REMARKS:

JOSEPH CROWLEY*

In the late summer of 1970 the law faculty of Fordham became aware that the AAUP was attempting to organize the faculty of Fordham on a university-wide basis. Thus, the question posed to the law faculty was: "What should be the position of a law faculty when confronted with organizational activity seeking a university-wide unit?"

The law faculty concluded that it did not desire the establishment of a traditional collective bargaining relationship. Rather the law faculty felt that it wished to continue a somewhat informal relationship with university administrators wherein periodic discussions were held to discuss the needs of the law school including recruitment and compensation. The faculty also concluded that the inclusion of the law faculty in an overall university unit would not be in the best interest of the law school and that it would tend to erode the degree of autonomy possessed by the law school. Underlying these conclusions were the considerations set forth in the report for the AALS prepared by Professors Gorman and Oberer and Dean Sovern.

Representatives of the law faculty then met with the AAUP. As a result of this meeting the AAUP agreed to exclude the law faculty from the petition it was about to file. The university administrators were asked by the law faculty if they too would agree to the exclusion of the law faculty from the proposed unit. The university would not agree. Thus as the Fordham University case came before the NLRB the petitioner, AAUP, had agreed to seek exclusion of the law faculty from the proposed unit while the employer had determined to insist upon the inclusion of the law faculty.

It seemed imperative that the law faculty should seek a way to participate in the NLRB proceedings so that it would have an opportunity to present its views.

Therefore, the law faculty organized the Law School Bargaining Committee so as to satisfy the definition of a labor organization within the meaning of the National Labor Relations Act.[1] After the AAUP filed its petition with the NLRB, the Law School Bargaining Committee filed a petition seeking a separate unit for the law faculty. Filing of this latter petition was essentially a defensive action designed to provide a forum to contend against the inclusion of the law faculty in an overall faculty unit and to argue the merits of a separate unit for a law faculty. In filing the petition, the law faculty was not too optimistic because it thought that the NLRB would seek to avoid fragmentation in the initial stages of collective bargaining between universities and their professional staff. However,

* Professor of Law, Fordham University.

[1] 29 U.S.C. § 152(5) (1970).

the result as you know did not justify our lack of optimism. In fact a footnote in the *Fordham* decision indicated that the NLRB would not be adverse to further fragmentation of a university faculty.[2]

In the election which ensued, the law faculty voted in favor of the Law School Bargaining Committee while the rest of the faculty voted down the AAUP by a narrow margin. The decision of the law faculty to vote for the Law School Bargaining Committee was again in the main to preserve the separateness granted by the Board and to avoid relitigation of the same issue in the future. I take this opportunity to thank the AALS and particularly Alvin Goldman for the excellent *amicus* brief filed with the NLRB.

It was mentioned by Professor Gorman that in the unit established for the law school, regular part time faculty members were included.[3] Now quite obviously, part time men would not have the interest in or even participate in the usual fringe benefits. Generally their sole concern would be the remuneration per course taught, but, even on that basis, the part time faculty member's interest in conditions of employment has not appeared to be very significant. At the same time the law librarian at Fordham, who is a member of the faculty, was excluded from the unit as a supervisor because of his responsibilities as law librarian.

What is the role of the Law School Bargaining Committee at this point? I have mentioned several times that the law faculty does not desire the establishment of a traditional collective bargaining relationship. I think we have to evolve something new—a relationship befitting a professional faculty. We've had one negotiation session with the administrators of the university, and I would report that the discussions to date are quite similar to those we've had in the past, prior to the Board proceeding. The primary gain derived from the NLRB proceeding is that the university realizes that it must meet with the law faculty, discuss problems of mutual concern, reach an agreement on the resolution of such problems and set forth in writing the agreement reached.

[2] 193 N.L.R.B. No. 23. In contrast, see Wayne State University, 3 CCH LAB. L. REP. [State Laws] ¶ 49,998.93 in which the Michigan Employment Relations Commission refused to separate the medical faculty from a university-wide faculty unit.

[3] The New York Public Employment Relations Board set up a separate unit of part-time faculty in N.Y. P.E.R.B. 2-3000, 2-3026, 2-3056 (1970).

REMARKS:

ALVIN GOLDMAN

Assuming that we are given our choice as to whether we as members of the law faculty should engage in collective bargaining, should our choice be in favor of that means for settling the terms and conditions of our employment? This question can only be answered in light of the alternatives.

One alternative to collective representation is maintenance of the status quo. It is hard to determine just what is that status quo. A few studies, mostly AALS sponsored, and generally rather dated, have attempted to survey the prevailing modes for resolving critical issues respecting the terms of law faculty employment. These studies reveal that in the setting of salaries usually the dean has a fair amount of discretion subject to varying degrees of review by university officials.[1] Whether such salary decisions are made largely on a laissez-faire type, individual bargaining basis, or are confined by a concept of overall group pattern, will depend, among other things, upon the personality of the dean, the tone and texture of the law faculty, past practices and university policies. Other terms of employment such as promotions, tenure, course assignments, decanal selection and course loads are generally determined with a considerable amount of law faculty participation.[2] At some institutions these questions are wholly resolved by all or part of the law faculty. At other schools the faculty's role in such matters is more limited. Whatever the format at a given institution however, it is probably safe to say that rarely are these noncompensatory dimensions of the law teachers' terms and conditions of employment determined according to a strictly individualistic bargaining model.

It is obvious, therefore, that in setting the terms and conditions of law faculty employment a collective element is already present, though perhaps that collective element tends more to corporate or partnership decision-making than to collective bargaining. Moreover, in at least some law schools, perhaps many, the dean acts as the collective's representative in efforts to secure improvement in terms and conditions of employment. And here I'll depart from the descriptive and assert that no person should serve as a dean unless he or she is prepared to be such a corporate or collective representative of the law faculty vis-a-vis the university administration.

Aside from the collective bargaining approach, the individual bargaining approach—if such exists at any law faculty—and the mixed systems which generally characterize the status quo, there is at least one other option which could be developed for setting the terms of law faculty employment. That option is militant utilization of the qualifying standards administered by our accreditation agency, the Association of American Law

[1] *See, e.g.*, ASS'N OF AMER. LAW SCHOOLS, ANATOMY OF MODERN LEGAL EDUCATION 195-202 (1961).

[2] Q. JOHNSTONE & D. HOPSON, LAWYERS AND THEIR WORK at 49 (1967).

Schools. A prerequisite for such a model would be for the AALS to develop a far more detailed schedule of accreditation standards than is presently utilized. Such standards would include specific procedural and substantive provisions as contrasted with the more general statements of policy characterizing our present approach. These provisions would contain such details as a minimum compensation schedule or salary benchmarks based, perhaps, on rank and longevity. This approach could go further and encompass minimum schedules plus rated pay schedules for above-minimum salaries in a manner similar to the rating system used by the AAUP. The AALS standards would also have to spell out maximum course loads, a code of conduct, required substantive and procedural safeguards of student and faculty liberty, promotion and tenure standards and review procedures, specifications of minimal library facilities and maintenance standards (again with the possibility of using a rating system in addition to minmum standards), minimum office space criteria, perhaps a minimum student to faculty ratio and the like.

Those of you who have examined the present AALS regulations know that a few of the above suggested areas for specifications are already in the regulations—though almost always in hortatory terms. And such detailed standards are found only in the minority of our accreditation regulations.

Upon establishing specific, concrete accreditation standards, the AALS would have to rigorously enforce them, suspending and expelling noncomplying institutions—a practice which our organization's past gentility seems to have precluded. Beyond that, it would be advisable for the AALS to lobby for its accreditation becoming *the* standard for diploma recognition by the licensing authorities. It would also be wise under such a system for the AALS to engage in public relations activities designed to dissuade teachers from working at, students from attending, and employers from hiring at those law schools which do not carry the AALS stamp of approval. In this process we would be well advised to play upon the status drive of university administrators. Bombard them with well executed photos revealing that the curvy coeds, broad-shouldered jocks, and the moneyed alumni all admire the leader who has an AALS accredited law school with A+ compensation standards, fringe benefits and plenty of equipment. To make all this more palatable to outsiders, it would be wise to have minority participation on the accreditation council by practitioners, students, and university administrators (preferably those administrators who are former law teachers), or possibly an advisory council composed of such persons.

All this would of course require a larger national office and a fatter budget for the AALS. Two thousand law teachers at $50.00 a head could, for example, generate an additional $100,000.00 income for the Association. I cannot say with confidence whether that increment would be enough to do the job, but for $50.00 to $100.00 in personal dues, tax deductible no

doubt, we should have a fighting chance and the prospective benefits should be well worth the financial risk.

Now, how does this last alternative, let us for convenience call it the Militant Accreditation Model, stack up against collective bargaining? For one thing, the Militant Accreditation Model eliminates having to rely upon work stoppages. This is very important for those of us who work in public institutions inasmuch as we can expect work stoppages to be outlawed.[3] Although collective negotiation is possible even without the ability to resort to work stoppages, substitute forms of bargaining leverage are necessary if the work stoppage is unavailable. The Militant Accreditation Model is structured around such substitutes—i.e., various forms of boycotts in hiring, replacement and product merchandising and manipulation of the adversary's status drive.

Avoiding reliance upon work stoppages for achieving group goals regarding law teacher employment should be attractive to those law teachers who have ethical misgivings concerning use of the strike weapon by law faculties. It should also appeal to those with misgivings about law teacher strikes based on an expectation that strike breakers—able, licensed ones at that—would be readily available in the event of a law faculty work stoppage.

The Militant Accreditation Model also avoids some of the local quasi-political problems resulting from bargaining unit structure: problems such as setting part time teacher prerogatives, deciding whether to give faculty status to librarians and clinicians, determining how to slice the faculty salary pie, whether to seek new positions or higher pay, new positions or new books, more or fewer adjuncts and the like. The Militant Accreditation Model also removes the danger that union or anti-union predilections might become a consideration in making personnel decisions. Of course some of these issues would merely be shifted from the local to the national AALS level, but that might be beneficial. After all, at the national level we have to live together for but a few days a year and can always skip a few years of suffering or enjoying each other's company.

The Militant Accreditation Model also enjoys a distinct fiscal advantage over the collective bargaining model. For example, one suggestion heard is that the AALS should get into the business of running for the office of collective bargaining representative whenever such elections are held for law faculty. But as collective bargaining agent, at least with respect to nonpublic institutions, the Labor-Management Relations Act would prohibit continued payment and receipt of annual AALS school membership dues. Under the Labor-Management Relations Act, there are very few lawful categories of fund transfers from employer to union. And an

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[3] *See* United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.) (3 judge court) *aff'd per curiam*, 404 U.S. 802 (1970).

employer, such as a law school, and a union, such as the AALS operating in that capacity, would not fall within any of the exceptions.[4] Hence, AALS represented law teachers would have to individually provide their school's present share of Association finances. By collectively securing improved terms and conditions of employment through the Militant Accreditation Model, however, we can continue lawfully to extract from our employers the organization's budgetary support as well as our personal expenses for attending meetings.

The debate concerning the best method or methods for resolving law faculty pay and prerogatives is not new. I know of no consensus and do not expect that we shall arrive at one this afternoon. Experience reveals however, that such discussions rapidly lose their utility when the rhetoric becomes overburdened by the declarative or exclamatory use of such terms as "exploiting," "radical," "reactionary," "dedicated," or "public-mindedness." It will be a disappointment if our ensuing discussion, particularly the discussion that follows from the audience, falls prey to excess use of such volatile rhetoric—but it will be dismaying, on the other hand, if such exclamations do not occasionally surface.

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[4] 29 U.S.C. § 158 (1970).

REMARKS:

JAMES B. MCCARTNEY*

Being in ignorance of the extent to which people in the audience are labor lawyers or other people who have experienced practical trade unionism, could I just put one or two points first. Why a trade union at all? It is so often forgotten that there is only one purpose of a trade union and that is the defense and the advancement of the interests of its members. And if you expect a trade union to do other things, well then you are expecting it to do things that it wasn't set up to do. (In our context a trade union can and does spend a very large part of its time on the purely academic professional matters, probably far more time in our case in the Association of University Teachers in the United Kingdom than it does on salary bargaining and other kinds of remuneration questions.)

Second, why collective bargaining? Why not go along with the present system of using university machinery for discussion and eventually evolving decisions on this, that, and the other? We have had varied experiences in our different universities of how the university machinery works. In many cases we have found that it is a case of manipulation by the administration of the academic senate and the other decision-making bodies. In other cases it has not been manipulation but genuine discussion, but so often it has been manipulation.

I think we have all been experiencing a new factor. We have had it for ten years in the United Kingdom. You, I think, have had it for about three years, and, from what I have seen, it has just started in Canada. I refer to governmental restriction on university financing. So far as we are concerned in the United Kingdom, it produced a new factor of such dimension that it turned our old-time professors into trade unionists. Those people used to shudder when ten years ago I got up and asked what the *union* was doing and was slapped down by the then President. Today this same man gets up and wants to know what the hell the union is doing not only about salary but also about academic freedom and other such matters.

And why representation? Well, first of all there is a practical need for recognition by the institution for purposes of discussion and reaching agreement with it, but also the type of labor relations system *you* have requires a particular kind of machinery to determine that kind of recognition.

Why separate bargaining at all for the law faculty? Well, I think that you may well have to reach a mixed position, and all I say at this stage is that there are many things which are common to university staffs as a whole and it would seem to me these need to be met by some other kind of united voice, not least of which is the direct effect of governmental

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stringency on the financing of higher education, and it would seem to me these need to be met by some kind of united voice. There may be other things which have to be *separately* bargained if the party which does the general bargaining is not responsive to the needs and the aspirations of a particular section.

Having said that, let me turn to what I have said in my written comments.[1]

The first thing I have done is to point out the dangers of trying to take something from one country and transplant it to any other country. So often it doesn't even work in the system you have taken it from. And if it does work, it may work for reasons other than those supposed. So, just watch the danger, the tremendous danger, of picking something up from the British system and trying to make it work here. Almost certainly it won't. But in doing this kind of comparative study we can perhaps get a range of models and, maybe more than anything, some idea of the things that go wrong.

The background of the labor relations system in Britain is a very different one. Until now we have not had the positively-regulated system that you have had here for so long and which Canada introduced ten years ago. We have had a negatively-regulated system in which it was left to the parties to reach, first of all, agreement (or not) on the question of the right to form a trade union, the right to recognition and the right to collective bargaining. The law interfered only in a negative way, but could interfere pretty heavily in a number of situations. In particular, we have utterly no concept of any need for a special labor relations system for the public sector. It is something that, even after five months in Canada and after having lectured here three years ago in Chicago, I can grasp intellectually that you have got a great felt need for a separate public sector bargaining situation, but—quite frankly—I don't understand that need. We don't know why you make such a big thing of it. We don't have it, so we don't have this factor which affects you in university collective bargaining.

One thing that we do have, though, affects many of you as well—cuts in financing—and I suspect it is going to affect you more and more as the total education budget spirals and therefore governments become concerned about how to cut the overall sum. This has been our experience. All of the something like forty universities in the United Kingdom get almost their entire funds from the government through one public source or another. Even Oxford and Cambridge, with their heavy tradition of endowments, now rely more and more on what they get from the government. This comes in two main ways. One is a direct grant through the University Grants Committee, a governmental body with some indepen-

[1] Professor McCartney prepared a written commentary distributed at the beginning of the session. Though the text of his spoken remarks departed somewhat from his written comments, the full substance of the latter is reflected in these published remarks and in the footnotes.

dence, set up to police both the estimating procedures and the expenditure procedures of universities on a five-year basis. It acts largely as a buffer between the government, in this case the Department of Education, and the universities themselves. Though the universities being independent organizations set up by charter, have nominally a very high degree of independence from government interference, whoever pays the piper can call the tune in so many situations. We have been seeing, in the past three years, more of the not so covert interference with the things that universities wanted to do, both in restricting us as to funds and in requiring that the funds which were allocated be channeled into particular disciplines. The other main area of governmental funds going to universities, a big one, is the allocation made by the Research Councils: the Social Science Research Council, the Science Research Council, and the Medical Research Council. Large sums are poured into the United Kingdom universities through these sources, but all are governmentally funded. Within the past two or three years, because of the outcry about the large amount of public money which universities were spending, with apparently little control as to what they did with it (and there was and still is a shocking amount of waste going on inside universities), both the Public Accounts Committee at Westminster and the Comptroller and Auditor General were given power to investigate university spending of public money. Another factor in the situation was the creation quite a number of years ago of a completely unofficial but very important and very powerful Committee of Vice-Chancellors and Principals, which did most of the collective negotiation on behalf of the universities with the University Grants Committee and with the Department of Education. They also were for many years a buffer against the AUT, the Association of University Teachers, in getting proper bargaining machinery.[2]

I think the next factor, as I gather it is here, is that we had a vast diversity of the extent of faculty participation in university government and university decision-making. Sometimes there was real decision-making, more often it was a facade of decision-making. The decisions were made by the administration and the various committees were manipulated, not the least because most of our colleagues go into such committee meetings without even having read their documents never name prepared themselves. Another factor is that with us the title "professor" is given only to heads of departments (with the exception of a few, rare, personal chairs). This has produced the situation of "professors and others," a great polarization between heads of departments and the rest of the faculty. In the

[2] The AUT now represents over 20,000 of the 25,000 potential academic and related staffs (senior library and senior administrative). It registered as a trade union eighteen months ago and achieved a remarkably high affirmative poll in a ballot for affiliation to the Trade Union Congress (the equivalent of the AFL/CIO). [Added from Professor McCartney's prepared written comments.]

typical university power structure, and indeed built into most of their charters, participation in the decision-making bodies is automatically the right of "professors" only and this has intensified the polarization between professors and the rest of the faculty. Procedures for determining the employment conditions of all types of staff members range from built in provisions in the charters themselves, through a paternalistic or a despotic approach by the administration to, in a relatively small number of instances, genuine discussion and decision making in consultation and agreement with the local branch of the Association of University Teachers. The general picture is probably one of discussing with the AUT, reaching an agreement with the AUT, but implementing it by putting that proposal to the appropriate university decision-making body, where it comes out as a decision of that committee or of the academic senate or whatever. The university consequently avoids *openly* negotiating with the Association of University Teachers so far as the knowledge of the bulk of the staff of the university is concerned. That is what we had until about three years ago when there was a great outburst against the National Board of Prices and Incomes Report No. 98, particularly proposals about merit increases.

As a result of that outburst we got enough pressure generated behind a rather old-guard executive. (Our structure produces an executive which is years behind the general feeling of the membership.) A demand was put so forcefully then that we secured from the government an immediate promise of national bargaining machinery. That bargaining machinery took about a year to achieve in detail.

You may first of all ask why *national* bargaining machinery. Well since we have got this position of the vast bulk of all money coming from the government, the government being the paymaster but the individual universities being our employers, we had buck-passing from one to the other. The government said we cannot bargain directly with you because that would be interfering with academic freedom. The universities said we can't bargain with you because there is no body to speak for the universities as a whole, they are independent and self-governing, and the Committee of Vice-Chancellors, being an unofficial body, is not in a position to speak for the universities either.

As a result of the promise of national bargaining machinery, pressure was put on the Committee of Vice-Chancellors and Principals to go back to the university and bring back an agreement that they would set up a body to represent the universities officially. This became known as the University Authoritites Panel and that became the negotiating body on behalf of the universities collectively. The AUT meets that body, the UAP, at Stage A of the two-stage national bargaining machinery. There is also an independent chairman, appointed by the government. Because the attitude of the University Grants Committee (UGC) has been a very positive and very

useful one, by agreement between the University Authorities Panel and the Association of University Teachers, that Committee is present at Stage A as an observer, though it is the government's advisor and, against the Committee's desire, advises the government *confidentially.* There are provisions for arbitration if there is no agreement at Stage A. The result coming out of that, whether agreement or arbitration, goes to Stage B, where the UAP more or less switches sides. At this stage the UAP and the AUT jointly face the government over the table and bargain on the agreed, or arbitrated, proposals from Stage A. Our experience—there only have been two rounds so far—has confirmed entirely the unsatisfactory nature of this arrangement.

This has got to be seen in the context of the fact that we had nothing for fifty years and of the deepening shifts of the prices and incomes' policies, almost entirely income policies, for some ten years. As part of the Incomes Policy legislation which we have had for a number of these years, a Prices and Incomes Board was set up to police all claims. The policies of the National Board of Prices and Incomes, as far as the private sector is concerned, have been virtually of no effect. At a time when there was a nil norm or a 3% norm for increases, the average increase in all employment earnings was 7.5%. But in the public sector, where the government is the paymaster, it almost always can enforce the Board's policy and only in the rare situation where there is real power and militancy on the part of the public sector employees' organization is there a real fight. In our case, in the first round we came out of Stage A with an agreement of 13%, which was endorsed by the independent chairman, and the government immediately cut it to ten, simply on the basis of a prices and incomes policy, no argument, no discussion.

In order to get on with a salary restructuring job, which we all thought would give us a much better increase and a much better position for further increases (this had been recommended by the Prices and Incomes Board in its swan song, Report No. 148) a divided AUT executive agreed to accept the 10%. A second round has now gone through Stages A and B. We came out of A with an average of 16% increase, which the government immediately cut down to 6.5% with no argument about merit, no discussion whatsoever, except that this was the Chancellor of the Exchequer's guideline in the current period of incomes policy. So it is now going to arbitration at the tail-end of the process, at the tail-end of Stage B. This will be our first test of arbitration and we will see now whether arbitration in our sector is any different from the way arbitration has been in the private sector in a period of incomes policy restriction. There the unions have had to get away from the arbitration courts because they have been following government policy irrespective of the merits.

This has been our general experience in the U.K. universities so far as

bargaining is concerned. I come now to the next point, the question of sectional differentials. In any employment situation and in any trade union, if a particular group or section sees that its interests are not being adequately met, you will have pressures for a change. Either pressures which result in sectionalization of the union structure and bargaining on a sectional basis, or else pressures culminating in breakaway organizations. We have many of these pressures in the U.K. You have them here as well, though the situation here is so much affected by the Labor Relations Board representation procedure. I think you are now getting this kind of thing in the universities, particularly the demand for separate representation for law faculties, because of the market situation.

We have, and this was disclosed particularly by the Prices and Incomes Board Report No. 148, a similarly favorable market situation for law faculties. Our experience has been of a single but long standing differential—a plus salary situation for doctors brought about by the militancy of the British Medical Association which was prepared to fight, particularly for the middle and senior doctors in general practice and in the hospitals, especially after 1948 when the National Health Act put the National Exchequer behind the hospitals. They have long had a plus salary over the rest of the university staff. Since the introduction of the hospital service this has been in the form of joint appointments, one with the university and one with the hospital, and two separate salaries. They get the normal university salary from the university and they get another salary, usually of about the same amount, from the hospital service. There are also some merit awards for the top—the deans and the other top specialists in the medical field.

The AUT has for many years set its face against other differentials on the basis that this was divisive. Also, we need solidarity in order to improve university salaries as a whole, because they have lagged over the past twelve years in relation to the civil service, who by manipulating the incomes policy were very careful to see that it did not affect them, and when it did, they recovered retrospectively. This certainly has not applied to the education sector, particularly to the higher education sector where the teacher organizations were by no means well represented.[3] They were too concerned about respectability, too concerned about academic freedom. But, as I have already indicated, with ten years of cuts and interferences a great change came about.

Finally, some vital United Kingdom differences. Our law schools are far less oriented to practice than yours. So far as I can see almost all law graduates here go into law practice of one kind or another. This is not

[3] Maintenance of this policy has been assisted by market variations, not least the sudden switch of research support from the physical sciences to the social sciences a couple of years ago. Research done for Report No. 145 of the NBPI revealed that market pressures were heavily against Universities in Law but, as yet, no substantial demand for plus salaries for law faculty has arisen. [Added from Professor McCartney's prepared written comments.]

so in the United Kingdom. Consequently the professional bodies, the Law Society in relation to the solicitors and the Inns of Court and Bar Council in relation to the Bar, have much less influence on the curricula and other standards of law faculties, and, therefore, so far as that is concerned, we lack strong outside pressure for law faculty standards. Also, though we have the Society for Public Teachers of Law, which in some ways corresponds to the Association of American Law Schools, only twice in its existence has it done anything to advocate standards. Once was about law libraries, many years ago, and again about seven years ago it put forward salary proposals to one of the predecessors of the Prices and Incomes Board. We do not, therefore, have the accreditation system which the Association of American Law Schools has and that pressure may be powerful. Maybe I misunderstand the situation, maybe it isn't all that powerful, maybe the pressure of the bar in America and Canada is not all that powerful either, but it appears anyway that you have got outside bodies able to exert pressures which we do not have. I think that this can be one big factor in your situation.

As I see it then, if your financial stringencies continue, and this is a new factor that we have all got to live with and got to meet, you are going to be faced with continuing and increasing demands for greater *union* as distinct from *association* activity. Greater attention to the bread and butter problems of remuneration as well as—and I must stress as well as—the academic and professional questions. The Association of University Teachers, let me say again, spends more of its time on questions of academic standards, professional standards, and academic freedom, than it does on remuneration and other money matters. But I think you are going to be met with this problem. However you meet it, you will have to decide whether you increase, as has been suggested, the effect of the accreditation system; whether you increase the pressure by the various bar associations, coupled with general assistance to whatever body does the collective bargaining; or, whether you utilize collective bargaining, and, if I may go back, perhaps on two bases: an overall collective bargaining situation to handle those matters which are common to all faculty and a sectionalized collective bargaining system on behalf of the law faculty alone.

REMARKS:

W. WILLARD WIRTZ*

I'll take as my guide Mr. Crowley's approach, which is simply to state a position and then to await any further developments in the question period which follows. There is, though, a difference. He takes that position from the confidence of knowing more about this subject than anyone else in the room. I take it as a counsel of desperation, having thought less about it than anybody else here.

I reach a contrary conclusion as far as this matter of a separate bargaining unit is concerned.

This is partly because of what seems to me a mistaken, but currently accepted, shibboleth regarding collective bargaining. If collective bargaining is to be conceived of as entirely and exclusively the interplay of the power of one group against another, with no room for the arbitrament of reason, it is not an attractive instrument for the effectuation of academic purposes —or any others.

But that evades the question of whether the law school faculties should be included in or included out of the university unit. It seems to me that at a time when the issue of university governance is one of the most important issues facing the society, the members of the law faculty have a very important contribution to make in that matter. This has been evidenced in the leadership which law faculty members have taken during the last two or three years, particularly in connection with the matters of student expression along lines quite different from those which we think of as traditional. I see the prospect of real loss in our excusing ourselves from taking that same leadership as far as this bargaining process is concerned.

A final point involves the concept of what legal education should be and will be in the future. The NLRB suggests that one reason for a separate law school unit is that members of law faculty see so little of the rest of the university faculty. I think we are moving rapidly away, however, from the virtual intellectual educational isolationism of three years of legal education after four years of something else. I think we're moving rapidly toward the time when there will be an interchange of faculty and an interdependence of subject matter, with the whole time trap pattern of education and life being broken up. The law school will no longer be a separate three years conducted on an entirely different set of principles with an entirely different set of approaches directed toward ostensibly different sets of purposes.

I assume that we can dismiss as demeaning the possibility that the principal consideration which may have entered into this discussion is the pro-

* Washington, D.C.; Secretary of Labor, 1962-1969; Professor of Law, Northwestern University, 1939-43, 1946-60.

tection of a higher salary level in the law schools than what is characteristic of the rest of the university. We would obviously all subscribe to the proposition that the teacher who does a child the most good should receive the highest salary—recognizing that this means that the first grade teacher should get the $25,000 salary, and the law school professor the $7,000 or $8,000.

In briefest summary, I would argue from the importance of participation of the law faculties in university governance as a whole, and from the belief that legal education should be tied more and more closely to the rest of education, to the conclusion that the separate bargaining unit decision is a mistake.

REMARKS:

THOMAS P. LEWIS*

In light of what I am going to say, I should begin by pointing out that I teach labor law and as an occasional arbitrator I get involved in the administration of collective bargaining agreements. I am very sympathetic with the goals and purposes of collective bargaining, but I do agree with the report of the special committee chaired by Bob Gorman that law faculties ought to seek severance when their university faculties attempt to organize to select a collective bargaining representative. And though I agree with the reasons stated in that report for this conclusion, I would add even more basic reasons that perhaps are implied in the report but are not expressly brought out.

Professor Crowley asked, What can a law faculty do when its university faculty is trending toward collective bargaining? I would suggest that one thing the law faculty can do and should do at a very early stage is to take a leadership role in trying to persuade the university faculty that collective bargaining is not a safe, sensible goal in the university environment. Let me point out in fairly conclusionary terms why I feel this way. There is not time here today to develop any of these thoughts very fully.

I assume that use of the phrase "collective bargaining" implies models of employee participation in private and public employment as developed by labor organizations. In the industrial world the principal function of collective bargaining is to supply one strong voice for the many weak voices of individual workers. The major goal of collective bargaining is to achieve for the worker some share in the government of his life as an employee. Unless workers can speak with a collective voice, an employer is apt to have virtually total say with respect to the employment situation. Without collectivization government in an industrial setting might resemble a virtual dictatorship. A more specific goal of collective bargaining has been to achieve for the worker a measure of job security. Typical substantive provisions of collective bargaining agreements protect workers from discharge except for "just cause" and base job rights and benefits on seniority. Over 95 percent of existing collective bargaining contracts contain agreements by the parties to permit the submission of unresolved disputes arising out of the interpretation or application of the contracts to impartial arbitrators. When a worker claims that he was fired without appropriate or adequate grounds or that he was improperly passed over for promotion, etc., his complaint may be submitted to an outside arbitrator who will interpret the collective bargaining agreement and reach a final and binding decision on the merits. Successful collective bargaining by

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workers generally requires the threatened or actual use of economic muscle to back up the demands of the collective workers. Typically, strikes and picketing provide this muscle. The workers have the power and generally the right to withhold their services in order to bring pressure to bear on their employer during the negotiation of the collective bargaining agreement.

Now let us consider briefly these techniques and goals of organized workers in relation to the university environment. Workers organize themselves into labor organizations in order to substitute one strong voice for their many weak voices. But as I understand and know the university, the faculty has a collective voice. Through a faculty senate or other organization, the faculty has available to it the necessary means to speak collectively. A senate may or may not be effective in a particular university, but if it is typical in organization it will most probably be a large and broadly representative body. A collective bargaining representative, on the other hand, though always representative in theory may or may not be representative in fact. It is generally thought that to succeed collective bargaining must be conducted by an individual or very small committee. It is generally believed that successful collective bargaining requires acceptance of the principle of exclusive representation, i.e., the principle that the collective bargaining representative, elected by a majority of the employees in a designated unit of employees, speaks authoritatively for each and every employee in the unit. In the university setting a designated unit of employees might be every member of the university faculty. When I try to imagine a collective bargaining representative speaking authoritatively for an entire university faculty, or even a college or department faculty, I see a requirement for more collectivization—more solidarity, if you will—among faculty members than we can reasonably expect to find in most university environments. I personally feel that efforts to generate the required solidarity will create an undesirable climate and that the requisite solidarity, if achieved, will not work ultimately to the advantage of the university faculty. I must leave this simply as a felt notion rather than one that I can elaborate upon in the limited time available.

I said earlier that a major goal of collective bargaining is to give employees a voice in the government of the employment situation. The university I know is one in which the faculty member now has a very powerful voice in his own government, especially at the college or department level. Where in the industrial world will you find employees gathering to hear a committee report filed by a committee of their own members and making recommendation concerning standards for promotion and job security and then, through their votes, designing effectively what the standards for promotion or tenure of employment should be? Where in the industrial world will you find employees making the initial applica-

tion of such standards to new employees—employees who were hired in the first place because they received a favorable vote from the existing employee group? In the industrial world initial hiring is generally left totally to the employer and standards for discharge and promotion are typically negotiated out and placed in the collective bargaining agreement. Typically these standards place the initiative in the employer and provide the employer with substantial discretion. An aggrieved employee might appeal his employer's exercise of discretion by invoking grievance procedures which call for in-plant discussion of his grievance between the employer and his labor organization. If his labor organization is willing to pursue his complaint it may finally be submitted to an impartial arbitrator who will decide whether the employer improperly applied any standards appearing in the contract. Surely, if instead of speaking of an employee with a grievance we speak of a former employee whose grievance is that he was improperly discharged, we can see that faculty members in general now have much greater job security than most workers who enjoy collective bargaining. The job security of most workers is ultimately dependent upon the judgment of an impartial outsider, an arbitrator. Among public employees who have organized for collective bargaining the trend apparently is away from civil service models and towards impartial arbitration. Faculty members should compare their existing tenure systems, whatever they may be, with a system in which impartial third parties possibly coming from outside the university environment make ultimate decisions concerning charges leveled against faculty members.

I have said that effective collective bargaining requires the means by which pressures can be brought to bear upon the employer and that these pressures typically result from the strike. In the public sphere where the strike is outlawed the trend has been to provide a substitute for the strike in the form of a process by which the workers can take their unresolved *negotiation* disputes with the employer to an impartial third party, again an arbitrator or a fact-finder, who will consider the positions of the employer and the employees and then either determine the matter or make recommendations for its determination. My instincts tell me that faculties are not going to be very powerful in the use of the strike, even in those segments in which the strike is permissible because the employer is a private rather than a public employer. In the public sphere the strike will continue to be outlawed, and even if it is occasionally used I think the very fact of its outlawry will stand in the way of a powerful solid strike action, and I think faculties who attempt to use that weapon may simply demonstrate weaknesses that were not immediately apparent to the legislature and to the administration. If use of the strike is avoided, a judgment must of course be made as to whether third-party resolution of the terms of employment is preferable to those various methods by which the terms of faculty employ-

ment are currently hammered out. My personal judgment is that university government should not be turned over to disinterested third parties.

I feel very strongly that university faculties are currently a giant step beyond collective bargaining. Faculties share in their own government at a stage well beyond the stage that has been achieved by employees who engage in collective bargaining. Moreover, it seems to me that the basic functions and goals of collective bargaining presuppose a much sharper line between management (supervision) and worker than exists in the university, where there is a proliferation of administration but precious little management. To insist on collective bargaining for a university faculty is, I believe, to force the backward creation of this sharper line between administration and faculty and indirectly to introduce restraints on the faculty that do not now exist. (Take a look at collective bargaining agreements currently in force in the academic world).

Finally, I believe collective organization and bargaining along the lines of existing movements may weaken the impact of faculties as now organized on such issues as academic freedom. The stance of the AAUP on this issue as I understand it is principled; it is not currently seen as essentially nothing more than articulated self-interest, as many of the gains achieved through collective bargaining by workers are seen.

I have tried to suggest some pragmatic reasons why collective bargaining does not appear to me to be a sensible goal in the university environment. Willard Wirtz, I think, touched upon additional reasons, grounded in principle, as to why collective bargaining might be inadequate and inappropriate. I have spoken very generally and against a background of the university environment with which I am familiar. I recognize that conditions vary markedly among universities and law schools. My thoughts may have little or no relevance for a school in which conditions of employment, as in some junior colleges where collective bargaining has caught on and where many of the collective bargaining agreements I just referenced originated, more closely approximate those in the private sector of employment organized by labor unions. It may be that my remarks do not have relevance to some situations known to you. I hope in the discussion which follows that if you disagree with me, you will isolate for us the kinds of problems that you see in your university environment which you think could be solved through collective bargaining.