

On Quotas and Affirmative Action

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More than a quarter century ago my oldest brother and I, in common with quite a few other American Jews, encountered the not-so-subtle but hard-to-pin-down workings of the quota system in American higher education. The results: he went to Scotland to study medicine, was caught in New York on vacation when war broke out in 1939, and never did become a doctor (but is nevertheless flourishing today in Roslyn, New York and at NBC, New York). I went to Brooklyn College and Brooklyn Law School, was recruited under the ethnic outreach program of a Wall Street law firm, in due course became Richard Nixon's law partner, then his campaign associate and more recently his Special Consultant, dealing among other things with matters like quota systems and affirmative action programs. My views on these subjects are therefore sharpened by irony as well as enhanced by experience.

In commenting on these matters in this article, I will not discuss the ability of the Federal courts to order a range of specific remedies, including numerical standards, when they make actual findings of past discrimination. I refer here only to the requirement outlined in Presidential Executive Order 11246 that "affirmative action" to ensure

non-discrimination in the hiring of minorities and women must be a condition for the awarding of Federal contracts. This latter requirement has become a source of some confusion in the recent past and some clarifications are in order.

For too many people, the clearest difference between quotas and affirmative action programs is that quotas are regarded as bad and affirmative action programs as good. Meanwhile, the real, practical distinctions between the two approaches have frequently been blurred or ignored. Yet, unless those distinctions are clearly understood and rigorously observed the whole concept of affirmative action could be in serious trouble.

A point to emphasize is that hiring quotas are rarely, if ever, labelled as such. They are identifiable, however, by certain characteristics.

On paper, a quota is an absolute hiring requirement involving a fixed percentage or a precise number which must be achieved if sanctions are to be avoided. An affirmative action program, on the other hand, requires a good faith effort to increase the number and quality of job opportunities for disadvantaged persons. Numerical goals and timetables set forth as estimates of what would appear to be realistically and reasonably attainable, are used to guide these good faith efforts. It is this practice which creates a certain superficial similarity between the affirmative action approach and that of the quota system.

But there are important distinctions. The crucial consideration under the quota system is whether the mandatory numbers of disadvantaged persons have been hired. If the employer fails, he is sanctioned, no matter what the reason for his falling short. The fact that the quotas may have been unrealistic to start with, or that other uncontrollable factors may have made them unachievable, is not taken into account. The employer's good faith effort to achieve the quotas is no defense for failure.

Under the affirmative action approach, however, the critical legal question is not whether the numbers have been achieved but whether there has been a good faith effort to achieve them. If there has, and the effort still falls short, then the response is not to apply sanctions but rather to continue the affirmative action effort, using the experience gained in the first round of hiring to build a better record during the second round.

A second major distinction between the two approaches concerns the way in which the numbers are arrived at in the first place. A quota system would generally assume that members of a disadvantaged group should make up the same fraction of a particular work force as of the surrounding community -- regardless of the qualification or job preferences of potential workers. But under the affirmative action concept, the size of the disadvantaged group in the general population is only one of the

many factors taken into account. Other criteria involving the skills and training of potential employees also receive major emphasis.

A third distinction is that affirmative action goals are usually arrived at through collaboration between government and private parties, while quotas are imposed arbitrarily upon the employer. The practical effect is that affirmative action programs often produce genuine progress toward racial understanding while quotas are the source of conflict and hostility both among workers and employers.

In sum, affirmative action plans are a process designed to work toward the elimination of discrimination by breaking down barriers of habit, attitude and training which prevent the recognition of individual merit. Quota systems, on the other hand, can actually compound discrimination by establishing arbitrary numbers that take no account of individual merit. Under the quota system, the individual qualities of particular employees virtually disappear; what counts are those attributes which the employee happens to share with some larger group -- even though these attributes are unrelated to the work in question.

Making all these distinctions work in practice is bound to be delicate and a difficult task. Dissatisfaction with particular programs by one side or the other is inevitable. This is the case with most of the important questions of public administration in our complex society. Determining

just what constitutes good faith, for example, can be a subtle process involving highly subjective considerations and difficult questions of fact. But each day administrative officials must make thousands of controversial judgments concerning other highly discretionary areas of social policy.

The only answer, in all such cases, lies in the persistent application of energy and intelligence, of goodwill and common sense. Reinhold Niebuhr once described the democratic process as the constant seeking after "proximate solutions to insoluble problems." The concurrent pursuit of equity and excellence through the sensitive administration of affirmative action programs is, I believe, a perfect example of what Niebuhr was talking about.

In the absence of such sensitive administration, affirmative action plans can quickly be transformed into de facto quota systems. It is easy and tempting for those who enforce such plans to substitute arbitrary quantitative measurements for more complex criteria in measuring compliance, to give undue weight to proportional representation in working out goals and timetables, and to allow the goal of advancement for every person on the basis of individual merit to yield to the effort to vindicate group rights.

When these things happen, the reaction is inevitable: resentment and resistance builds against the whole idea of affirmative action.

It is seen as a sham, a semantic trick for disguising what turns out to be a quota system after all. And out goes the proverbial baby with the bath water.

President Nixon recently reaffirmed his support for affirmative action programs and his opposition to quotas. The apparent deterioration of the distinctions discussed above, particularly in the administration of higher education programs, prompted his instruction to federal officials to re-examine their procedures and to take whatever remedial actions are necessary. This is now being done.

This effort is not a retreat from strong affirmative action programs. There is no truth to the rumors which predict such a retreat. There is, however, every reason to work to protect true affirmative action programs by preventing their fatal transformation into de facto quota systems. For if that happens, the crucially important struggle for equal opportunity will inevitably be set back.

An article by Daniel Bell in The Public Interest reviews the debate, from Rousseau to Rawls, over equality versus merit. I subscribe to Bell's general conclusion: "One can acknowledge the priority of the disadvantaged (with all its difficulty of definition) as an axiom of social policy, without diminishing the opportunity for the best to rise to the top through work and effort. The principles of merit, achievement and universalism

are the necessary foundation for a productive-and cultivated-society.
What is important is that the society, to the fullest extent possible, be
a genuinely open one."

Printed in
Philadelphia Inquirer
October 6, 1972