QUESTIONS AND COMMENTS

MR. HILLMAN*: I have a question for Professor Crowley. With regard to the position of AAUP at Fordham, was their willingness to separate out the law faculty based on their concept of its being inherently inappropriate as part of the general unit, or was it simply a question of being concerned with the consequences on the vote if the law faculty were included?

MR. CROWLEY: I think the latter was the more persuasive reason.

MR. GORMAN: Of relevance to that question, the severance of the law faculty at St. John's was by consent of the employer and the labor organization; the severance of the law faculty at Fordham was by consent of the labor organization. It is my understanding that authorization cards looking toward an election are being collected at NYU and I think that there the AAUP will be a little more determined to seek a university-wide unit, and will not be willing to go along with what I gather is a movement within the NYU law faculty for a fragmented bargaining unit. So it's possible that the decision in the *Fordham* case will be good only for that case because it was a case in which neither of the two competing organizations, the AAUP or the Law Faculty Association, raised the question and wanted to have a university-wide group. But if the NYU case takes its course I think that will be the first instance where that issue will be raised. The Temple law faculty is before the Pennsylvania State Labor Relations Board and they too are seeking separate representation rights. I don't know whether that is being challenged by any other employee association but the NYU case is likely to test the issue.[1]

MR .GOZANSKI:** Just a few comments on militant accreditation. There seem to be some glaring lacks there; the first one being the absence of some kind of structured grievance procedure. Hopefully one would not necessarily need one, but if one is needed it should be there. Secondly, there seems to be the experience of the AAUP where they had the national standards which were to a great extent ignored by many of the universities and have now fallen into disrepute. Now the AAUP seems to be developing more on the typical union type model. And thirdly, there seems to be some

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* Jay Hillman. Professor of Law, Northwestern University.

[1] Since the above remarks were made, a representation petition seeking a bargaining unit composed of all full-time nonmedical school faculty at New York University has been filed with the NLRB. The United Federation of College Teachers, AFL-CIO, seeks to intervene. It desires a unit comprised of all nonmedical school full-time faculty plus those part-time individuals who regularly participate in the teaching program. In addition, the UFCT unit would include professional librarians. A petition seeking a separate law faculty unit, consisting of full-time law teachers, has been filed on behalf of the NYU Faculty of Law Association. New York University, 2-RC-15719, 2-RC-15757 (decision pending).

** Nathaniel E. Gozanski. Professor of Law, Emory University School of Law.

problem of diffusion of the collective interests. I'm sure that the problems of the professors at Fordham University are not the same as the problems of the professors at the University of North Dakota. We have some sort of a national body which is determining these standards; this local autonomy which seems to be needed for these unions is not present.

MR. GOLDMAN: First, as to the grievance procedures, I thought I encompassed in my presentation the position that the regulations of accreditation would include requirements for procedural and substantive rules to protect faculty liberty. And probably that should be even more broadly stated. There are some kinds of grievances that would not run to faculty liberty, such as whether a faculty member is being assigned an office of the appropriate size under the standards. Yet, I think that is certainly something which would have to be encompassed.

As to the AAUP analogy indicating the lack of any real prospect for the accreditation model becoming a feasible alternative, I point out first of all that the AAUP is not an accrediting association. Last year a motion was made for the AAUP to become an accreditation association. It was defeated, I am told, by about a two-to-one vote. They don't have that weapon and they have not been militant—or I should say we have not been militant. I am still paying my dues to AAUP though more and more wondering exactly why. AAUP has not been militant in imposing its own standards. The censure list applies only to academic freedom and tenure cases; it takes two or three years generally for an academic freedom and tenure case to be processed. It's become an absurd situation procedurally, and then all that's done is a list is published and in only one case that I'm aware of—and that was St. John's University—was the censure accompanied by a request that faculty not accept jobs at that institution and that those faculty members at that institution seek to find jobs elsewhere. So I don't think that the AAUP experience is the acid test.

As for your third comment—the inability to establish a national criteria—that is a very critical question. Having taught at only one law school I am not in a position to really gauge whether that problem would be so insurmountable as to be a good cause for deterring any efforts toward utilizing the Militant Accreditation Model.

MR. LEWIS: I will comment on Al's proposal principally because he invited me earlier, when I had taken issue with his statement privately, to do so publicly because he wanted someone to take an adversary position. I feel rather strongly that his proposal is unsound. In fact I cannot imagine a worse solution to the economic and other problems of law professors than the kind of protective system that he suggests the AALS should establish. The system strikes me as not unlike the system of build-

ing codes that have been written into some municipal codes. In some cases we are unable to provide perfectly adequate low cost housing because it will not measure up to restrictive building codes. I think to censure an institution because it does not observe fundamental principles of academic freedom is one thing, but to censure an institution because it is not providing offices of "adequate" size or paying a salary that measures up to some nationally established standard may well be simply to deprive of an accredited education a student who really has no choice but to go to the resource available to him in his state. Perhaps the resource that is currently available to him is the best that the people of the state can or will make available to him at that time. We cannot change the size of offices very quickly and it may not be possible to raise salaries very quickly. In any event, I think Al's proposal might be self-defeating because I cannot see the AALS closing schools or seeking to close them through the boycott technique when they have failed to measure up to certain standards unless those standards are set at such low levels that they will not establish worthwhile goals for any but the very most deprived of schools. This would not only lead me to question whether the program would be worth the effort, but also to fear the "drag" that such standards could create for the great majority of law schools in the country.

MR. FORDHAM*: I do not speak with any particular confidence in this matter but I do have some notions which I would like to express briefly. My thinking runs somewhat parallel to that of Tom Lewis. This discussion is not focussed on input. It is focussed on the relationship of what we are doing or what we might do through collective bargaining for the improvement of legal education or university education broadly. What I am concerned with is the relevance of something like collective bargaining to the job that we are supposed to do. I should like to get us to concentrate on that, having in mind the traditional position with respect to collective bargaining. There is a perfectly natural and understandable desire of people to use their general and collective economic capacity and force to achieve ends which are pretty much a matter of personal self-interest. In general this is justifiable. But when you get to the university level, and this may sound a little bit old fashioned, but I say it without equivocation, it seems to me we are presented with a company of scholars who are or should be preeminently concerned with the educational process and the quality of it. I am not interested, as a university teacher, in being in a posture in which collective bargaining will apply to the terms and conditions of employment, which will almost surely include large considerations of educational policy. There is no clear line; class size and teaching load are elements

* Jefferson B. Fordham. Professor of Law, University of Utah; Dean and Professor of Law Emeritus, University of Pennsylvania. Professor Fordham is a former President of the AALS.

that illustrate this. The framework of educational policy-making should be designed to promote improvement in the quality of the institutions and their processes and end product. I do not see that the collective bargaining approach would provide such a framework. It is basically a matter of trying to advance both the collective and individual interests of the group. That sort of commitment does not befit the high calling of university faculty people. I am disposed to put it more strongly; faculties should be basic educational policy-makers but it is not compatible with that role for them to participate in policy-making as union members preoccupied with self-interest.

MR. GORMAN: I think we all share in common a notion about the way a university should ideally be run, at least the most general outlines. Tom Lewis mentioned some of those: that the faculty shares in the governance of the institution, sets educational policy, and so on; that the administration adheres to accepted standards of academic freedom and tenure and so on. If we could assume, as Tom I gather does, that most institutions already have internal machinery to achieve those goals then I think there would be less need to concern ourselves with collective bargaining. I think the problem is, however, that there are many institutions which do not have these internal faculty organs to achieve those goals and collective bargaining seems, perhaps if only temporarily, to be one means for sharing control over the mission of the university, perhaps with a view toward setting up those very internal organs of faculty authority which may currently be nonexistent. In other words it's possible to look, as I think the AAUP does, at collective bargaining as one means and perhaps only as a temporary means of achieving the kinds of goals which we all share for university structure and university governance. I think the thrust of the report of our emergency committee may have been misunderstood to that extent. I regard that report as stating simply that law faculty, like university faculty generally, should have the authority to determine for itself the best way to achieve these goals which we all share. As I say, there may be some schools which feel that collective bargaining is the most effective way to do that at their present stage of institutional development.

MR. MCCARTNEY: The AUT's move into being a trade union resulted entirely because it was driven into doing it. I think very few even of our most militant, most trade-union minded members, wanted this, but they were driven into it as the result of ten years of deepening financial stringency imposed by the government and by interference or attempted interference by the government in academic freedoms. And I don't disagree one single bit from Mr. Wirtz' concept of a university or his aspirations within such a community of scholars. But we have found that the reality was that

we were employees. Most of our members were appalled to find that they were employees because they didn't believe that they were employees. But they found that they were employees and that they were treated as employees. When the government closed down some of the agricultural institutions, redundancy raised its head in our universities and was met as a normal redundancy situation, though we attempted to fight it off by putting forward arguments about education.

Since we achieved the national negotiating machinery three years ago, and have had two major claims through it, we have put far more time into fighting for academic freedoms and against government interference than on salaries or any other question of remuneration. And I would like to make this clear. We were driven into it because of the financial situation and if you have the same experience I think you're going to be driven into it too.

MR. SHAPIRO*: Mr. Crowley, I'm curious about one thing. You indicated that the law school primarily moved to the bargaining unit as a defensive action. After the university itself voted not to have a bargaining unit, why didn't you abandon your bargaining unit?

MR. CROWLEY: Well, first of all, the elections were held on the same day so that there was no prior knowledge of what the vote in the other unit would be. Further, as I mentioned previously, as the university had taken the position that the law faculty should be included in a university-wide bargaining unit and as the determination of the NLRB was to exclude the law faculty—i.e., to establish a separate unit for the law faculty—we felt that to abandon the separate unit would lead to future proceedings wherein the same issue would be relitigated. This would not only be burdensome to the law faculty but, more significantly, such abandonment might be an indication to the NLRB that the law faculty did not truly desire separate representation.

Thus, having obtained separateness, it was felt desirable to act so as to preserve it but to do it in a manner compatible with the professional responsibilities of a law faculty.

As stated previously it was recognized by the law faculty that as a result of the NLRB decision it would be incumbent upon the parties to evolve a bargaining relationship that would reflect the *sui generis* characteristics of a professional school.

MR. LEVY*: I would like to ask Bob Gorman whether there is any evidence—I plead ignorance on the subject—from the labor union movement to suggest that if a collective bargaining model is initially adopted by a law

* Allen H. Shapiro. Associate Professor of Law, University of Toledo.

* Robert J. Levy. Professor of Law, University of Minnesota.

faculty or a university faculty as an interim measure to achieve faculty goals—whatever they may be—that the collective bargaining device will eventually evolve into some other form of collaborative or community entity in the fashion suggested earlier?

MR. GORMAN: One can be justly skeptical that the bargaining representative will share power or delegate power to some other organization. I don't think there is any applicable model in the private sector. I think collective bargaining in higher education has an enormous responsibility to fashion novel kinds of approaches to collective bargaining. It is possible as I've said to create a structure whereby the faculty senate will continue to exist and the faculty association, the collective bargaining representative, will wither away. I don't think that is likely to happen. The imperatives of power are such as to make that unlikely. There has been a suggestion that one ought to divide issues into economic matters and noneconomic educational matters, with the collective bargaining representative handling the economic matters and the independent faculty senate handling the strictly educational matters. A little bit of thought on that should make it clear that there is no sharp dividing line and that matters of educational policy are ultimately convertible into dollars and cents. I think all we can do is look at the very limited experience we have. We have collective bargaining at the State University of New York which has within it a law school at Buffalo. We have collective bargaining at Rutgers University which has two law schools in it, one at Newark and one at Camden. We have the St. John's experience and so on. As I understand the Rutgers experience, the AAUP there represents the faculty university-wide, including law faculty, and it has made an effort to preserve the autonomous organs of faculty authority within the university. Although it is a short experience of perhaps two years, pre-existing internal faculty organs continue to exist and continue to play a role, so there is ironically a pluralistic approach within what is theoretically a framework with exclusive bargaining representatives. I guess that is a long way of saying I don't think there are private sector industrial analogies and that we have to look beyond industrial analogies and at the special problems of collective bargaining in higher education.

MR. MALESON*: The AAUP is currently trying to devote a much larger part of its facilities to foster collective bargaining. Apparently, from what I hear today, the AALS may be trying to get into the same type of deal. My question is why is it necessary for either one of these organizations to do anything at all about this? Apparently it's perfectly possible for an individual chapter of AAUP to represent the school if it wants to. Mr. Crowley tells us now that at Fordham the faculty itself formed its own unit

* Alfred I. Maleson. Professor of Law, Suffolk University.

without any outside affiliation. Why should it be necessary? It seems to me that once AALS or AAUP really gets into this business it's going to spread even faster than the J.D. degree spread a few years ago. Actually, any faculty that really wants to have a collective bargaining agreement can have it if it wants it.

I don't really want to get organizational support behind the concept although we can't oppose it too long. Whatever Dean Fordham might think, I've spoken to a lot of people at an AAUP regional conference from schools that I never heard of before, from community colleges and little state schools, and I discover the attitude of the faculty is so different from anything I've encountered with university faculties that it is going to spread whether we like it or not and pretty soon be right up to us and then envelope us. But why do we have to get into this now at an institutional level? Why can't we let other schools do it on their own as Fordham has? They don't have any problems doing it on their own.

MR. BROWN*: The dynamics of collective bargaining—why it's moving the way it is—to me is the most perplexing and troubling aspect of the whole thing. As for my own preferences, I agree wholeheartedly with what was so well expressed by Mr. Lewis and Dean Fordham, and then admirably stated by Willard Wirtz on the basis of his tremendous authority and experience. Yet as an officer and functionary of the AAUP I see bargaining organizations on every hand. In higher education generally, we face the rise of organizations at other levels of education, all seeking bigger slices of the public pie. So the reaction is, "My God, we've got to organize and get in there or else we're going to get squeezed out." People come to the AAUP and say, "You've got to help us." That's the reason AAUP nationally has been dragged kicking and screaming into this: the chapters say, "We can't do it on our own. We have to have guidance, help, expert advice and so on, from the national."

The AALS in that role?—Well, ten years ago I would have found it difficult to imagine AAUP taking an active role, so, if I stretch my imagination beyond its wildest bounds I could see the AALS doing it even though I always thought of AALS as a dean's organization. One element that impels law faculties is the view that we oughtn't to separate ourselves; that we ought to get more deeply involved in university governance—that is the point that has been raised by Bob Gorman in response to what you've said, Mr. Lewis. You described the picture of the university from that honorable place, the University of Minnesota. But from my AAUP experience I know there are hundreds—many hundreds—of institutions in this country where your sort of faculty role does not protect them. Many fac-

* Ralph S. Brown, Jr. Simeon E. Baldwin Professor of Law, Yale University. Professor Brown is a former President of the AAUP (1968-1970).

ulties are looking to collective bargaining at this point, I think, because they are frustrated and angry and they come to think that collective bargaining is going to be the answer for them. So, for example, at a place with the prestige of the University of Illinois, when the faculty got all riled last summer about what the legislature was doing to them, and what the administration was doing to them, when they began thinking about collective bargaining they even gave a cordial hearing to the *Teamsters*—at the *University of Illinois*. It reflects a rather pathetic academic naiveté to think that the Teamsters are going to give you something for nothing.

Economic fears may be less of a spark than autocratic policies of administrations and inability of faculties to take hold of the aspects of governance that are rightfully theirs. This is not confined to central university administrations. Our own houses are not models of full faculty participation in academic governance. Let us use our skill and influence, I would urge, not in separating ourselves but in trying to make our schools and our institutions live up to the standards of the profession.

MR. BUSS*: I am going down to a much less philosophical level by returning to the narrow issue that I guess we are supposed to discuss: If there is going to be collective bargaining, are the best interests of law faculties and the academic community generally served by placing law faculties in a separate decentralized unit? It's not obvious to me that keeping the law faculty separate is a very sure way of protecting the law faculty salary advantage. Nor is it obvious to me that keeping the law faculty separate means that it cannot be involved in university governance. It seems to me that in either event there is still a single employer and a single set of problems, certainly a single bag of money to divide up. There are going to have to be accommodations worked out between the different groups that want to have some influence and to have some share of that pot. It's just not clear to me, and I really would like it if some of the members of the panel would address themselves to this question. It seems to me you have questions like, "Is it better for the law faculty to represent its own position if it is outside the general bargaining unit and has a separate bargaining agent or is it going to be better off to be part of the general bargaining unit and have a voice in what the representative of that unit says at the bargaining table to the employer?" It's very unclear to me how it works out. It may be it will work out differently in different places but I would be happy for comments.

MR. CROWLEY: First of all, to discuss the extent that a voice of a law faculty would have in an overall unit is something that would depend on a given situation. In most cases the law faculty is going to be outnumbered.

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* William G. Buss. Professor of Law, University of Iowa.

We've heard from Bob Gorman today that the experience at Rutgers is to the effect that the AAUP is permitting the law faculty to have a separate voice in the question of negotiating law school needs. Whether that would prevail in every situation no one would know. A lot of this is going to be the result of experience.

MR. BUSS: But the number problem is there whether you go to the bargaining table separately or whether you go as part of a larger unit. If the number factor really is the crucial factor, then the law school doesn't really have very much bargaining weight when it goes to the bargaining table separately.

MR. CROWLEY: No sir, the number factor by itself is not a crucial thing. It is if you are all in one unit. There the number factor may become crucial, but in a separate bargaining unit you at least have the opportunity to present law school problems directly to the administration and to compel the administration to discuss such problems and to achieve a resolution.

MR. WIRTZ: We are talking about three issues, and confusing them more than a little. One is whether there should be some procedure for larger participation by members of law school faculty in the affairs of education and the governance of the university. I come down squarely on that issue with Mr. McCartney and Mr. Brown that there should be much larger participation, both as a matter of protection of legitimate, individual, personal self-interest, and to effectuate a course of action which is for the general good.

Issue number two is whether collective bargaining is the right form for achieving this larger participation. I think it is not.

The third issue is whether, given collective bargaining, the law faculties are to be separate units or part of the larger unit. I am so presumptuous as to suggest that part of the reason for the feeling that they ought to be separate units is real doubt about the answer to question number two, regarding the efficacy of collective bargaining, and a feeling that by being a separate unit we can find a better answer to question number one. I doubt whether very many of us disagree fundamentally on any one of the three issues. At the root of our essentially common view is the belief that there is an unrepresented, underdeveloped, potentially much more effective force in law school faculties for the improvement of education, as well as for the advancement of personal interests.

On this note of what I think reflects a fairly broad consensus, I turn to a highly technical question for Professor McCartney. Professor McCartney, in the system that you are describing I believe you mentioned Step A and Step B and you also mentioned the intrusion of incomes policy, which has put a limit on the overall maximum increase, but with what I thought

was a suggestion, that at the end of Stage B some process of arbitration might be effective in superceding the limit of the incomes policy.

MR. MCCARTNEY: We've now gone into that stage and we're waiting.

MR. HILLMAN: This is a part of the procedure of your incomes policy as well?

MR. MCCARTNEY: No, it's part of the procedure of our collective agreement. The incomes policy doesn't provide for it.

MR. HILLMAN: Is the collective agreement a permitted abrogation of the incomes policy?

MR. MCCARTNEY: We will have to see what the government does when the arbitrator brings down a decision in our favor, if he does. Then we're going to see whether the government will refuse to follow what the arbitrator has agreed on.

MR. HILLMAN: It is not necessarily a final arbitral decision?

MR. MCCARTNEY: No.

MR. GOLDMAN: This, of course, is a problem that exists for a number of public universities in this country where, under the local public employee collective bargaining statute, a final resolution through arbitration is available, but it is designated as an advisory arbitration award.

MR. BARD*: I would characterize one of the questions implicit in this discussion of whether the law school ought to be a separate bargaining unit as: Does the law school have special kinds of interests which are different from the rest of the university? However, attached to that is another consideration we just touched on and that is that there are at least two broad kinds of bargaining that go on between faculty and administration. And, then there is the other equally serious conflict, and maybe particularly serious for law school, and that is a conflict between faculties and outside forces which are attempting to bring pressure, through various ways, on the law school. Very often a lot of the conflicts may take the form of a conflict between faculty and administration, but really the administration is on the same side as the faculty and the real fight—talking particularly about public institutions—is with the legislature and boards of trustees. In recent history, particularly with respect to things like clinical programs, as the law school moves more into the world—assuming that trend is going to be

* Robert L. Bard. Associate Professor of Law, University of Connecticut.

continued—the chances have increased for the law school to pick up outside hostility. The very bad experiences the University of Connecticut is having with respect to clinical programs demonstrates, I think, that such conflicts may be greater for these new programs than for other branches of the school whose activities tend to be less visible, less carried out in public fora, less likely to take on established interests. I don't know whether that leads to the conclusion that the law schools should be separate units. It may lead to the conclusion that they have a separate set of dangers with which they are concerned and that some sort of separate collective action may be appropriate. I'll just leave that as a consideration.

MR. MCCARTNEY: I think we've really got down to realizing that there's a great deal of individuality here, of a type, and we've had three examples of it. Where one comes out—whether one puts his emphasis upon one or another aspect of this depends on what makes each one of us tick under any particular priority.

In the AUT's fight over its salary claims in relationship to the civil service, some of our men were motivated predominately by their duties to their families. And this is a duty that I wouldn't shirk at all. I think we have got today to bargain economically in pretty powerful terms. But many of our members were also, or perhaps predominately, activated by a fight to prevent a decline in university standards because we're beginning, in substantial terms, to find ourselves unable to retain and recruit faculty members of appropriate caliber. That this difficulty was beginning to hurt was shown in the Prices and Incomes Report No. 148, particularly in the research done for it.

Another aspect motivating the law faculties at present, as I understand it here, is that law faculties have a differential over the rest of the faculty in salary. There is in practice an average higher salary for law faculty than there is for the rest of the university. And the question here is: "Will the bargaining agent for the whole unit pay adequate attention to the reasons why law is in a plus situation to the rest of them?" And, as I understand it, those reasons have been because of market influences, the fact that there is a professional society that lawyers can go to, and that there are competing demands from the profession, from government, and from elsewhere, for lawyers. In short, the market situation is different for law teachers. The differential reflects itself in other respects as well. Law faculties, here, I understand, have higher standards of accommodations, of staff supervision, and so on, than prevail in the rest of the university and these are influenced by the same kind of factors and also by the accreditation forces and the influence of the bar association.

Will overall bargaining for the whole faculty pay attention to these things—the needs and aspirations of law faculty—or will it be more con-

cerned, because of the majority vote of the vastly greater number of other faculty, with the overall interests and not the sectional interests? This is the thing that always produces sectional demands for separate representation. So, you've got that kind of dual problem.

If I may put the final one, as I indicated earlier, I see a need in some situations for a whole unit approach. For a whole gamut of things which are important to law as well as to all other faculties, such as the question of the university budget which is going to be available, the questions of university standards, of educational policy in the country as a whole and of academic freedom are common to all of us and I see a need for a common struggle on them. But, either within the same organization or—if it has to be a separate organization—there is a need to continue to secure the separate needs and aspirations of law faculty. And finally there is a need for the continuation, or perhaps an intensification, of the kind of pressures that I understand, maybe incorrectly, that are imposed by the AALS and its accreditation powers, and the bar associations and their great pressures, and the utilization of an LL.B. as a basis for practice in this sort of thing. And, I see the separate needs of the law faculties being protected perhaps through these three mechanisms, as well as through the continuation of the use of the various pieces of the existing university machinery, the academic faculty, the individual departmental boards and faculties, and so on.

MR. GOLDMAN: The mark of a round table's success is that at its closing the audience still has questions and comments. I believe that correctly characterizes our situation, and because we are still at that state, and because it's adjournment time, I will deem our meeting adjourned. Thank you.