the 90 percent who are all the same. You want to get the best person for an opening, whether it's a person in your work force, or a corporate executive, or a government official, or a congressman, or what have you.

MR. RASPBERRY: What I'm saying is that that best person is not detectable by counting years of experience of doing this or that, or by counting the numbers of degrees. The only way people arrive at this "best" thing is on terribly subjective kinds of judgments. If there are clear-cut superiorities, I think the problem falls away; it simply does not exist.

We're talking primarily about those cases where the judgments are not that crisp and clear-cut. And it seems to me very clear that you could staff your university from now until the year 3000 with whites only and still not discriminate in any provable way against a single black or female applicant for a job there.

PROFESSOR SEABURY: I wonder if I could turn to this, because one of the things that makes universities a little bit different from, say, brick-making companies is that universities hire people on an idiosyncratic basis. For example, if you want a professor of Russian history, what you are looking for is the best professor of Russian history you can get. And sometimes the search is even more neatly defined than that. When one goes the route of numbers, and says that social justice and rectification are more important than the staffing of a highly skilled university, why, we at least ought to recognize that the game has changed.

MR. RASPBERRY: One does not say that. I know of no one who has said that, and I don't think you ought to set up that kind of straw man to—

PROFESSOR SEABURY: Well, this is one of the difficulties, because there have been cases. In a theology school up in New York, somebody said, "Why do you require all of those ancient languages? Why don't you do away with them and do something relevant? Then you might be able to get the right kinds of people for your program."

MS. GLASER: I understand that this was also one of the objections to the Berkeley plan and to other universities' efforts—that there is no list of job-related criteria; if you had that, you could then, very fairly, interview a very wide spectrum of people. You would not have, as Professor Fiss said earlier, this very vague approach. He described the selection of a faculty member as being extremely vague—how many books has he written, how many has he published, this kind of thing. As Bill says, you need a set of job-related criteria, and universities so far do not seem to have come up with that.

MR. RASPBERRY: Is, for instance, the likelihood of a person fitting in well with the existing faculty a reasonable criteria? If it is, you see what we do, immediately. "This one is likely to fit in with the rest of us, and that one less likely." You do some things right away.

PROFESSOR WINTER: Now, let us pass on to another question and talk more specifically about the constitutionality of preferential treatment. How does one determine which groups may be given preferential treatment on the basis of ethnic background, race, or sex, and how would we identify people as members of those particular groups —the constitutionally permissible ways, that is?

PROFESSOR FISS: Well, I think the question that you pose is a difficult one. I would think that preferential treatment would be permissible by a state university, for example, if the group occupies a certain social position which could, just for shorthand purposes, be described as perpetual subordination. If you had a group that, in many respects, had occupied the lowest social rung for an extraordinarily long time, as the blacks have, it would be permissible to afford them preferential treatment on the theory that it is permissible for a state agency or state university to try to elevate the position of that group. The pure case would be blacks—a group that has occupied a position of subordination for two centuries or more. Other groups could find themselves in roughly analogous positions, and I would say they are also entitled to the same kind of preferential treatment.

My point is this: Given the function of the equal protection clause, which I view to be one of protecting subordinated classes from hostile state action, it would be ironical to use that legal instrument to prevent a state from taking action that is corrective and tries to elevate such a class.

PROFESSOR WINTER: What other groups would you include?

PROFESSOR FISS: I would include Chicanos, certainly the American Indian—the list can go on; but I would certainly include the racial minorities. I think the most difficult issue would be posed by the women. I say "difficult" not because one couldn't make comparisons in terms of their social position in America. But part of the rationale for, say, a state university or a state agency giving

preferential treatment to blacks, and for the court tolerating it, would be, I think, their political position. And I suspect that women, constituting something greater than a minority—indeed, having a much stronger political position—might not be regarded in the same light as, say, blacks or Chicanos or some other racial minority. They are a harder category for me. But as to racial minorities, the groups concerned in the DeFunis case, I would certainly say the state is entitled to give them preferential treatment.

PROFESSOR SEABURY: Could I just interject a question here about the DeFunis situation, because I think it's a rather critical one in talking about federal or state power.

The DeFunis case is a very peculiar one if one relates it to the general category we've been talking about—affirmative action in employment. But it's different, also, in another sense, in that you had an instance of a university deciding voluntarily, on its own, that it was going to follow its own admissions policies, and set aside that category, and so forth. Now, if the DeFunis case had gone against the University of Washington, it's conceivable that the federal government could have come in, with its clout, and said, "You shall not establish quotas anymore, and we're going to see that you don't." Here, of course, then, the question separates between the issue of discrimination and the issue of the invasion by the state into the affairs of higher education. That's a very tricky kind of an issue.

PROFESSOR POSNER: Well, I don't think so. If the state of Washington said, "We are going to have a 10 percent Catholic quota and a 2 percent black quota," you wouldn't call it intrusion into the affairs of the university if the federal government or some other plaintiff charged that this was unconstitutional action by a state agency. That's what the equal protection clause forbids. Of course, it involves some intrusion into the affairs of public educational institutions.

PROFESSOR SEABURY: Well, I don't know, because you

have, for example, black colleges and universities in the South—

PROFESSOR POSNER: But the equal protection clause only constrains public bodies, like state universities. A private institution ought to be free under the Constitution to discriminate in favor of a group or against a group. That's outside the scope of the constitutional limitations.

PROFESSOR SEABURY: The distinction between "public" and "private" is beginning to break down, though, as can be seen in the use of federal contracts as the camel's nose under the tent. Then a private institution becomes—well—a ward of the state, in this respect.

PROFESSOR POSNER: I agree that there has been a tendency to interpret more and more private actions as state actions and thus susceptible to governmental control; I think that's a serious and regrettable trend. But once you've decided that a state university really is part of the government, you have to adopt the principle that the university is forbidden to discriminate, even though the enforcement of an antidiscrimination law will necessarily involve some interference in the self-governance of the institution. I can't see exempting state universities alone, of all public bodies, from the Constitution.

I have reservations about Professor Fiss's theory regarding racial minorities. As I read the background of the equal protection clause, it was designed to deal with racial discrimination and closely similar practices. Although the primary focus in the deliberations on the amendment was on the situation of the blacks, a question did arise about another unpopular group at the time: "What about the Chinese on the West Coast? Do we have to accord equal protection to them?" And the grudging agreement of the congressmen debating the proposed amendment was that you couldn't limit the equal protection clause to one racial group. So it seems to me that the clause protects anybody against racial discrimination. I don't think it's possible to limit the principle, as Professor Fiss suggests, to groups that have been historically oppressed or that we somehow

view as oppressed minorities. I think that's too slippery, too amorphous. There's too much judgment involved in deciding, "What about Armenians? Are they an oppressed minority? If they're not an oppressed minority, does it mean that the state university of Washington can decide not to accept any Armenians because it wants to promote some other group?" And if, in a particular area, some racial minority has an electoral majority, does that mean that it is free to discriminate against people who are members of a majority group in the larger society but in the minority in that area?

MR. RASPBERRY: I suspect the problem is less one of what is right to do—that is, a moral problem—than a legal one. The legal one is to frame a law aimed at dealing with blacks, for instance—and it's hard to conceive such a law being drafted—that is general enough to withstand constitutional challenge.

I think the distinction is generally made between what we've called affirmative action—that is, acknowledging discrimination against blacks and other minorities in this country—on the one hand and trying to draft a law that doesn't look like reverse discrimination on the other. I see that as a legal problem and not a "real," moral one.

PROFESSOR FISS: I think it's a real problem. Some of us would say that it's not only permissible to have an antidiscrimination law, but you can go beyond it, if you wish. And that's what's involved in DeFunis—going beyond an antidiscrimination law which just says be color-blind, and trying actively to give some preference to people because of the color of their skin.

MR. RASPBERRY: Well, that's what I mean when I distinguish between the "real" problem and the practical world one. I think that in the public mind—and certainly in my mind—there is a difference between what the University of Washington was trying to do in that case and a decision by another university that says, "For our own reasons, we're not going to admit any blacks whatever," or, "We're going to give preference to whites, to the

exclusion of blacks." I think the two principles, while they may be difficult to distinguish in law, are really quite different.

PROFESSOR FISS: I don't think those two principles are difficult to distinguish in law. I think Professor Posner's argument is essentially one of the slippery slope—my view of the equal protection clause will present difficult questions of judgment. I acknowledge that drawing the lines that I suggest is difficult, and there may be a risk that the license granted will be abused. But, Dick, the alternative is equally troublesome. Sometimes you take a risk; sometimes you engage in difficult judgments because you believe that the substantive principle or the substantive end that's at stake is worth it.

PROFESSOR WINTER: Well, I can think of one possibility that I want to play with a little bit. Suppose someone decides that groups B, C, and D are just not doing as well as group A—that A is always coming out on top, and dominates the professions, and the universities, and the like. There are really only two ways to help B, C, and D: one is to have a preferential program for them; the other is to limit the number of A. It seems to me that either would be permissible under the constitutional test that you suggest.

PROFESSOR FISS: Well, I think one moves in that direction. Certainly, by giving preferential admission to blacks, the University of Washington has reduced the number of openings that are available to A. But I find that statistical limitation less troublesome than specifically singling out A and saying, "We don't want your kind here." Now, maybe your hypothetical case is somewhere between the two, but I think that there is a distinction, and that it is constitutionally relevant.

PROFESSOR WINTER: Thank you, members of the panel. Although we have in no way exhausted the subject, we will now turn to questions from the audience.

LUCY SELLS, University of California at Berkeley: I am a graduate student, doing research in sex and ethnic differences in educational achievement.

First, in what way does affirmative action, as it is currently being practiced and operated, address the problem of early filtering out of women and minorities from the availability pool of qualified Ph.D. candidates; that is, what happens in high school, and undergraduate school, and graduate school that keeps women and minorities out of the Ph.D. pool of qualified applicants for recruitment? Second, given the declining job markets and no foreseeable increase in enrollments at institutions of higher education over the next five or ten years, how can we seriously talk about affirmative hiring when there are no slots for hiring?

PROFESSOR POSNER: That filtering really worries me. I hope you're not suggesting that we should go back into the grade schools and start defiltration activities, designed to increase the number of X in Ph.D. programs.

MS. SELLS: That's precisely what I'm saying.

PROFESSOR POSNER: That's what I thought. There must be a limit to our wish to press government intervention in private lives, in the name of affirmative action.

MS. SELLS: I'm not talking about government intervention in private lives. I'm talking about an educational process that raises people's awareness to what some refer to as institutionalized racism and sexism.

PROFESSOR POSNER: Is it the role of government to operate a propaganda ministry that will try to make people change their views on bringing up their girls, or whatever the issue is?

MS. SELLS: It's one of the most constructive things that government could be doing.

PROFESSOR POSNER: Well, I must say, I'm horrified at proposals for bringing government into the business of shaping people's opinions. It's unconstitutional anyway.

MR. RASPBERRY: One of the things that helps to shape the kind of earlier choices that Ms. Sells was talking about is the opportunity enjoyed by those who have gone through the training process and are finding it possible to move into the employment market and make reasonable progress there.

What I'm saying is that one of the advantages of the affirmative action program is that it says to despised minorities and discriminated-against minorities that, yes, it's worthwhile doing the hard work of training, beginning in grade school and continuing through high school and undergraduate school; that there is some payoff at the end. I think that, in itself, sends a message back down the line.

PROFESSOR FISS: I think the harder problem is not the intervention by government at the earlier stages and the removal of the obstacles that exist, but your second question—what affirmative action means in either a stable or contracting economy.

Most of the proponents of affirmative action in its toughest sense—that is, preferential treatment for minorities or for women—have always operated on the assumption that openings would exist at the entry level to allow this preference to come into play as you choose among a pool of twenty-five people. Or, you're in a department, and you want to get promoted to a supervisor's position which is now vacant.

The harder question is the one in which there is an incumbent in the position. I think it would be very difficult

to push the affirmative action concept to take care of that problem. It would be difficult politically; I think it would be difficult legally, given the legislative history of some of the operative laws. Some legislators spoke specifically to the problem of bumping. They said, whatever else you do with the antidiscrimination laws, you're not going to bump incumbent employees.

MR. RASPBERRY: If you've got twelve people and ten chairs, there's no way to work out a fair seating plan. That's essentially what it comes to.

PROFESSOR FISS: No, but Ms. Sells's problem is different. There are ten chairs, and ten people sitting in them, and the question is, now that there are five people here who do not have jobs, and two are black, do you get one of those ten people out of a chair to give it to one who's waiting? That's the tough question.

MR. RASPBERRY: Yes. I think it may be a tough theoretical question. It's so tough, as a matter of fact, that it becomes easy. It's simply politically unpalatable, and morally repugnant as well.

MS. GLASER: And it's not envisioned under affirmative action as we are defining it now.

PROFESSOR FISS: I appreciate what you're saying, but I suspect that in 1964 some people said the same thing about affirmative action in the sense that it's being used in now. Looking at it today, such bumping seems like an impossible option that will never come into being. But in 1984?

PROFESSOR SEABURY: That's a good year.

PROFESSOR WINTER: The difficulty is not, as Mr. Raspberry suggests, theoretical. In fact, in theory, there is no reason at all why affirmative action programs shouldn't call for kicking people out of jobs to put other people in. It's totally practical, it's totally political, and the political complexion can change very quickly—every day.

DAVID RUFFIN, Equal Opportunity Subcommittee of the House Education and Labor Committee: So far, we've been talking about affirmative action and equal employment opportunity in terms of giving minorities and women jobs.

But I think there's another question involved—that is, having minorities and women actually participate in the operation and direction of the government, social institutions, and the economy of the country. They perform in servile positions in our institutions, instead of being in managerial positions and policy-making positions. At this point, minorities are often servants and cannon fodder. I was wondering if you could address that problem.

MR. RASPBERRY: I mentioned at the beginning of the show that institutions tend to reproduce themselves. I think one of the goals of affirmative action programs is to change institutions almost on a one-time basis. There is a lot of argument about how to do this, but I think what one wants to do is to build an institution that one would be content to see reproduce itself over and over and over again.

Obviously, you can't do this simply by introducing affirmative action at the entry level only, unless you take great care to see that fairness, that affirmative action, in fact, permeates the institution. This kind of change in an institution need happen only once, really, because then that institution tends to continue to produce that kind of situation.

MS. GLASER: May I speak to that also? It is quite true that minorities and women have been boxed into the lower-paying jobs, generally, and we can see some upward movement. But unless we can continue it, unless we can open up—which means that some people are necessarily going to lose out, because we get a more competitive situation, with more women, more blacks, more other minorities—we are not going to have a change in the fabric of the leadership, of the leaders of thought and the political leaders of the country. I believe such a change is needed. Under some of the arrangements that I have heard dis-

cussed here, the blacks, minorities, and women would not have access, or would not even be considered, and so, therefore, their access would be quite limited—

PROFESSOR POSNER: Well, I certainly don't accept that characterization of what I've been saying. I'm not proposing to deny access to anybody.

MS. GLASER: Well, you say you're not, but—

PROFESSOR POSNER: I don't believe in denying access to people on racial grounds; quite the contrary.

MS. GLASER: What about sex grounds?

PROFESSOR POSNER: Or on grounds of sex.

MS. GLASER: I'm glad we have that clear.

PROFESSOR POSNER: Well, it seems to me it's a debasement of the debating process to suggest that if a person does not support affirmative action, therefore he supports discrimination. Can't you distinguish between them?

MS. GLASER: I certainly don't distinguish it from what you're saying. You do not support affirmative action. Can you make some better suggestion for eliminating discrimination?

PROFESSOR POSNER: There are many laws forbidding discrimination, in all areas of life—public accommodations, employment, many others. These laws are enforced by a variety of public and private means. So long as there is vigorous enforcement, I assume that these laws will be effective in eliminating discrimination.

MS. GLASER: But, Professor Posner, there is no "vigorous enforcement." The Civil Rights Commission, over and over again, has monitored the agencies of this government and has shown that, under many administrations, both

Republican and Democratic, they were not enforcing the laws designed to protect individuals.

PROFESSOR POSNER: I do not think that is true today.

MS. GLASER: I think that is true today. The Civil Rights Commission very recently made another report indicating that. To assume that, because we have a law, it will be vigorously enforced is being extremely naive.

PROFESSOR POSNER: But you were the one who mentioned the thousands of legal complaints against discrimination.

MS. GLASER: I said that there were thousands of complaints.

PROFESSOR POSNER: That implies enforcement activity. Many of those complaints take the form of federal court actions against universities, or unions, or what have you, and these actions—

MS. GLASER: These complaints have not all reached the stage of court action.

MR. RASPBERRY: May I suggest that the difficulty in the enforcement of antidiscrimination laws is, really, in any particular case, proving discrimination. That is to say, you've got twenty-five applicants for a job; four or five are black; six of them, women; the remainder, white males; and a white male is chosen. It is extremely difficult in every specific case to demonstrate that the hiring of that white male was a result of racial or sexual discrimination.

What is a little more accessible is a pattern over time. If, in every case where an institution has twenty-five applicants, including minorities and women, it continues to hire only white males, then one raises some questions. The pattern, over time, suggests that the problem is precisely the difference between enforcing antidiscrimination laws and working through an affirmative action kind of plan—

which is to say, if, over a long period of time, you keep hiring white males for whatever reasons, the weight falls on you to show that you are not discriminating against the remainder of that pool.

PROFESSOR WINTER: Mr. Raspberry, does that really follow? I mean, Mr. Seabury made a point in an article that, if one takes statistics in a pattern over time and looks at what groups are not hired, one would have to conclude that the University of California at Berkeley discriminates more against Republicans than it does against either blacks or women. Now, that follows as much from the statistics as does the conclusion of discrimination that you find.

MR. RASPBERRY: I think it does not. What I said is that if, over a time, the pattern persists, the burden should reasonably fall on the employer to demonstrate that he is not discriminating against those groups who are not selected. I'm not saying that the pattern proves discrimination against them. I'm saying it shifts the burden of proof, and it ought to shift the burden.

PROFESSOR SEABURY: Okay. Could I interject something from the world—the real world of Berkeley that I live in? [Laughter.]

PROFESSOR WINTER: Which is the unreal world for the rest of us.

PROFESSOR SEABURY: Berkeley is the mother of all things, as you know. It is possible, actually, to have procedures which demonstrate fairness. I say that because those procedures are in use at the University of California today. For example, our department is making one appointment this year of a young assistant professor. It will take two weeks of the time of the deputy of our department and one secretary to submit the proof on that one case to satisfy the Berkeley campus arrangements for affirmative action. In each personnel case, you have to prove in a document to the administration of the University of California not only that this fellow is very, very

qualified, but that his qualities are wholly better than those of the other people you have considered. I have no idea what the total cost in energy is to the University of California. But I would roughly estimate that this administration's affirmative action in a time of tremendous scarcity of resources is probably consuming about 15 percent of Berkeley's operating expenses.

Now, I think one ought to begin to be aware of the gigantic problem of cost when this whole thing becomes bureaucratized, when all personnel matters must be dealt with as scrupulously as that.

PROFESSOR FISS: But depending on how much you value eliminating discrimination, it might be worth the price. You can't make your case just by pointing to the fact that it's a costly process.

PROFESSOR WINTER: Could we end this discrimination against members of the audience, and return to them for questions? I have no doubt that we'll resume this argument.

ROBERT MALSON, Senate Judiciary Subcommittee on Constitutional Rights: Professor Posner stated earlier that the basic question, if I can paraphrase him, was, does a person's race or sex entitle him or her to a better job? A few minutes later Mr. Raspberry asked, if I may paraphrase him, is it a fair criterion for the Sociology Department of the University of California at Berkeley, for example, to decide whether or not a potential professor in that department will fit in? Professor Fiss said later that if we find in retrospect that a certain group has been discriminated against, then it might not be at all inappropriate to grant a member of that group preferential treatment. Professor Posner then said that it doesn't follow necessarily that one who is opposed to discrimination is necessarily in favor of affirmative action. I've gone around the circle and missed the two in the middle, but not by much, I think.

I would suggest to Professor Posner the opposite—that it does mean affirmative action is the answer. Reme-

dial action, as most of us who have had any experience in this field will tell you, is probably the worst solution to discrimination that could possibly exist. Professor Seabury talks about the costs involved, the time that it would take a secretary and a staff member of his department to present one case for one individual for remedial action following a charge of discrimination. It seems to me that unless we have an affirmative action program that is effective, we are not going to rid the country of discrimination, whether it be in employment or education or higher education.

I'm just not sure exactly whether the theme of this round table really makes sense. As I recall, it went something like, is affirmative action an answer to discrimination? Then we start talking about preferential treatment for minorities and women as an affirmative step, when it seems that what we really need to be talking about is, are we really serious about ending the preferential treatment of white males? Because, as I see it, if we are serious, the burden is upon all of us to determine whether or not white males occupy the position that they do because of their qualifications. If they do, then they should stay. If they don't, I see no problem whatsoever to making sure that the greater pool is adequately represented.

And if "Alice in Wonderland" were to be rewritten, I think the main chapter would be "Dancing the Line between Goals and Quotas." I don't think that makes any difference at all.

PROFESSOR POSNER: But there is an intermediate position. It is possible that some white people owe their jobs to discrimination and that many do not. Affirmative action requires institutions that themselves have not discriminated to attempt to attain a more racially mixed composition. And that's a very radical remedy.

You see the problem here is no different from the problem you have in any other area of law. How big a price, in terms of radical remedies, are you willing to pay for the most effective enforcement of law? If you are concerned about antitrust violations—price fixing and the like—you may debate the question whether we should break up all the large companies in the United States into

little companies to make it more difficult for them to engage in antitrust violations, which are costly to prosecute. It's the same issue here. As with enforcement of most laws, it is costly to prosecute discrimination cases and to prove discrimination. The question is whether discrimination is so prevalent and so intractable to conventional legal remedies that we should engage in fundamental surgery on our social, political, and economic system.

It is striking to me how often people like Miss Sells and one of the other questioners, who favor affirmative action, leap very quickly to remedies of extraordinary severity, such as a government information department to propagate views about child upbringing. These affirmative action programs are very radical responses to a problem which I think, first, significantly diminishing, and, second, amenable to the vigorous enforcement of the abundant conventional civil and criminal remedies that we now have, with large monetary rewards for the successful enforcers.

MS. GLASER: Well, Professor Posner, radical is in the eye of the beholder. I think that there are some people who regard it as rather radical, given the distribution of our population, that the leadership positions and the economic and political power of this country are concentrated in one group, the white males. To them, that situation is perhaps as radical as an affirmative action program is to you.

Most of these things respond, as you pointed out earlier, to political pressures. And we are going to see political pressures building up on these things unless we take affirmative action. And I think "affirmative action" is a very good descriptive phrase for what we are trying to do here.

PROFESSOR SEABURY: I would like to inject a couple of points here, because in any matter of social policy there are side effects and there are costs, so that one is really juggling values against each other. Thus, a total focus upon one often leads to very costly results, sometimes results that are quite unexpected.

If one shifts the issue here from the universities to, say, a baseball team, it seems to me that the team manager

has a very high incentive to hire the best baseball players he can get. The test here is winning, and it is very easy to see who wins, because at the end, somebody wins in the World Series. You know, that's harder to do when you are choosing between people from Harvard and people from Berkeley, but still, one of the basic things that we are concerned about is excellent education, and that means really hunting for the best people for the best jobs.

One may say that that principle ought not to apply in the universities and colleges of lesser stature, although I think that's a very patronizing view to take of the matter. The question of excellence should apply in all sectors and it should be answered on the basis of the innate qualifications of the people being considered in exactly the same way that a baseball team operates.

MR. RASPBERRY: The difficulty with that is that it presupposes that it's possible to rate a dozen applicants for a single job as one rates the batting averages from .347 down to .314. As a matter of fact, it is simply not possible in every instance to rate applicants for most jobs in that manner.

Athletic teams are a very, very special case. One runs the 100-yard dash in a fixed and measurable time, one competes against others in very accurately measurable kinds of ways. But the twelve applicants for a job as professor of English, for instance, may include a couple of really excellent prospects; in which case the other ten go by the boards, and you are choosing between those two. They may include a couple of idiots, in which case you are talking about the remaining ten, because the idiots go by the board. But if that pool of a dozen people happens to include neither truly excellent prospects nor idiots, you are talking about twelve people who fit the criteria that you have set up, who meet your qualifications; and there are lots of ways then to choose among them.

PROFESSOR WINTER: Would you let HEW say that they have to pick the 5 percent superstars and there has to be a lottery for all the rest of the hierarchy?

MR. RASPBERRY: What I am saying is simply that once you understand that in nearly every real-world case we are talking about choosing among qualified people, there are a lot of things that can be brought into play. A lottery is one reasonable way of doing it. Another is to use that opportunity to do some other things that you might consider right for the society to do—correct racial imbalance, for instance.

PROFESSOR POSNER: I think you are wrong in suggesting that people are so interchangeable. Incidentally, I think you are wrong about baseball.

PROFESSOR WINTER: You are absolutely wrong about baseball. It's highly discriminatory.

PROFESSOR POSNER: You cannot express a baseball player's skills arithmetically, because there are many factors in addition to one particular index, like the batting average or slugging average or fielding average, which go to make a successful baseball player. And I think it's true in virtually all human activities.

Our problem is in the universities. We don't know that much about building a house or running a factory, so we assume the people who do that are interchangeable cogs. But I think the truth is that in most activities you don't have an easily differentiable genius category, plus idiots, and then the fungible intermediates. You have a large range of skills, and what you try to do is get the very best people.

Your reference to competition is an important one, because one of the reasons that bigotry has diminished in this country is that competition between firms, or between academic departments, puts a premium on hiring the most able person and penalizes the institution which indulges its racial or religious preferences. And that is one reason why we shouldn't think that, without massive government action, we are condemned to a constant level of serious discrimination. Competition erodes it, just the way it eroded the color bar in baseball: the teams could not

afford to exclude qualified people. The same is true of an English department, which would be foolish to pass up a qualified minority person who would give it a competitive edge over other English departments.

Someone in the audience and some members of the panel have the notion that this country is pervaded, permeated by bigotry, as if the most important thing about the United States was that there was discrimination.

MR. RASPBERRY: Do you consider it unfortunate that there was massive government intervention in precisely this area—let's date it back to 1964, the 1964 Civil Rights Act, and the civil rights acts following that? Do you consider that the government intervention—which unquestionably accelerated the process that you say is going apace now—was unfortunate?

PROFESSOR POSNER: No, I think many of the civil rights acts were very much in the right direction—

MR. RASPBERRY: But we don't need any more?

PROFESSOR POSNER: —and especially the Voting Rights Act. I do not think that once you embark on a program of government regulation, you are somehow committed to follow that path, regardless of cost and regardless of the likely benefits from continuing it.

The fact of the matter is that there has been an enormous diminution in discrimination in this country, a diminution registered in the very sharp economic gains of minority groups in the last fifteen years. And it seems to me that there is momentum in that process, and that the need for government action, especially the disruptive restructuring of institutions to bring about racial and sexual balance, has reached the point of diminishing returns.

PROFESSOR FISS: But I think the question that was put to you, Dick, which you really haven't responded to, is this: If you believe that the competitive process is the one to correct the position of the minorities, why have a fair employment law at all?

PROFESSOR POSNER: The competitive process works very slowly.

MS. GLASER: And also you must remember that many people do not get an even start in that competitive process. A number of groups will start from way behind.

PROFESSOR POSNER: No one starts even. I mean, you are born with some intellectual, health, characterological, appearance, and coordination endowment, which obviously influences how you are going to do in society.

MS. GLASER: Do you think the blacks started even in the competitive process that you want to rely on?

PROFESSOR POSNER: Today I think they do start even.

PROFESSOR WINTER: Mrs. Glaser, let me ask you something. There really is an enormous amount of evidence about what has gone on in the universities. I'll read you one example, a letter which was received by a person who was a candidate for a faculty position:

"I'm sorry to report that although our department saw you as top candidate, we will not be able to make you an offer for our new position.

"Our university is an affirmative action employer and the department must attempt to fill the new position with an individual from a recognized oppressed minority group. Although the department initially viewed your ancestry as satisfying the requirements of affirmative action, consultation with our institutional advisors on the affirmative action program indicated to us that your ancestry does not qualify you as an oppressed minority.

"I wish you the best of luck in your future."

Now, is that fair?

MS. GLASER: I think it's a ridiculous question.

MR. RASPBERRY: That's plain stupid. And I think that it's unfortunate that that gets introduced into a serious discussion of affirmative action.

PROFESSOR WINTER: But that's what's going on.

MR. RASPBERRY: Then that's not only stupid, it's quite illegal, and plainly so.

MS. GLASER: It is plainly illegal. Nobody in the government is forcing universities or any other units to hire unqualified people. If they do that is illegal, and I can only wonder why they are doing these illegal things.

PROFESSOR SEABURY: If I could raise a factual question which is rather intriguing. I wish we had an HEW person here who could answer it. There have been many, many cases like that described here. I would like to know whether HEW has made any effort to investigate specific cases of that sort. I have heard not a word of this. It seems to me that if HEW is going to do a balanced job on the question of discrimination, it's about time they began to think about doing something about the Pandora's box that they have opened.

MR. RASPBERRY: I have heard that one letter so many times that, really, I find it offensive to hear it again.

PROFESSOR WINTER: Well, there are other letters. But, anyway, I think we should leave this with Mr. Seabury's attack on someone who is not here. [Laughter.]

Thank you members of the panel, and thank you very much, ladies and gentlemen, for joining us this evening.

Affirmative Action: The Answer to Discrimination? brings together lawyers, academicians and journalists to discuss the legal and moral consequences of a controversial federal program for combatting discrimination. The debate centers around these broad questions: How far should the government intrude into the private sector in dictating goals to eliminate discrimination? Should performance capabilities be the sole criterion in hiring? Do affirmative action programs entail preferential treatment? If so, is preferential treatment constitutional? Is there a distinction between goals and quotas? Has the Department of Health, Education and Welfare been successful in its enforcement of affirmative action guidelines?

The panel, moderated by Ralph K. Winter, Jr., of the Yale Law School, includes Owen Fiss, also professor of law at the Yale Law School; Richard Posner, professor of law at the University of Chicago Law School; Vera Glaser, syndicated columnist for Knight Newspapers and WTOP radio commentator; William Raspberry, columnist for the *Washington Post;* and Paul Seabury, professor of political science at the University of California at Berkeley.

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