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**AN EXCHANGE OF LETTERS**

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**The black  
quota  
at  
Yale Law School****MACKLIN FLEMING / LOUIS POLLAK**

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*This exchange of private letters between Macklin Fleming, Justice of the Court of Appeal, State of California at Los Angeles, and Louis Pollak, Dean of the Yale Law School, seems to us to raise important issues affecting the public interest. We are grateful to Justice Fleming and Dean Pollak for permission to publish the correspondence—Eds.*

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Dean Louis H. Pollak  
Yale Law School  
New Haven, Connecticut

9 June 1969

Dear Lou:

The press of activity on Alumni Day didn't allow me to comment on your report to the Executive Committee of the Yale Law School Association about current admission policy at the Law School. Hence this letter.

From your remarks and those of Dean Poor, I understand that 43 black students have been admitted to next fall's class, of whom 5 qualified under the regular standards and 38 did not. You anticipate that half this group will actually enroll, thus furnishing 22 black students in the first year class of 165, of whom perhaps 3 will have qualified under the regular standards and 19 will not. You also said

that the future policy of the Law School will be to admit 10 per cent of each entering class without regard to qualification under regular standards. It thus appears that the demand of the Black Law Students Union that 10 per cent of the entering class be black has been more than met. It also appears that 38 fully-qualified applicants for admission to Yale Law School have been rejected solely because they are not members of a minority race. Under current policy the admission ratio for black applicants (50 per cent) is 5 times the admission ratio for other applicants (10 per cent).

This new policy represents a radical departure from that set out in the 1968 Yale Law School catalogue: "Admission is based entirely on a judgment as to the applicant's promise of professional distinction." It is clearly apparent that to this judgment has been added the criterion of race.

With the adoption of its new admission policy the Law School has taken a long step toward the practice of *apartheid* and the maintenance of two law schools under one roof. Already there has been established in the Law School building a Black Law Students Union lounge with furniture and law books provided by the school. And I learned from Dean Poor that the 12 black students in the present first year class who were admitted under relaxed standards have not done well academically. Dean Poor attributed this deficiency to the preoccupation of these students with racial activities. I think it equally logical to attribute their preoccupation with racial activities to their lack of qualification to compete on even terms in the study of law.

Next year the Law School will have in its midst approximately 30 students who were not required to qualify for admission under the regular standards because of their race. Of the 128 admittees to next fall's entering class who had accepted in early April, the highest ranking of 13 minority admittees stood in an 8-way tie for 98th place under the regular criteria for admission. Predictably, most of these students will find themselves unable to compete in law studies on even terms with the other students, who have been admitted on the basis of demonstrated academic performance and aptitude for logical reasoning.

The immediate damage to the standards of Yale Law School needs no elaboration. But beyond this, it seems to me the admission policy adopted by the Law School faculty will serve to perpetuate the very ideas and prejudices it is designed to combat. If in a given class the great majority of the black students are at the bottom of the class, this factor is bound to instill, unconsciously at least, some sense of intellectual superiority among the white students and some sense of intellectual inferiority among the black students. Such a pairing in the same school of the brightest white students in the country with black students of mediocre academic qualifications is social experiment with loaded dice and a stacked deck. The faculty can talk

around the clock about disadvantaged background, and it can excuse inferior performance because of poverty, environment, inadequate cultural tradition, lack of educational opportunity, etc. The fact remains that black and white students will be exposed to each other under circumstances in which demonstrated intellectual superiority rests with the whites. If to compensate for disadvantaged background, the faculty discriminates among students in its grading and marking, its double standard will be quickly perceived by both groups of students. Because of the Law School's current admission policy the difference between the two groups will be centered on the factor of race.

No one can be expected to accept an inferior status willingly. The black students, unable to compete on even terms in the study of law, inevitably will seek other means to achieve recognition and self-expression. This is likely to take two forms. First, agitation to change the environment from one in which they are unable to compete to one in which they can. Demands will be made for elimination of competition, reduction in standards of performance, adoption of courses of study which do not require intensive legal analysis, and recognition for academic credit of sociological activities which have only an indirect relationship to legal training. Second, it seems probable that this group will seek personal satisfaction and public recognition by aggressive conduct, which, although ostensibly directed at external injustices and problems, will in fact be primarily motivated by the psychological needs of the members of the group to overcome feelings of inferiority caused by lack of success in their studies. Since the common denominator of the group of students with lower qualifications is one of race this aggressive expression will undoubtedly take the form of racial demands—the employment of faculty on the basis of race, a marking system based on race, the establishment of a black curriculum and a black law journal, an increase in black financial aid, and a rule against expulsion of black students who fail to satisfy minimum academic standards.

**T**HESSE unhappy prospects flow from the abandonment of an objective system of admission based on intellectual aptitude (painstakingly evolved over a period of decades) and the adoption of a system of admission which takes racial considerations into account. From your remarks and those of other members of the faculty I gather the new system's justification rests on three theories.

The first is a theory of proportional representation. Only 1 per cent of the lawyers in the United States are black, and it is desirable that this percentage be increased to the proportion of the black population in the country, roughly 10 per cent. Consequently, all law schools, including Yale, should have a student body which is 10 per cent black.

The weakness of the proportional argument is that quotas, once instituted, cannot logically be limited to one group when other groups exist which are equally entitled to quotas. The next step is a series of quotas. But if minorities obtain quotas, demands from majority groups for quotas are bound to ensue. In short order a full-blown quota system would arise which would necessarily impose restrictions on overrepresented groups in order to assure a student body representative of the general population. A quota policy particularly discriminates against minority groups which have achieved disproportionate representation in a particular field. Such a policy discriminated severely against Jewish applicants for admission to medical schools in the 1930's. That policy was undoubtedly justified by its supporters as one designed to preserve a proportion of gentile students in medical schools equivalent to their proportion in the general population. Currently, the orientals in California, roughly 1 per cent of the population, comprise in some instances 30 per cent of the enrollment in certain engineering and technical schools. Were a quota system to be introduced in those schools in order to favor black and Mexican-American applicants, the first losers would be applicants from the presently disproportionately represented oriental group.

A quota system based on race must assume there are two kinds of racial discrimination and two types of quotas: the benign type designed to help a disadvantaged group, and the malignant type designed to prevent over-representation in a particular field by a hard-working and competent minority. This argument wholly ignores the fact that discrimination in favor of X is automatic discrimination against Y. For X and Y substitute any color, religion, or ethnic background; the process remains discriminatory. The argument of benign discrimination glosses over the fact that under a quota system a person is no longer judged on individual merit but is judged in part according to his membership in a group. It also assumes that race is a relevant criterion by which to choose law school applicants.

The faculty may have been persuaded to adopt its present quota system by the argument of inverse, or compensatory, discrimination—that past discrimination against a particular group should be remedied by present discrimination in its favor until the group catches up. Here again the vice lies in the substitution of a group standard of merit for an individual standard and in the extension of the criterion of race to an area in which it should not apply. The American creed, one that Yale has proudly espoused, holds that an American should be judged as an individual and not as a member of a group. To me it seems axiomatic that a system which ignores this creed and introduces the factor of race in the selection of students for a professional school is inherently malignant, no matter how high-minded the purpose nor how benign the motives of those making the selection.

The aspiration to train more lawyers from minority groups is highly commendable, but I do not believe it will be furthered by putting unqualified or poorly qualified black students in competition with students at Yale Law School who average in the 97th percentile of intellectual achievement (higher than at any other law school). There are many good regional and local law schools in Philadelphia, Boston, Los Angeles, and other metropolitan areas, where black law students can compete with white law students on equal terms and where they can study law in competition with students of similar qualifications and aptitudes. Many of these law schools do not follow Yale's policy of numerically limited enrollment and are geared to handle within reason all students who can qualify for admission. In view of the prevalence of these law schools, the relative ease of admission to many of them, and their flexibility in handling increased numbers of students, the initiation of a system of proportional representation for black students at Yale Law School serves no genuine need or purpose.

**T**HE second justification for the current admission policy derives from the Oxford precedent of training leaders for underdeveloped countries. Oxford admitted students from distant countries—Burma, Nigeria, Kenya—without a close look at their academic qualifications on the theory that whether or not they qualified for serious study, something of Oxford culture would rub off; that when these students returned to their people as leaders they would carry the torch of Oxford with them. It is argued that, comparably, the mission of Yale Law School is to train national leaders, and therefore its students should be representatively selected in order to assure quality leadership for all segments of the population. This theory assumes that the study of law and the mastery of legal principles are merely incidental by products of attendance at Yale Law School. It also assumes that black lawyers compete only with other black lawyers in the practice of a special kind of black jurisprudence and therefore the academic performance of black law students at Yale Law School is largely irrelevant to the development of their future role as national leaders. No theory could be a greater myth, for the law the black lawyer must master to achieve success in his profession is the same law that the white lawyer must learn to handle. In his legal career the black lawyer must expect to compete on even terms with the white lawyer, whether he goes into a government office (executive, legislative, or judicial), a corporate department, or a law firm. Any suggestion to the contrary does a great disservice to black law students, for I think it a safe prediction that national leadership will continue to come, as in the past, from the ranks of those individuals who have risen to the top of their occupations and professions.

The third justification for a policy of racial discrimination is based

on the suggestion that the traditional measures of qualification for admission to law school—aptitude tests and college grades—are not accurate, and therefore the Law School is justified in not paying strict attention to objective standards of admission. Doubtless there is room for improvement in measuring aptitude in logical reasoning and ability to handle abstract concepts, the qualities demanded for intensive study of law, but from everything I have heard the present tests achieve reasonably accurate results. For many years the Law School prided itself on its ability to predict student performance in law school on the basis of the criteria used for admission, and I have heard nothing to cast doubt on the continued accuracy of such predictions. If these criteria are ignored, the consequences are equally predictable. In 1966 Michigan Law School embarked on a policy of admitting black students under relaxed standards of admission. The results of this policy were reported last fall to Michigan Law School's Committee of Visitors as "disappointing and to a degree demoralizing . . . the academic performance is not satisfactory and some new approaches must be explored." And, I am told, similar academic difficulties are being experienced by the under-qualified black students in the first year class at Yale.

In my view none of the above theories justifies the inclusion of race, or disadvantaged status, among the criteria for admission to Yale Law School. While racial quotas may serve a purpose in some contexts, they are entirely irrelevant to the operation of a graduate professional school with limited enrollment, admission to which requires four years of college training and specific aptitude for the profession involved. The present policy of admitting students on two bases and thereafter purporting to judge their performance on one basis is a highly explosive sociological experiment almost certain to achieve undesirable results.

The number of fully qualified minority applicants is growing, and because of increased college attendance the number of those who will qualify for admission to Yale Law School under its regular standards should mushroom within the next few years. Under an open door policy of competitive admission without regard to race, religion, or color, and based solely on demonstrated achievement and aptitude for the study of law, Yale Law School will maintain national leadership in legal training. Under any other policy I think this result doubtful. I urge reconsideration of the current admission policy.

Very truly yours,  
MACKLIN FLEMING

**Dean Pollak replies**

The Honorable Macklin Fleming  
District Court of Appeals  
State Building  
Los Angeles, California

June 23, 1969

Dear Mack:

In characteristically lucid fashion, your letter of June 9 poses many important questions about the Law School's policy of accepting a number of black and other disadvantaged students whose paper academic credentials are not as high as those possessed by the general run of our student body. I hope the following considerations will help to round out the picture.

For as long as I have had any first-hand acquaintance with the Law School's admissions policies and practices (i.e., going back to 1955, when I joined the faculty), the Law School's Admissions Committee has sought to select those applicants who present evidence of substantial promise of high professional capacity. An extraordinary sense as to what evidence of promise is most probative was one of the great skills possessed by our late Associate Dean Jack B. Tate, who was for so long Chairman of the Admissions Committee. Prime indices have of course been the applicant's academic record at college and his performance on the Law School Aptitude Test (LSAT). Secondarily (but to a rather greater degree than has been true at some other major law schools) the Admissions Committee has paid substantial attention to other indices of professional promise—as disclosed by letters of recommendation from teachers; interviews with alumni, and/or members of the faculty, etc. This process has yielded entering classes whose pre-law school academic records have on the average, been very high (higher, apparently, than at any other law school), but without slavish adherence to minimum cut-off figures (whether as to college grades or LSAT scores) which would have operated to foreclose consideration of applicants who, although not preeminent academically during their college years, presented other very compelling evidence of the strong intellectual potential and high motivation which are such vital ingredients in the achievement of distinction in the law.

For years—and long before such skepticism was fashionable—our Admissions Committee has entertained doubts about the predictive value (with respect to ultimate professional distinction) of the LSAT, and even of the college record, for applicants whose childhood and family background are remote from the experiences and aspirations of (primarily white) middle-class America, to which our conventional indices of academic aptitude and achievement are inevitably oriented. With this in mind, the Admissions Committee,

under Jack Tate's aegis, customarily gave less weight to the LSAT and the rest of the standard academic apparatus in assessing black applicants (and, indeed, occasional white applicants whose histories seemed culturally atypical, or who appeared, for other reasons, to have high promise not reflected in formal academic terms). This means that, at least for the past fifteen years, numerous black students have been admitted to this Law School who would not have been admitted through uncritical application of the normal indices of past academic performance. Not surprisingly—given their lesser academic preparation—most of these students have not achieved academic distinction at the Law School. (Though even this is not uniformly true. A few have compiled high grades and/or achieved membership on the *Law Journal*. Conversely, very few have failed to graduate.) But, in my judgment, the important point is that so many black alumni have, in entering upon the profession, speedily demonstrated professional accomplishments of a high order. And this fact, so it seems to me, sufficiently demonstrates the discernment exercised by the Admissions Committee over the years.

I stress all this because I think it important to recognize that the admissions practices which you call into question are not really new. What is new is the number of black (and other minority) students involved—that is to say, a dozen (or, in this September's entering class, perhaps as many as two dozen) in a class rather than six or three. Enlargement of these numbers requires more extensive recruitment activity (by faculty members, students, and alumni), and it of course imposes on the Admissions Committee a far heavier docket of difficult judgments. But it does not represent a departure from the long-pursued principle that the school has an obligation to train a number of men and women who, notwithstanding limited academic preparation, show promise of significant professional capacity.

**I** SUBMIT, then, that the real question is whether the school was warranted in enlarging its numerical commitment to this objective. For me, a large part of the answer lies in the fact, which we lawyers have only belatedly realized, that far too few black citizens are being trained for positions of future leadership. Leadership-training is needed on many fronts, but it seems particularly clear that the country needs far more—and especially far more well-trained—black lawyers, bearing in mind that today only 2 or 3 per cent of the American bar is black. Happily, law schools throughout the country—including Harvard, Columbia, and other major schools—are recognizing the depth and urgency of the training obligation which our profession must assume. In this setting, if Yale Law School can play a larger role than it has before in meeting this important national need, it ought to try to do so. And I am persuaded that our past ex-



perience indicates that we can do more—provided we remain discerning in our judgments of the professional promise of those we admit, and provided also we remain unswervingly committed to the proposition that all students admitted to the Law School will be required to measure up to a single standard of professional excellence.

There are, I think, two answers to the frequently voiced concern that the Law School's educational processes will be diluted through the infusion of a substantial number of students who, however promising in long-run terms, are not yet sufficiently prepared academically to compete on equal terms with the general run of their fellow-students. First, it is the view of the faculty that the school's educational processes are unlikely to be impaired if the number of students with prior educational deficiencies is a minor fraction of the total student body. Second, it seems, in any event, reasonable to expect that the number of black applicants who are well prepared academically will increase markedly within the next few years, as a corollary of the increasing number of blacks matriculating at first-rate colleges; and it is a fair expectation that our Law School can draw a substantial number of those who are highly qualified—or at least that we can do so if, by enlarging our scholarship and loan resources, we can help meet the ever-increasing financial needs of a category of students who are, by and large, in particularly straitened circumstances.

It would, of course, be misleading to suggest that (a) the problem of educational deficiency is confined to blacks (and Mexican-Americans, and Indians, and other racial minorities), or (b) the obligation of leadership-training is racially circumscribed. Of course, the problem and the obligation seem most acute with respect to those groups which have longest and most effectively been set apart from the main currents of American life. But—as the Law School Committee of the University Council persuasively argued in a recent report—the considerations which have led the faculty to enlarge its readiness to accept academically under-prepared applicants of high promise are not confined to blacks or other disadvantaged racial minorities; these same considerations, the committee has observed, argue for greater solicitude with respect to, e.g., white applicants from Appalachia or the rural south. The point is one which will, I am confident, not be lost sight of; for the implications of, and experience under, our present admissions policies will, assuredly, be under continuing review by the faculty. In this connection, I hardly need add that your very perceptive letter will also be of great value to the faculty in its continuing appraisal of our admissions policies. For pushing us to think hard about these hard issues, we are all greatly in your debt.

Sincerely,  
LOUIS H. POLLAK