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Equality

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BOOK REVIEWS

EQUALITY. New York: Random House, 1965. Pp. xxv, 191. $4.95.

"Equality" is a collection of five essays dealing with the controversial concept of "affirmative action" as a solution to the problems of racial discrimination. The proponents of "affirmative action" reject the thesis that the United States Constitution is "color blind," and instead urge the federal and state governments to enact laws which deliberately take race into account to combat racial discrimination. The "Equality" contributors,[1] five lawyers who have been professionally and organizationally involved in the problem of racial discrimination, have neither hostility nor doubt about the propriety and necessity of "affirmative action." They recognize that the standard of color-blindness will hardly begin to satisfy the irrepressible demands for racial equality.[2]

There is no compartmentalization of subject matter among the contributors. It appears that each was given carte blanche to write an essay on the problem and to define, describe, analyze and offer remedies as he or she saw fit. Thus the three principal sectors—employment, housing, and education—all receive attention. Included among the essays are historical summaries, economic analyses, statistical delineations, sociological insights, and some illuminating case-history illustrations. Legal problems are considered and discussed to various extents, but the approach seems deliberately aimed at the informed, or eager to be informed, non-lawyer.

At some point each of the essayists considers the congeries of problems embraced in the concepts of racial preferences, compensatory treatment, and quotas, and indeed it is the continuing debate over these "explosive issues"[3] which inspired the book. The authors as a group espouse these concepts and most of their implementations.[4] But sensitive to the prevailing public concern

1. Charles Abrams, Loren Miller, Dorothy Kenyon, Robert L. Carter and Peter Marcuse.

2. Starting in 1954 with the landmark decision of Brown v. Board of Educ., 347 U.S. 483 (1954), the Supreme Court has consistently held that state laws requiring racial segregation in the use of public facilities are unconstitutional violations of the equal protection clause of the fourteenth amendment. See, *e.g.*, Gayle v. Browder, 352 U.S. 903 (1956); Turner v. Memphis, 369 U.S. 350 (1962); Johnson v. Virginia, 373 U.S. 61 (1963); Schior v. Byrum, 375 U.S. 395 (1964). See generally, 2 Emerson & Haber, Political and Civil Rights in the United States, ch.VII (2d ed. 1958). The significance of these decisions is the Court's deliberate abandonment of the notion of "separate but equal," as imposed in Plessy v. Ferguson, 163 U.S. 537 (1896), as constituting compliance with the equal protection clause. Although *Brown* marked the end of the era when racial discrimination might be overtly imposed and required by law, the fact that it did not end racial inequality in the United States, much less produce a paradise in race relations, is amply demonstrated by the events of the last several years. See Farmer, Freedom, When? (1966); Warren, Who Speaks for The Negro? (1965); Hentoff, The New Equality (1964); Silberman, Crisis In Black and White (1964); Zinn, SNCC–The New Abolitionists (1964); Redding, On Being Negro in America (1951); Karpatkin, Book Review, 202 The Nation 134 (1966). It is increasingly recognized that the elimination of prohibitions has not and will not end racial discrimination in education, housing, and employment. "Affirmative action" is the solution urged by the "Equality" contributors.

3. Book jacket.

4. For a well-reasoned presentation of the case against preferences and quotas, see Pfeffer, *The Case for and Against Quotas, Compensation and Unlawful Demonstrations*, 2 CLSA Law Commentary 3 (1964).

over the unorthodoxy of these ideas and practices, they approach the issue very cautiously. Good lawyers all, they take particular pains not to introduce unfamiliar or unpopular material, without first laying a proper and elaborate foundation.[5]

The first essay is written by Charles Abrams, former Chairman of the New York State Commission Against Discrimination, and an internationally distinguished authority on public housing. Although billed as a "foreword" to the chapters contributed by the other four, in fact, it stands on its own as a substantive contribution to the discussion.

Mr. Abrams provides a good introduction to the problems under review, by discussing two cases which have precipitated discussion of so-called benign quotas:[6] *Progress Dev. Corp. v. Mitchell*,[7] and the case history involving the New York City Housing Authority's "phase" programs.[8] *Progress* reflects the successful effort by the Village of Deerfield, Illinois, a Chicago suburb, to frustrate the attempted development of a racially integrated middle-income community. The developer, Progress Development Corporation, proposed to sell approximately twenty percent of the houses to Negroes, and to control the racial balance of that proportion via resale agreements. When the municipal authorities immediately took action to condemn the property, for transparently racist reasons, Progress sued for an injunction in federal court. The court found that plaintiff had failed to prove any bias or discrimination in the hasty condemnation and ruled for the defendants. At the same time it held that plaintiff did not have "clean hands" inasmuch as its intended plan would be unenforcible under the fourteenth amendment. The court claimed to follow *Shelley v. Kraemer*,[9] which held racial restrictive covenants invalid. Throughout the *Progress*

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5. The most extreme illustration of careful laying of a foundation is in Dorothy Kenyon's contribution. Judge Kenyon does not expressly articulate her position until the next to last page of her 54-page essay. P. 92.

6. The adjective "benign" is an unfortunate choice with which to characterize a quota device calculated to promote the desirable social objective of racial integration. The word suggests to this writer an analogy with the layman's notion of medical pathology, the distinction between "benign" and "malignant" tumors. But who wants a tumor? No tumor is *desirable*, even one which is "benign." It is at best something foreign to and inconsistent with the body organism, but not likely to do any harm, and not likely to spread. Moreover, the medical semantics are outdated. The present teaching is that there is no hard and fast line between benign and malignant growths. See 5 Lawyers' Medical Cyclopedia § 38.15 (1960): "It must be borne in mind that some tumors pathologically classified as benign may nevertheless pose a serious threat to health or be fatal." *Id.* at 495. *Cf.* Bollo, Introduction to Medicine and Medical Terminology (1961). "[S]ome may begin as benign but later become malignant." *Id.* at 181.

If one must have a medical analogy, I would rather suggest the notion of an anti-toxin, the introducing into the body of a drug containing the potentiality of a small amount of harm, for the purpose of serving a greater good.

7. 182 F. Supp. 681 (N.D. Ill. 1960), *modified*, 286 F.2d 222 (7th Cir. 1961), *complaint dismissed*, 219 F. Supp. 156 (N.D. Ill. 1963). See Note, *Benign Quotas: A Plan for Integrated Private Housing*, 70 Yale L.J. 126 (1960).

8. N.Y. State Comm'n Against Discrimination, Report on Informal Investigation of Tenant Selection Practices and Policies of New York City Housing Authority, Investig. No. 981-60 (1962).

9. 334 U.S. 1 (1948).

opinion, the developer's motive was criticized[10] and the defendants' motives were held irrelevant.[11]

Mr. Abrams takes solace from language in the opinion which he interprets as suggesting that benign quota systems would be permissible if enacted by a public agency, but not by a private developer.[12] He is, however, much too generous about its implications. As I read the case, the court was overtly hostile to the plaintiff's integrationist motive and unblushingly sympathetic to the apparent motives of the defendant.[13]

The second case cited by Mr. Abrams, that involving the New York City Housing Authority's phase program, is in itself evidence that those hostile to racial integration do not make the fine distinction which Abrams hopefully extracts from the *Progress* case. In an effort to cope with the tendency of low-income housing projects in New York City to become all-Negro and Puerto Rican occupied, the Authority quietly set up a complicated "phase program," the essential thrust of which was to control the racial balance in the projects. It involved simultaneous efforts to give preference to white applicants in projects which were becoming increasingly Negro and/or Puerto Rican occupied, and to give preference to Negro and Puerto Rican applicants in projects which were largely white occupied.[14]

The New York State Commission on Human Rights (then the New York State Commission Against Discrimination) unhesitatingly assumed jurisdiction, although no formal complaint had been made, and condemned the practice as a violation of the New York State anti-discrimination law.[15] The opinion of Commissioner Katzen is replete with turgid reiterations of the obvious, but does not meet the crucial question as aptly stated by Mr. Abrams: "If the Housing Authority was trying in good faith to prevent segregation, was it intending to violate the law's true purpose or seeking in fact to observe it?"[16]

The Authority was not able to withstand the attack and retreated. A walk through any one of a number of low-income projects will demonstrate that the problem it sought to cope with is as ubiquitous as ever,[17] and has serious ramifications in terms of school segregation. Thus, notwithstanding Mr. Abrams' op-

10. Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, at 709: "[W]hen all is said, [plaintiff] has as its object the motive of profit not only for its stockholders but also for its promoters."

11. *Id.* at 712: "This court cannot consider the motives of the Commissioners of the Deerfield Park District in instituting condemnation proceedings against the premises . . . ."

12. P. xx.

13. See, *e.g.*, Progress Dev. Corp. v. Mitchell, 182 F. Supp. 681, at 706: "Most of these people have all their life savings invested in their homes and the prospect of losing that security was a greater factor than the thought of Negro neighbors." Also, *id.* at 707: "While all this was happening, defendant[s] . . . took stock and concluded that it was an ill wind which blew no one any good . . . [T]hey believed it was an opportune time to call another referendum . . ." (to obtain park land, an earlier referendum having been defeated).

14. Pp. xv-xviii.

15. See *supra* note 8.

16. P. xviii.

17. This writer's personal knowledge is limited to New York City. But I doubt if the situation is substantially different in other large cities with growing non-white populations.

timism to the contrary, the same "a-quota-is-a-quota" thinking which led to the defeat of a plan for private integrated housing in Deerfield, led to the defeat of a measure seeking to protect public integrated housing in New York.

In all of the articulated opposition to racial quotas as a device to promote racial integration, at least two groups are discernible. The first is that of the city fathers of Deerfield and their supporters and apologists in low and high places, whose sincerity about opposition to racial discrimination may very much be open to question. The second group, however, consists of persons and organizations whose sincerity has been established by decades of committed struggle for racial equality. This group consists of those for whom quotas and quota systems were the personification of anti-minority bias.[18] Mr. Abrams recalls that until the present discussion, quotas suggested, by and large, two phenomena in American life: the national origins quota system of our xenophobic immigration laws, and the deliberate quota restriction of Jewish students in medical schools. To these veterans of the anti-discrimination struggles of many years, to these diligent advocates of anti-discrimination laws, quotas are anathema. Abrams gives their arguments due and respectful treatment, hints that his own view is however different, and then at the point of advocacy, he seems to withdraw, as if his own views are not yet firm.

Drawing on his many years of close study of public housing, he outlines a program of affirmative proposals, all requiring federal action, which would if implemented, do a great deal to promote integrated communities. These include nominal interest loans for home ownership; extension of anti-discrimination measures to savings and loan associations; increased income limits in public housing; exertion of creative pressures against persistently exclusionary suburbs (Deerfield?); rent subsidies; urban renewal on open land rather than by levelling Negro areas and thereby further concentrating racial ghettos.[19] His conclusion, perhaps unnecessarily meek, is that until the gross deficiencies are corrected by such measures, both public and private experimenters with quota devices "merit a better understanding of their problems instead of a blanket condemnation."[20]

Judge Loren Miller writes with the distinguished credentials of having been successful counsel in *Shelley v. Kraemer*.[21] *Shelley* is the case which directly held that the processes of the law will not be available to enforce a racially restrictive covenant, and by implication, that the law cannot be an instrument of enforcement of *any* racial discrimination.[22] However, *Shelley* did not produce inter-

18. See Pfeffer, *supra* note 6, at 7-9.
19. P. xxiv.
20. P. xxv.
21. 334 U.S. 1 (1948). With characteristic modesty he does not even cite this epochal decision. Loren Miller's impact on the contemporary scene is not only as advocate and Judge of the Municipal Court of Los Angeles. He wrote a seminal article, *Farewell to the Liberals*, 195 The Nation 235 (1962), which brilliantly foreshadowed the present "black power" debate.
22. See *supra* note 2.

racial residential communities any more effectively than *Brown* resulted in integrated schools.

Judge Miller begins his essay by comparing Whitney Young's massive "Marshall Plan" approach, an intense multi-billion dollar special effort to narrow the economic, social and educational gap between Negro and white Americans, with Thaddeus Stevens' proposal to compensate former slaves by an award of forty acres of land.[23] A variation of Stevens' plan was enacted in early post-Civil War legislation, but it did not survive the collapse of Reconstruction. Judge Miller then gives the reader a short course in the history of the Negro in the United States[24] up through the present Negro revolution with its slogan of "Freedom Now."

His approach to the problems of quotas and preferences is shaped by the history which he recites. Notwithstanding all of the legal victories and all of the "progress" which has undeniably been made, "the back wheels never catch up with the front wheels on the buggy."[25] "Freedom Now" describes the revolution "against the arrangement of American life that disadvantaged the Negro from the cradle to the grave."[26] "Freedom Now," as Miller sees it, means that the Negro is no longer satisfied with "progress" in race relations. He wants "an even start with all other Americans—now, today, under his own leadership and direction and on his own terms."[27]

Since there can be no equal start unless the cradle-to-grave disadvantages are overcome, the necessity of some form of compensation is a logical imperative, and hardly receives any justification beyond historical account. Therefore Miller vigorously advocates, at least in government employment and perhaps generally, an "announced policy of preference for Negroes who do qualify for promotion" and the "rigid and ruthless pursuit of such a policy."[28]

However, after vociferous advocacy of the propriety and necessity of preferences, Miller becomes much more circumspect as he approaches the legal ramifications. He notes that the original intent of the fourteenth amendment was corrective—"a command to the States to take affirmative action to confer equality on Negroes."[29] He then itemizes various established precedents of singling out certain groups for preferred treatment, all without any constitutional impediments; *e.g.*, trade unionists who have been the victims of discrimination, handicapped persons, women, children, and veterans.[30] Nevertheless he concludes by suggesting "a way out of the constitutional impasse" via massive assistance of

23. Pp. 4-6.
24. He has since published a complete historical narrative. Miller, The Petitioners: The Story of the Supreme Court of the United States and the Negro (1966).
25. P. 20.
26. P. 18.
27. P. 19.
28. P. 27.
29. P. 31.
30. Pp. 32, 29.

depressed areas—the poverty program—as a vehicle for reaching the Negro population[31] without the use of an explicit policy of preferences.

Thus, Loren Miller suggests an ostensibly color-blind method to reach an avowedly color-conscious goal in order to avoid a constitutional "impasse." Regrettably, Miller has never clearly defined this "impasse." Moreover, such constitutional discussion as he does present suggests that the impasse "is more apparent than real."[32]

Dorothy Kenyon's section headings ("What We Face Today," "What We Are After," "Habits and Customs," "The Supreme Court and Public Attitudes" and "Words, Words") are suggestive of the leisurely, discursive piece which she has contributed. Out of her vast experiences[33] as a civil rights and civil liberties advocate, she presents what is in effect an orientation lecture, intended for the intelligent, well-disposed, but perhaps not-too-well informed layman. She does not resist the temptation to offer asides, or to occasionally meander off on a tangent, but everything she writes is interesting.

She has no doubts about the central policy questions which plague her colleagues. For her, the issue is simply "How to Compensate for Years of Discrimination Without Counter-Discrimination."[34] Therefore while she supports "compensatory" treatment, she opposes "preferential" treatment because

> if it involves choosing between a white or a Negro man, equally qualified . . . then it is definitely discriminatory, will operate as unfairly against the white man as it has in the past against the Negro, and should not be permitted.[35]

She goes on to propose a number of indirect methods which will, presumably, "compensate" without being preferential. As the first of these she commends President Johnson's proposal for the appointment of fifty women to high policy-making posts in government, and suggests that the same conscious selection process be applied in the recruitment of Negroes.[36] If the reader looks for the rationale which makes such a conscious selection of women or Negroes "compensatory" (and therefore permissible) rather than "preferential" (and therefore discriminatory) it will not be found. Judge Kenyon cannot hide her delight at this proposal and observes "if this were discriminatory, as I have no doubt it was, nobody batted an eyelash."[37]

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31. Pp. 33-39.
32. P. 31.
33. Dorothy Kenyon has been a member of the New York Bar since 1917. She was appointed to the New York City Municipal Court by Mayor Fiorello La Guardia in 1939, but not reappointed by his successor. She has been a member of the Board of Directors of the American Civil Liberties Union since 1931, and is currently Chairman of its Equality Committee.

An early unfriendly witness before the McCarthy subcommittee, she has told friends that she intends to bequeath to her alma mater, Smith College, a huge collection of mail, obscene and otherwise, which she received following her appearance.

34. P. 76.
35. Pp. 83-84.
36. P. 84.
37. *Ibid.*

Concluding her essay, Judge Kenyon offers an interpretation of the equal protection clause which is of considerable more utility than efforts to distinguish between "compensatory" and "preferential." The fourteenth amendment, she writes, allows "differential treatment" under certain circumstances:

> permitting it where the differences between authentic groups are such as to make the results of differential treatment reasonably likely to produce more genuine equality than the mathematical type of identical treatment.[38]

No one has been more intimately involved with the legal struggle for racial equality than Robert L. Carter, the eminent General Counsel of the National Association for the Advancement of Colored People.[39] He was the NAACP counsel for Oliver Brown, in the trial and appellate courts, culminating in the first of the five school desegregation cases which were heard and decided together as *Brown v. Board of Education*.[40] While his legal efforts in confronting various types of racial discrimination in the Southern milieu have been spectacularly successful,[41] his more recent concentration on the Northern school scene has met with considerable frustration.[42] This frustration stems from the enormously greater difficulty in establishing and implementing the constitutional and legal principles necessary to overcome racial discrimination not openly ordained by statute.

Where some of the other essayists paused, hinted or detoured around the question, Mr. Carter proceeds to present a reasoned constitutional case for

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38. P. 92.

39. The Legal Department of the NAACP, which Mr. Carter heads, is not to be confused with the NAACP Legal Defense and Educational Fund, Inc. The Fund is an independent legal defense organization which is not organizationally related to the Association. During its early years the two were closely associated in the public mind because of the prominence of Mr. Thurgood Marshall (formerly U.S. Circuit Judge and now Solicitor General of the U.S.) who was Director-Counsel of the Fund and Special Counsel to the Association.

40. 347 U.S. 483 (1954). Mr. Marshall was counsel in the accompanying South Carolina case; Mr. Spottswood W. Robinson, III (now U.S. Dist. Judge for the Dist. of Columbia) in the Virginia case; Messrs. George E. C. Hayes and James C. Nabritt, Jr., (now President of Howard University, and until recently, on leave as Ambassador to the United Nations) in the District of Columbia case; and Messrs. Louis L. Redding and Jack Greenberg (currently Director of the Fund) in the Delaware case. This reviewer cannot resist this name-dropping because he was, during the preparation of the *Brown* briefs, employed as a legal assistant by Messrs. Marshall and Carter. For the special efforts involved in these cases, the services of these and a large number of other lawyers were combined under the overall leadership of Mr. Marshall, and coordination of Mr. Carter.

41. See, *e.g.*, NAACP v. Button, 371 U.S. 415 (1963); Gibson v. Florida Legis. Investig. Comm., 372 U.S. 539 (1963); Gomillion v. Lightfoot, 364 U.S. 339 (1960); NAACP v. Alabama, 357 U.S. 449 (1958).

42. *Compare* Blocker v. Board of Educ., 225 F. Supp. 208 (E.D.N.Y. 1964), *and* Balaban v. Rubin, 40 Misc. 2d 249, 242 N.Y.S.2d 973 (Sup. Ct. 1963), *rev'd*, 20 A.D.2d 438, 248 N.Y.S.2d 574 (2d Dep't), *aff'd*, 14 N.Y.2d 193, 199 N.E.2d 375, 250 N.Y.S.2d 281, *cert. denied*, 379 U.S. 881 (1964), *and* Vetere v. Allen, 41 Misc. 2d 200, 245 N.Y.S.2d 682 (Sup. Ct. 1963), *modified*, 21 A.D.2d 561, 251 N.Y.S.2d 480 (3d Dep't 1964), *aff'd*, 15 N.Y.2d 259, 206 N.E.2d 174, 258 N.Y.S.2d 77, *cert. denied*, 382 U.S. 825 (1965), *with* Bell v. School City, 213 F. Supp. 819 (N.D. Ind.), *aff'd*, 324 F.2d 209 (7th Cir. 1963), *cert. denied*, 377 U.S. 924 (1964), *and* Barksdale v. School Comm., 237 F. Supp. 543 (D. Mass.), *rev'd*, 348 F.2d 261 (1st Cir. 1965). See Carter, *De Facto School Segregation: An Examination of the Legal and Constitutional Questions Presented*, 16 W. Res. L. Rev. 502 (1965).

preferences, quotas, and any other rational expression of affirmative action.[43] Citing material which is obviously drawn from some of his own cases, he attacks the frequent hypocrisy of the cry of color blindness by demonstrating that school site selection is often unavoidably color-conscious. The color-consciousness is there. The question is whether it is used to extend or to reduce racial segregation. Consequently, "attendance plans drawn with a deliberate attempt to accomplish desegregation" are not invalid because based on racial considerations.[44] Thus, consideration of the negative and positive implications of color-consciousness seems to compel constitutional sanction to taking race into account.

Carter then notes all the precedents for constitutionally-approved recognition of "group status," and the argument that general anti-poverty programs will include fifty percent of the Negro population.[45] However, he shows impatience with the repetition of these arguments for indirect compensation, and observes that:

> There is nothing in the law to legally preclude as such a governmental regulation expressly designed to assist poverty-stricken Negro families. The law need not reach all of the nation's impoverished. The present Federal program most certainly cannot. Abstract symmetry is not required[46]—so long as those similarly situated are afforded equal treatment within the reach of the regulation, no fundamental questions of legality or constitutionality are presented.[47]

The argument has been advanced by some that notwithstanding the constitutional permissibility of taking race into account, the existence of a civil rights statute precludes preferential treatment of Negroes.[48] The unarticulated (and startling) minor premise is that certain anti-discriminatory measures can be undertaken in the *absence* of an anti-discrimination statute, but not in its *presence*. Carter points out in an employment context,[49] as did Abrams with reference to housing, "this would amount to a complete distortion of the reasons for the law's enactment." He then makes the vital distinction between the long-term objective of society, and the present situation: "Conceivably, when the millennium arrives and Negroes are no longer subject to discrimination, then perhaps that case could be made."[50]

The same reasoning leads Carter to the opinion that there is no constitutional impediment to quotas "as a temporary expedient to give integration a

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43. Pp. 95-102.
44. Pp. 97-98.
45. P. 98.
46. The essayists were apparently enjoined to avoid citations, but there is powerful Supreme Court authority for this proposition. See, *e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Tigner v. Texas, 310 U.S. 141 (1940); Buck v. Bell. 274 U.S. 200 (1927).
47. Pp. 98-99. In Carter, *supra* note 41, he further develops the constitutional justification for the entire array of affirmative measures in coping with de facto school segregation.
48. See authorities cited *supra* notes 7, 8. See also Marcuse, *Benign Quotas Re-examined*, 3 J. of Intergroup Relat. 102 (1962).
49. See generally Conference Issue—Toward Equal Opportunity in Employment, 14 Buffalo L. Rev. 1 (1964).
50. P. 99.

chance to get off the ground."[51] But he does have some very definite policy reservations as to the *wisdom* of negative housing quotas, *i.e.*, those that seek to limit the proportion of Negroes in a given project or community to avoid a racially segregated result.

It is clear that he is not concerned about *positive* quotas, that is, compelling a certain minimum of Negro members to preclude racial imbalance in a school, or employment or residential facility. He is not concerned about quotas which force consideration of race to bring in Negroes. He is concerned about quotas which keep out Negroes, even temporarily, in order to promote integration, although he does not see any legal distinction between this and any other bona fide affirmative device. The objections he raises deserve serious consideration.

First he suggests that the entire problem of quotas arises from the uncritical acceptance of the "tipping point" doctrine: that as a residential facility integrates, once the non-white population reaches a certain proportion, there is an irreversible trend to white abandonment and the facility rapidly becomes completely segregated. Mr. Carter notes that housing experts are no longer unanimous in their analyses of the tipping point phenomenon.[52]

But one may ask if the problem of negative quotas, is merely a problem in housing. It is at least as serious a problem with regard to racial balance in schools. When school boundaries are drawn in integrated urban areas, persons working to promote racial balance are as concerned with removing Negro children from all-black schools and placing them into integrated schools, as they are concerned with keeping the schools integrated, and thereby preventing an integrated school from becoming all black.[53]

Second he suggests, but unfortunately does not develop the argument, that the quota concept may be misused so as to result in tokenism.[54] To this reviewer, this is a serious but not insuperable obstacle. Obviously if housing or education administrators in enlightened New York City decide on a thirty percent quota, what is to stop less enlightened administrators in Birmingham or Memphis from deciding that ten or five or two percent is all that can be permitted before the whites flee, and to hypocritically cite New York as a precedent? The answer, it would seem, is that such transparent devices would be precluded by the courts, and ultimately by the Supreme Court. Of course, there are always border-line situations, but no novel doctrine is required to establish a denial of equal protection when the demonstrable purpose of limiting Negro enrollment or residency is to substitute tokenism for genuine integration. There are increasing signs that

51. P. 102.
52. P. 100. But Mr. Abrams, who is a recognized housing expert, does not question the validity of the tipping point. Abrams, Forbidden Neighbors 311-312 (1955).
53. *Cf.* the following statement: "An increase in the ratio of Negroes and Puerto Ricans to whites in city public schools helps to precpitate movement out of the public schools and out of the city." N.Y. State Educ. Comm'r's Advisory Comm. on Human Relations and Community Tensions, Desegregating the Public Schools of New York City 11 (1964).
54. P. 102.

federal courts at least will "not be that 'blind' court" that was described as "unable to see what 'all others can see and understand.' "[55]

Third much more serious, and perhaps unanswerable, is Mr. Carter's circumspect reference to Negro ambivalence about quota limitations. It is one thing to accept the wisdom or even the necessity of quotas, but it is quite another to be the Negro who feels the rejection because he is in excess of the number. Mr. Carter describes a personal incident which candidly reveals his position:

> I remember becoming furious on accidently learning that in a housing unit in which Negro occupancy was controlled in the interest of integrated living, accommodations to a Negro friend of mine, with an application of long standing, had been refused, while several of my white friends, who had just sought entry, were being offered apartments. I could intellectualize about the larger wisdom of the restriction to guard against white exodus, but the actual situation posed too great a threat through my two sets of friends to my own sense of worth and self-esteem. My mental process, therefore, could not prevent a feeling of outrage and indignation at the injustices my Negro friend suffered because of his color.[56]

It is a pity that Mr. Carter does not force this dilemma of conflict between "mental processes" and "feeling of outrage" to a conclusion. Would he allow his sense of worth and self-esteem to outweigh the desirability of an integrated community? How would he vote if he were on the Board of Directors of the housing unit, and a proposal were brought in to abolish controlled occupancy, and to accept all applicants, first come, first serve? This is not the first occasion when men of good will have had to face a clash of values. Nor is it the first occasion when the clash is between a desirable public good and a contrary individual interest, however valid and honorable. It seems almost self-evident that if quota limitations serve a useful social purpose, such experiences as those described are insufficient reason to abandon the policy.

Fourth, and of greater moment, is Mr. Carter's impatience and irritation at the central position in the race relations debate attained by arguments about quotas.[57] He fears that "if we debate about these questions, we can pretend that the problem of discrimination itself has been solved."[58] He cites a mass of economic and social data to demonstrate (if any demonstration is necessary) that more than a decade after the *Brown* decision, racial discrimination continues to be rampant in every sector of American life, North and South.[59] Since we are still

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55. Gomillion v. Lightfoot, 270 F.2d 594, 608 (5th Cir. 1959) (Brown, J., dissenting), *rev'd*, 364 U.S. 339 (1960); see also NAACP v. Button, 371 U.S. 415, 445-46 (1963) (Douglas, J., concurring opinion); NAACP v. Alabama, 357 U.S. 449 (1958); Grosjean v. American Press Co., 297 U.S. 233 (1936).

56. Pp. 102-03.

57. Pp. 103-10.

58. P. 105.

59. Pp. 110-32. Hardly a week passes without the disclosure of further evidence. See Negro Jobless Up—Why?, N.Y. Times, May 25, 1966, § 4, p. 6; Kodak Management Voids Pact on Hiring Unemployed Negroes, N.Y. Times, Dec. 24, 1966, p. 40.

very much at the elementary stages of confronting and eliminating manifest and sanctioned discrimination, he argues, it is at best an abstract intellectual exercise to try to pin-point the proper metes and bounds of such refinements as "quotas, preferences or compensations."[60]

To this reviewer, this argument is well-taken, but proves too much. Mr. Carter surely would not deny the necessity of taking affirmative as well as negative anti-discrimination measures. It is one thing to say that quotas and similar affirmative measures are not the key issue. It is another to say that they are no issue at all. If it is frustrating to debate quotas to the exclusion of more pressing problems, it is a needless futility to argue that the quota problem should be abandoned because it is of secondary importance. Precisely in the areas of urban housing and education, there is a serious present problem of maintaining racial balance. Mr. Carter's essay reinforces the conviction that quotas are one effective —and constitutional—method of coping with the problem.[61]

Peter Marcuse brings to the problem his own special experience as civil rights attorney, activist and community leader in a moderately-sized Northern city.[62] His essay is an effective admixture of undoubtedly eyewitness observations with intellectual reflections. Without stating whether he is recounting a specific Waterbury experience, he presents the history and dilemma of "OURS" (Open Urban Regions Society), a hypothetical open occupancy movement "in a typical Northern community."[63] The history of OURS ends with the "paradox" that in order to maintain open occupancy, serious attention must be given to quota techniques. It is unfortunate that Mr. Marcuse apparently agrees that it is a paradox, *i.e.*, a statement that is seemingly self-contradictory or opposed to common sense, but perhaps true in fact.[64]

Marcuse is prepared to use all affirmative measures in the fight for open occupancy, and every variety of compensation and preference, except that which would be most effective. He is so apprehensive about the use of quotas to promote open occupancy that nowhere in his otherwise flawless, and sometimes brilliant exposition, does he undertake to answer the specific dilemma which he presents. Thus, although he appears to support "sophisticated attention" to location and "occupancy policies" of public housing projects,[65] he avoids the word "quota." And where he uses the word, he makes clear that he means only positive quotas, as in employment, bringing in more Negroes[66] and not quotas to prevent an

60. P. 110; pp. 132-33.
61. "The only conclusion the facts permit is that the measures taken and the changes they have made so far are not nearly enough." U.S. Dep't of Labor, Bureau of Labor Statistics, The Negroes in the United States, Their Economic and Social Situations, Bull. No. 1151, June 1966, p. 47.
62. Mr. Marcuse practices in Waterbury, Conn., where he is Chairman of the Board of New Opportunities for Waterbury (NOW), an anti-poverty Community Action Program. He was formerly a Waterbury City Alderman, and has acted as counsel for NAACP, CORE and other civil rights organizations in Connecticut and elsewhere.
63. P. 136.
64. Webster, New International Dictionary 1636 (2d ed. 1966).
65. P. 175.
66. P. 169.

integrated situation from becoming segregated. Elsewhere he brushes over the problem with the suggestion "that the use of voluntary benign quotas . . . voluntary cooperation . . . in maintaining an integrated occupancy, is the most desirable of several unsatisfactory solutions."[67]

The failure to come to grips with the problem of quota techniques is all the more perplexing in the light of Marcuse's lucid analysis of a number of related concepts and devices. He argues the case for compensation with uncommon persuasiveness. He is particularly effective in reducing the shibboleths of "color-blindness"[68] and "discrimination in reverse,"[69] as well as the notion that the Negro is no different than prior waves of immigrants seeking entry into American society.[70] His evaluation of the constitutional problem, although more painstaking, brings him to the same point as his fellow-essayists: "The Constitution leads to rather than prohibits compensatory treatment."[71]

His intensive examination of the very notion of compensatory treatment illustrates his characteristic precision:

> If preference is desirable, who is it that should do the preferring? Should it be compulsory for everyone, or for some, or should it be entirely voluntary? Should it be required by law, can it be regulated by law, or, indeed, is it even permissible under many existing laws? If the purpose of preference is compensation, when have we reached the point where enough has been paid? And who should do the paying—only those who were guilty of discrimination in the past, or everyone, regardless of his individual desserts?[72]

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67. P. 153. Mr. Marcuse refers the reader, modestly, and without benefit of citation, to his article, *supra* note 48, and implies that he has nothing to add. In that article he concludes that quotas are frequently the most effective, if not the only effective, device to produce an integrated community. *Id.* at 109. But he fears that quotas include "sacrificing the welfare of certain individuals for the possible benefit of a group, thus depriving such individuals of certain fundamental rights guaranteed under the Constitution." *Id.* at 110. Therefore he recommends only *voluntary* quotas, *i.e.,* persuasion only without any legal enforcement power. Mr. Carter's essay demonstrates that our Constitution does sanction the recognition of group rights. See *supra* note 45 and accompanying text. Indeed, the notion of non-recognition of groups is precisely that kind of shibboleth that one would have wished Mr. Marcuse had put on his dissecting table.

A few other questions he might consider are: If it is permissible to persuade, is it not permissible to encourage via financial subsidy? And if it is permissible to subsidize to encourage a desirable "voluntary" act, why is it not permissible to tax to discourage an undesirable act? At what point does the voluntarism become coercive? And if Mr. Marcuse is under the illusion that voluntarism will be effective in this field, he should take a stroll through any one of a number of housing developments in New York City. If the situation is different in Waterbury, one suspects that it is not due to voluntary persuasion and no more.

To sum up this critique, quota techniques are among the various tools of affirmative action available in pursuit of a public policy of racial integration. The constitutional and policy arguments for and against them are essentially no different than the arguments for and against other affirmative techniques. The invocation of quota techniques will not produce the millennium. But the continuing resistance to using this tool where it is appropriate reveals a surprising and serious fissure in an otherwise highly praiseworthy essay.

68. Pp. 159-60.
69. Pp. 161-62.
70. Pp. 154-56.
71. P. 166.
72. Pp. 145-46.

Marcuse's essay is replete with any number of such shafts of laser-like analysis. He notes the "moral fervor with which the demand for preferential treatment is opposed by many who consider themselves loyal friends of the Negro . . ."[73] and suggests: "It is almost as if such persons were glad of the opportunity to separate themselves from the 'extremists' in the Negro community."[74]

He agrees with Carter that it is neither legally necessary, nor logically required, nor morally just, to seek to skirt the problem of compensation for Negroes via poverty programs. "Color itself per se and not associated with any other economic or social or intellectual characteristic, has been a disadvantage in our society."[75] "Looking at color happens to be quite an accurate short cut to identifying need, and avoiding its use makes such identification more difficult."[76] How one approaches the relationship between color and need is also influenced, Marcuse observes, by one's function. "The logician will start with need, the picket captain with color, the adept polemicist will undoubtedly stress the interconnection."[77]

No one is a more adept polemicist in projecting the interconnections between color and need, between the civil rights struggle and the anti-poverty struggle, than Peter Marcuse. He predicts that demands for compensatory treatment must lead to demands "for an absolute increase in the available supply of goods and services."[78] The broader social issue is how American society will respond to this demand,[79] or perhaps, what transformations will be required of American society, as it inevitably responds to an irrepressible demand.[80]

More than a year has elapsed since the publication of "Equality," but events demonstrate its continuing importance. There does not appear to be any other single volume which brings together so compactly and so well, not one, but five able discussions of the law and policy problems in American race relations which will undoubtedly persist for the next several years. If "Equality" receives the wide circulation and careful reading it deserves it will be a valuable instrument of progress towards equality.

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73. P. 143.
74. P. 145. *Cf.* Herbert Marcuse, *Industrialization and Capitalism*, 31 The New Left 4 (Issue No. 31, May/June 1964): "[T]he idea of scientific neutrality . . . in relation to values and ideals, is untenable."
75. P. 149.
76. Pp. 148-49.
77. P. 153.
78. P. 189.
79. He asks, and by no means rhetorically: "Does our society recognize an obligation to help its citizens lead a full and rewarding life, decently housed, adequately clothed and fed, educated to an appreciation of the wonders of the world in which they live, and able to partake of them?" P. 190.
80. *Cf.* Marcuse, *The Anti-Poverty Program: Attack on the Symptoms or Attack on the Source?*, 3 Pratt Planning Papers 21 (1965).