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As I Was Saying....A Selection of Lectures and Informal Talks on Law and Universities and the Communities that Usually Tolerate and Sometimes Support Them

William Burnett Harvey
Indiana University School of Law

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As I was saying ...

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PREFACE

This started innocently enough!

The contents of my office at Boston University needed winnowing. There had been a good start a year before when I gave a substantial collection of Africana to another university. But more needed to be done in anticipation of the day when my need for an office would have expired, and someone would need to remove my belongings and make the room available to another occupant.

In starting the chore, I noticed several files of talks, more formal speeches and such, that had accumulated over the years. Yellowed pages and frayed edges looked a bit ragged and tired; so the thought of putting them on computer discs for compact storage and convenient review in case I ever wanted to do anything with them probably arose more from my obsessive desire for neat order than anything more pretentious.

From such modest, indeed trivial, beginnings this project arose. Later the thought occurred that if the talks were in the computer, I might print them out for any in the family who might be interested. At this stage, however, significant doubt began to intrude. Who might have any interest in reading what I had once said, and what justification could I provide for offering what might well be regarded as imposing only a burdensome obligation to read? Doubt almost prevailed, and the project came close to storage in that secret cupboard that holds the remnants of ideas whose time will never come.

Since the project has survived and may in time result in the gift of a little book to family members and a few friends, I think it obligatory that I provide, as honestly as possible, a statement of the reasons that conquered the earlier doubt. I accept it as part of the human condition that we cherish a hope of being remembered, at least for a while, within some small circle. And, while memory lasts with others, there is the probably immodest hope that it will coincide with the self-image, will direct attention to matters that were important, sometimes profoundly so, to the one who survives only in the recollections of living loved ones. Several years ago, in a brief memorial essay for a friend, I recalled a play in which the stage was the world occupied by the living, while heaven was an upper room, illuminated and seen by the audience only when the living remembered those who had slipped into the shadows. This is about as firm a concept of immortality as, hope aside, I can grasp. So if one indulges both the hope of remembrance and the immodest desire that the memory will coincide with one's own image of reality, the search for aids to fulfilling hope and achieving
desire continues.

I have no doubt that most, and by far the most important part, of the substance of recollection is the result of intimate personal contact when love led to commitment, when children came to provide opportunity for stories told, songs sung, and games played, when the companionship of friends and the support of colleagues in shared enterprises formed lasting bonds. I can do nothing at this time to alter these sources of recollection. What I may be able to do, and in this venture will attempt, is to add a dimension often revealed little if at all in these intimate relationships. And, in looking over the files of talks made, I've come to believe that they focus on some interests, concerns, and commitments rather better than most of the writing one had done for publication in books or professional journals.

During the years in which the contents of this collection came into being, if I were giving a brief, informal talk, for example, a luncheon talk to the Rotary Club, I always spoke from notes and preserved no record of what I had said--ephemera to both speaker and listeners. On rare occasions when the speech was more substantial but preparation time limited, I also spoke from notes, but in those circumstances I often dictated from the notes when time allowed to preserve a written version. Particularly in the politically tense years when I was at Indiana University, I followed this practice, since it seemed prudent to be able to correct any ascriptions, inadvertent or intentional, that departed from what I had said. In general, however, if the occasion called for a speech of greater length and, one hoped, more substance, I prepared a full written version which I didn't read but followed closely. This pattern led to the preservation of a large number of speeches in my files and, therefore, when I began this project I faced the need for sifting and selecting.

In most instances the decision on inclusion here or reburial in a file was easy. For example, I could think of no reason for imposing on anyone today the hour-long talk I gave to several hundred lawyers on the complexities and absurdities of the parole evidence rule. I also excluded a number of items of transient interest at best, such as presentations to Round

1. In Appendix I, I have included a bibliography. I acknowledge, however, a strong suspicion that few, if any, read most professional writing and that the shelf life of most publications is minimal. To the extent that I'm wrong on this, the bibliography may be a convenience.

2. The talk was surprisingly well received and the editor of the Michigan State Bar Journal asked for it. It appears as Item 4 in the bibliography, Appendix I.
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Tables at annual meetings of the Association of American Law Schools. One exclusion I rather regret was a speech I gave in 1960 in the Law School of Boston College at an institute for college pre-law directors. Bob Drinan 3 had invited me in my then capacity of Chairman of the A.A.L.S. Committee on Pre-Legal Education to lead off the conference with a talk on "Current Thinking on Pre-Legal Education." What I said on that occasion surely wasn’t memorable. In fact, at the beginning of the talk I made this confession:

"When I learned of the subject assigned to me, it sounded as if I were expected to report on a ferment of thought, a spate of new ideas, throughout the country. This raised in my mind a number of questions: first, whether there is, in fact, any new thinking on this problem. I hope so, but I can’t be sure. Second, and more important, if there is any ‘current thinking on pre-legal education,’ do I have any special competence to report on it or criticize it. I regret to say that I could think of none."

I recall this occasion at Boston College, not because of any memorable content of my talk, but because I had determined to overcome an inhibition I found annoying. I had never had the courage to use any humorous anecdote, however easy I might think it would be to make it seem relevant, not dragged in by the heels. Two fantasies constrained me. Easily I could imagine forgetting the punch line or so mangling it that the humor was lost. Or, perhaps worse, I imagined anticipating the punch line myself and becoming so overcome that I could hardly get a word out, while my audience sat in stony wonder about what I found so amusing. Appreciating the value of a touch of humor, I was resolved to conquer my inhibition. So I dredged up a couple of stories that, without too much violence, I could relate to the subject of my talk. I don’t exaggerate in reporting the rattle of my knees behind the lectern as I told the first story. To my amazed delight, I neither forgot the punch line nor laughed prematurely—and the audience rewarded me with a good chuckle. Such success went to my head, I lost my nerve completely and abandoned the second joke untold. But thereafter the inhibition was gone.

3. Bob, a Jesuit priest, was then Dean of the Law School of Boston College. Later he was elected to Congress from the Sixth District of Massachusetts and served there until he and other clerics were directed by the Pope not to serve in public offices. Since leaving Congress he has been a Professor at Georgetown University.
Perhaps I should add that probably in many of the talks included here, I began with some light, possibly humorous, remarks, before turning to the substance. Of these preliminaries I have kept no record and, even if I had done so, I would have omitted them here.

The speeches included here pursue a small number of themes, and the organization is in large measure thematic. Within each thematic group, the organization is usually chronological. This latter feature seems important in light of the possibility of my clarifying, deepening, or correcting something I had said earlier. Most of the speeches were made in the 1960s and later. I have little recollection and few records of talks I gave earlier, probably because invitations to young assistant professors to make speeches are fairly rare. The first group of talks

4. I resigned from the Washington firm of Hogan and Hartson in 1951 to become Assistant Professor in the University of Michigan Law School. I had always known that a move to the academic side of the profession was a distinct possibility, since I had done some teaching during my college years, in my period in the Navy, and while I was in law school. During the slightly over two years I was at Hogan and Hartson, Michigan was the fifth school that had approached me about a faculty appointment. In each case declining was easy: I felt I would benefit greatly from more practice and I was confident that an offer would come from Michigan in a year or so.

When the Michigan offer came, I had no doubt that I would accept it, but asking for some time for consideration seemed the appropriate thing to do. From a starting point of complete certainty on what my decision would be, I moved steadily during the two-weeks for decision I had asked for to such uncertainty that at the end I could have tilted either way. That I accepted the Michigan invitation was probably the result of the firm’s attitude, expressed largely by Nelson Hartson, the senior partner. Although I worked relatively little directly with Mr. Hartson, he clearly liked me and I liked him; at least once a month he would invite me to lunch with him at the Metropolitan or Cosmos Club. Our relationship was warm and relaxed. When I talked with Hartson about the Michigan offer, he indicated that the firm wanted me to stay and asked what kind of compensation and other terms I wanted. I responded that I preferred not to make the decision on the basis of income, having no doubt that the firm could easily outbid any University. He understood that and adjusted my salary so that I would have no immediate income loss if I stayed. He then said, "If you feel attracted to teaching, try it. If it doesn’t prove satisfactory for you, you can certainly come back." With that generous assurance, I accepted the Michigan offer and returned to Ann Arbor in August 1951.
explores the concept of the "Rule of Law," which was being invoked in this period with increasing frequency by such leading exponents of fidelity to law as Richard M. Nixon. I found disquieting the repetition of the Rule-of-Law mantra as a surrogate for thought. Perhaps the principal reason for the focus here on the Rule of Law talks, however, lies in the fact that they provided an opportunity for me to begin a fairly systematic statement of my own legal philosophy.

The decade of the sixties was the time of my own immersion in Africa. The educational and political issues I had to deal with in this period provided one of the most fascinating, creative, and ultimately disappointing experiences I have ever had. Most of what I have thought it useful to say out of the African experience is in readily available publications for the use of anyone with a shred of interest. I have included the entirety of or excerpts from a few talks out of the African experience, however, because the challenge of African development played such a prominent role in my professional life that it cannot be entirely ignored. During the period of work in Africa, some of my basic views on education, as well as on the nature and function of universities, came more sharply into focus; these were given fuller expression in talks I have organized in the third group.

The third thematic group reflects the central concerns during the turbulent sixties for those of us who worked in universities and had to deal with the protests of young people against the war in Vietnam and the various forms of injustice that students saw as intimately connected with that conflict. As I have reviewed the various talks I gave in this period, I have been struck by the extent to which the views I had developed concerning law, educational goals, the nature of a university, and the obligations of lawyers, became intertwined in a Gestalt that found expression in virtually every speech I made.

Before each speech included here, I have provided a brief statement of its provenance. In one or two instances, however, although I recall clearly preparing the speech, I simply have no recollection of the setting or the audience. I strongly suspect that the memories of those in my audience are no better than my own.

The thematic organization with its attention to the challenges of working in post-colonial Africa, as well as to the rebellion of the young during the sixties and early seventies, (footnote continued): I was promoted to Associate Professor with tenure in 1954 and to Professor in 1957.
suggests perhaps the possibility of an interest in this project beyond family and a few friends. As I write this, I remain unsure whether I will make any effort to explore publication. I feel only doubt that sales would suffice to interest any publisher, and any anticipated royalties probably would be minuscule. In this connection, I recall the musings of Sir John Colville as he considered reasons for writing a collection of charming essays on people and events he had experienced over a distinguished career:

Should I ... in the sacred cause of truth and in the interest of historical research, pursue my theme? I remembered a Fellow of Trinity College, Cambridge, an American of polished culture and agreeable hospitality, whose contribution to learning was the history of the County Palatine of Durham during a few mediaeval years. This vast tome sold, I believe, three copies and is never likely to be superseded, If I went ahead I might, assuming I could find a publisher, aspire to be his equal, for it is said that those good-natured institutions, the British Museum, the Bodleian and the Cambridge University Library acquire every book published in the United Kingdom, although they expect to receive their copy free.2

I thought this a useful reminder that I would have to find the justifying rationale for my modest project somewhere other than in the crasser gains of authorship.

I therefore conclude this preface and its attempted justification with a brief passage from Margaret Yourcenar’s MEMOIRS OF HADRIAN, words she put into the pen of the Emperor as he wrote of his past to the youthful Marcus Aurelius:

"I have formed a project for telling you about my life. To be sure, last year I composed an official summary of my career... . I told as few lies therein as possible; regard for public interest and decency nevertheless forced me to modify certain facts. The truth which I intend to set forth here is not particularly scandalous, or is so only to the degree that any truth creates a scandal... . I offer you here...a recital stripped of preconceived ideas and of mere abstract principles; it is drawn wholly from the experience of one man who is myself. I am entrusting to this examination of facts to give me some definition of myself, and to judge myself, perhaps, or at the very least to know myself better before I die."

In selecting talks for inclusion here, I recognize that even selectivity can be a form of lying—and of self-justification. Whatever opportunities as I now have for such indulgences, however, are limited somewhat by the fact that most of what I offer is simply a record of what I thought and said publicly many years ago. To that, I have added notes and one or two longer comments in an effort to place the talks into their context. Those who shared that context with me will have to decide on the accuracy of my recollection. Finally, although I offer this selection in the hope that it will enable my family and some friends to know me better, I share with Hadrian another objective, "to give me some definition of myself, and to judge myself, perhaps, or at the least to know myself better before I die."

To whatever value this project may have, many people—teachers, colleagues and friends—have contributed; their number defies listing and appreciative acknowledgment of my indebtedness. A necessary exception must be Marilou. Over more than fifty years of marriage, she, a non-lawyer, has had to endure "lawyer speak" and lawyer's work in many parts of the world. With good cheer and grace she has participated in treks to some places her own preferences would not have suggested; she has endured bar association meetings and vast amounts of the duty-entertaining that afflicts most teachers and all deans; and she not only had to hear virtually all of the talks included in this little book, but usually to read and critique them before they saw the light of day. For me to speak simply of gratitude would be grossly inadequate. But I can do little more; I wish I could.
PART ONE

REFLECTIONS ON THE RULE OF LAW

THE RULE OF LAW IN HISTORICAL PERSPECTIVE

[In the summer of 1960 the University of Michigan Law School held a Special Summer School for Lawyers, attended by a number of lawyers from the United States and other countries. The program included courses for "up-dating" participants on recent developments in various areas of the law. It also included a series of lectures on the theme "Post-War Thinking About the Rule of Law," intended in the words of the Director of the program to "enrich the study program and to direct attention away from 'bread and butter' thoughts to broader problems." I was invited to deliver the first and last of these lectures and did so on June 20 and 29, 1960. Later the lectures were published, as they appear, in volume 59 of the Michigan Law Review.

Reaction to the lectures was favorable though not entirely free of criticism. A note to me from Charlie Rhyne, a Washington lawyer who was a recent President of the American Bar Association, whom I had quoted in the first lecture was complimentary, though Charlie indicated that I certainly had misinterpreted his view. I continue to believe that the Natural Law outlook I ascribed (and criticized) was indeed his. The compliment I most enjoyed though came from a lawyer in Baltimore who, I believe, had not heard the lectures but only read them. He indicated that mine were the only discussion of "jurisprudence" he had ever understood.

In preparing the lectures for publication I added a limited number of footnotes to identify some of my references. I have eliminated them here to avoid the usual impedimenta of scholarly writing and to preserve the character of the talks as I had prepared and delivered them. Also, I have edited the lectures, particularly the second, slightly to avoid some repetition that seemed needed originally because the lectures were delivered a week apart.]

Events of the past two decades have made imperative a fundamental re-examination of the basis of government and the legal order. The gross inhumanities of the German and Japanese regimes during the Second World War are fresh in our memories. In many areas of the world today, the force of law is being used
for the systematic suppression of claims to freedom and human dignity. The revolutionary ferment of the post-war years has brought into existence new governments with the task of determining their fundamental orientation and the direction of their legal orders.

In such times the basic problems of government and law demand re-examination. Older societies, contemplating the barbarities of their own governments or of those they have defeated with the incalculable cost of war, press the question - what safeguards can and should be erected to restrain within decent bounds the acts of public officials. The emerging societies and older ones as well challenge traditional concepts of government and law with insistent demands for positive action on broader fronts to provide a better life for the people.

In discussion of these problems the phrase, "the Rule of Law" recurs. In recent years two great international conferences, reflecting the principal political division of the world, have met in Chicago and Warsaw to examine the Rule of Law in the West and in the East. The American Bar Association, under the leadership of its recent president Charles Rhyne and with the imprimatur of the President of the United States, has inaugurated an annual "Law Day" to memorialize our devotion to the Rule of Law. A distinguished university has established a "World Rule of Law Center" to further the study of this concept in international affairs.

All this is probably worthwhile, but what do we mean by the Rule of Law? Are we using a notion of determinate content to illuminate the dark corners of government and law, or are we tilting with Leviathan with only the emotive force of a cliché? It seems especially appropriate in a gathering of this kind to turn our attention at least briefly from the technical knowledge and skills of our profession to a consideration of the meaning and function of this concept and, hopefully, to the fundamentals of the legal order.

It would be a digression today to speculate on the origins of government and law in small, primitive kinship groups. It is enough to note that man's life in society has seen an inexorable movement toward larger governmental units and toward ever widening areas of official power. This development had not progressed beyond the city states of ancient Greece, however, when the philosophers raised the basic questions which still perplex men's minds: Whence comes the authority of the State? What title to respect and observance has the law? And, ever recurring in different contexts, the agonizing dilemma of Antigone whose con-
science and sense of justice demanded that she perform the customary burial rites for her brother, though Creon, Regent of Thebes, had decreed that he should remain unburied as punishment for his treason. This apparent conflict between law and justice is still a part of our daily lives.

Greek thought, funneled into the main stream of Western ideas about government and law primarily by the Roman Stoics, postulated a view of the universe, of man, and of law which retains its vitality today. Cicero stated:

True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting; it summons to duty by its commands, and averts from wrongdoing by its prohibitions... We cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge...

Christian thought built on these foundations and provided a theory of government and law which appeared to reconcile authority and justice. The cosmic order, emanating from the mind of God, according to St. Thomas Aquinas, to some extent is perceptible to man’s rational faculties and, as Natural Law, provides a universal standard for the formulation and administration of human law by those invested with the care of the community. The objective of government and law is thus the common good. While some deference even to unjust law may be warranted by the gain of civil peace, the commands of reason are ever present to guide the lawmaker, to inform and support the governed, and in the extreme case to justify a rejection of the demands made by human law.

The Reformation ended the harmony of medieval thought which was based on this view. The unity of the Church was destroyed -- with a consequent undermining of confidence in a universal and cognizable standard of justice. Concurrently the emerging spirit of nationalism produced increasingly powerful states whose diverse enactments rendered untenable the earlier justification and validation of positive law as the enactment of universal justice. To explain and justify the law-making and -enforcing aspirations of the new national states, the theory of territorial sovereignty was developed. While not the earliest,
certainly one of the most powerful formulations of this theory was presented by Thomas Hobbes in 1651. Starting from the postulate of a pre-governmental condition of man, which was a war of all against all and in which the life of man was "solitary, poor, nasty, brutish and short," Hobbes attributed the institution of civil government to a compact granting unlimited authority to the sovereign. To Hobbes, the meaning and content of justice were determined by the sovereign's enactments of positive law. The only consolation he offered to men ground under the heel of Leviathan, the mortal God, was the contemplation of their far worse condition in the absence of civil government.

Building on the foundations provided by Hobbes, John Austin in the early 19th century defined law as sovereign command, deriving its peculiar character from the naked fact that the manifestation of the sovereign's desire is coupled with a sanction, the threat of an evil, to assure compliance. It would indeed be unfair to Austin and many other positivists to suggest they ignored or were insensitive to the problem of evaluative standards for the positive legal order. Austin expressed his belief in a law of nature and suggested that the principle of utility was man's best index to this standard. But evaluative standards were carefully delimited from law and from the proper province of jurisprudence. It is not surprising, therefore, that the developed positivistic tradition, whether derived from Austin or his modern continental counterpart, Hans Kelsen, has accepted the postulate of a going legal order, based on the sovereign monopoly of force, and has insisted that the primary, even exclusive, task of jurisprudence is to analyze and understand that order. Judgment or evaluation is someone else's function.

The significance of these philosophical developments, divorcing law from evaluation, is brought into sharp focus by technological, economic, and sociological developments of the last century and a half. The Industrial Revolution inundated the simple economy of household craft and stimulated the growth of great urban centers. The production and distribution of goods have become increasingly complex. Channels of commerce have lengthened to the far corners of the world and the significant forms of wealth have been fundamentally altered.

It was, of course, inevitable that such revolutionary developments in socio-economic conditions should have affected deeply the nature and function of government and law. Demands have been insistent that government act to correct social and economic maladjustments and to provide public services. In meeting these demands the apparatus of government has grown phenomenally, with the result that official interest and regula-
tion range broadly over the most significant aspects of men's lives.

Against the background of a positivistic theory of law, can we fail to be concerned by this development of the modern state? With its reserved monopoly of force, its economic power, its overpowering resources of information to be disseminated, or withheld, or spread in partial or distorted forms, with its fantastic proliferation of legislation and decision, how can we cope with it, whether as an individual, a minority group, or the broad mass of the population? Lord Acton's famous aphorism that power tends to corrupt and absolute power to corrupt absolutely focuses historic experience on our dilemma. In a demanding, complex society like that in which we live, it is unthinkable that governmental authority and the administration of justice should be reduced to the elemental level of preserving the public peace. Yet how can we reconcile such great and pervasive power with the preservation of those values we cherish most highly?

It is, then, with this problem in view that we turn to an analysis of the Rule of Law. One common meaning of the term may be mentioned briefly and immediately put aside as not significantly responsive to the present interest. This meaning equates the Rule of Law merely with the existence of public order maintained through the systemized application or threat of force by a modern state. In this sense, the Rule of Law exists in every developed state, is not dependent upon any particular ideology, and applies no restraint on official action in relation to individuals or groups. On this basis, it is plausibly arguable that the Rule of Law is furthered as the scope of legal regulation is extended into the lives of citizens. In fact, this argument was made by the apologists of the late Nazi and Fascist regimes.

It is obvious that more than this notion is involved in the thought of those who offer the Rule of Law as a bridle for Leviathan. In their views, may I identify very briefly three basic meanings of the Rule of Law and suggest some criticisms of each concept.

The first of these, while in no sense prior in point of time, perhaps deserves first mention because of its association with Professor A. V. Dicey, who popularized the term, the Rule of Law. In his well-known work on The Law of the Constitution which first appeared in 1885, Dicey declared that since the Norman Conquest two features had characterized English political institutions. The first of these was the supremacy of the central government, and specifically in modern development, the
supremacy of Parliament; the second was the Rule of Law. To Dicey this second feature had three distinct facets: first, "that no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land." Therefore, the Rule of Law, according to Dicey, is "contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint." Second, the Rule of Law meant that every man was subject to the ordinary law of the land and came within the jurisdiction of the ordinary courts; therefore, Dicey vigorously rejected the idea of a separate body of administrative law applied by special tribunals to the conduct of officials, best exemplified in the French Conseil d'État. Third, according to Dicey, the principles of English constitutional law, and specifically the rights of individuals, were derived from judicial decisions and not from written constitutions.

Before commenting further on Dicey's classic formulation, a word might be said about the extreme theory of one of Dicey's modern disciples, the Austrian economist, Friedrich Hayek. In his widely read book, The Road to Serfdom, Hayek asserts that the Rule of Law, stripped of all technicalities, means "that government in all its actions is bound by rules fixed and announced beforehand -- rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge." Thus, the Rule of Law, according to Hayek, is antithetical to state planning, for planning necessitates the exercise of official discretion in regulating the affairs of determinate people.

Much criticism might be leveled against the theories of Dicey and Hayek. The former purported to describe the operative constitutional principles of late 19th-century Britain; yet even at this level his view was partial and hence distorted. He ignored the many privileges, powers, and immunities of the Crown which then existed and produced essentially different treatment of official and private conduct. He ignored the developing administrative agencies in Britain and grievously misunderstood the nature of administrative justice on the continent which has succeeded far better in developing meaningful review of administrative action and curbs on abuses than have been achieved, even today, in England.

Basic in the thinking of both Dicey and Hayek is a sharp distinction between law and administration. Law was conceived by them as a body of rather specific rules applied by the ordinary courts, while administration meant discretion and official arbi-
trariness. Yet such a sharp distinction was not descriptive even in Dicey's day and is even less realistic in the middle years of the twentieth century to which Hayek speaks. Surely no one beyond his first year in law school conceives of law as directions printed in heavy black type, susceptible of literal and mechanical application by the courts. Discretion in the administration of the law by the courts is inevitable. It appears when a judge scales punishment to fit the criminal and not the crime; it is invoked by the application of such concepts or standards as reasonableness, bona fides or the jurisdictional test in equity of the inadequacy of the remedy at law. The crucial point, perhaps, to the theories of Dicey and Hayek, is who exercises the discretion. As Sir Ivor Jennings has pointed out, Dicey's asserted goal of "rule by the law alone" comes close to meaning "rule by the judges alone."

Finally, insofar as Dicey proposed the Rule of Law as a substantive safeguard of individual rights against the ravages of government, he is caught in an irreducible contradiction. His entire catalog of the ancient rights of Englishmen, developed and protected by the ordinary courts, stands under the deep shadow of the initial characteristic of English constitutional law -- the supremacy of Parliament. Ultimately it would seem, therefore, that the preservation of individual liberties is less dependent upon the Rule of Law, as conceived by Dicey, than upon the threat of political action should the acceptable bounds for official action be exceeded.

Thus, this first concept of the Rule of Law purports to reflect certain constitutional principles of 19th-century Britain. On analysis, it seems more accurately reflective of the political ideology of a late 19th-century Whig valiantly fighting a rear guard action against the inevitable governmental developments arising from an increasingly complex, technological society. In terms of the allocation of governmental powers essential to an adjustment of the legal order to the life of society, the theory implicitly prefers the dominance of the judicial branch. Its political thrust is inherently conservative.

The second basic meaning of the Rule of Law is essentially procedural. The following succinct statement by Professor Harry Jones of the Columbia University Law School provides a highly satisfactory summary:

For want of a commonly understood American version of the rule of law, I will hazard my own understanding of the term's connotation in the American legal order. The rule of law is a tradition of decision, a tradition
embodying at least three indispensable elements: first, that every person whose interests will be affected by a judicial or administrative decision has the right to a meaningful 'day in court'; second, that deciding officers shall be independent in the full sense, free from external direction by political and administrative superiors in the disposition of individual cases and inwardly free from the influence of personal gain and partisan or popular bias; and third, that day-to-day decisions shall be reasoned, rationally justified, in terms that take due account both of the demands of general principle and the demands of the particular situation. This enumeration does not purport to exhaust the meaning of the 'rule of law'; doubtless there are other essential attributes to be included in the term's full intention. But any American lawyer would say, I think, that the three features just given characterize the best of our legal institutions -- for example, our criminal litigation when properly conducted -- and make up the adjudicative ideal of our legal tradition.

This concept, usually referred to in this country as "due process of law," surely is part of the conditions of responsible and respectable government. Yet if the Rule of Law purports to encompass all significant aspects of the individual's relation to his government, this procedural perspective can be only a partial view. In the Anglo-American common law tradition, it is not surprising that regulative ideas germane to the judicial process should claim the center of the stage. Yet these ideas speak indirectly, if at all, to the innumerable impacts between government and citizen which do not result in litigation either in the ordinary courts or in the new administrative agencies exercising quasi-judicial powers.

Perhaps the gravest inadequacy of this primarily procedural view of the Rule of Law is its lack of relevance to the legislative process and its unresponsiveness to felt demands that the legislative power be subjected to substantive curbs. One poignant illustration of this point comes from the Union of South Africa.

In the pre-dawn hours of December 6, 1956, one hundred and fifty-six persons were arrested in various parts of the Union and flown by military aircraft to Johannesburg. There they were charged with high treason and other serious crimes. This miscellaneous group was made up of Europeans and Africans, of laborers and professors, of militants and pacifists, of Christians and pagans. They shared only one obvious characteristic -- an avowed opposition to apartheid, the South African version of white supremacy.
The crimes charged merit some explanation. The first was high treason. In South Africa, this is a Roman-Dutch common law offense of exceedingly broad inclusion, punishable by death. For example, one commentator suggests that it apparently may be committed merely by suppressing information. The accused were also charged under the Riotous Assemblies Act which makes criminal a wide variety of acts "calculated to engender feelings of hostility between the European inhabitants of the Union on the one hand and any other section of the inhabitants of the Union on the other hand..." Why the actions of the government in implementing its policy of apartheid are not in direct contravention of this Act is somewhat difficult to discern. The government, however, charged that the activities of the accused in opposing that policy were in violation of the statute. The third basis of charge was found in the Suppression of Communism Act which defines "Communism" broadly enough to include any scheme or doctrine "(b) which aims at bringing about any political, industrial, social or economic change within the Union by the promotion of disturbance or disorder, by unlawful acts or omissions or by the threat of such acts or omissions or by means which include the promotion of disturbance or disorder..." or "(d) which aims at the encouragement of feelings of hostility between the European and non-European races of the Union the consequences of which are calculated to further the achievement of any object referred to in paragraph (b)." Again the apartheid government seemed to be exempt from accusations of this broadly-defined "Communism," while those in opposition, even Christian moderates like Chief Albert Lithuli, head of the African National Congress, are "Communists" to be suppressed.

We cannot take time to follow the trial through its various proceedings in the tedious months and years which followed the arrests. My point can be made much more simply. The judges assembled to try the accused were steeped in the Roman-Dutch law, which has a tradition of judicial fairness comparable to our own. The proceedings have been orderly and full opportunity has been given to the defendants to be represented by counsel and fully heard. Thus, there were procedural protections in full measure. But does all this make it possible to say that the Rule of Law prevails in South Africa?

Commenting on the South African Treason Trial, Dean Erwin Griswold of the Harvard Law School has stated succinctly the problem confronted by one who measures the Rule of Law primarily or exclusively by the conditions of a fair trial. He said:

No question can be raised about the competency or the
capacity of the court. Each of the judges named is a member of the Supreme Court of South Africa for one of the Provincial Divisions. South Africa has long had excellent courts maintaining high standards of fairness and justice; and this court will, of course, fit into the South African judicial tradition. Nevertheless, no matter how fair and competent a court may be, if the underlying legal situation is deeply unsound the Court may, simply because it must act according to law, be compelled to unsound results.

It seems clear, therefore, that if the Rule of Law is to define adequately the relations of men to civil government, it cannot focus entirely on one manifestation of governmental power. It must comprehend the legislature and the executive, as well as the courts.

The third basic meaning of the Rule of Law, to be discussed here, is the most ancient. Like many of our ideas it was expressed in the thought of ancient Greece. Aristotle, you will recall, observed in the Politics:

He who commands that law should rule may thus be regarded as commanding that God and reason alone should rule; he who commands that a man should rule adds the character of the beast. Appetite has that character; and high spirit, too, perverts the holders of office, even when they are the best of men. Law [as the pure voice of God and reason] may thus be defined as 'Reason free from all passion.'

This same view appeared in the earlier quotation from Cicero's De Re Publica. Many other exponents of this view of the Rule of Law, ancient and modern, might be cited, but I prefer to use as illustration the views of a contemporary American, far removed from sheltered academic halls.

During his year in the presidency of the American Bar Association, Charles S. Rhyne, expressed on a number of occasions his view of the Rule of Law. At the dedication of the Association's memorial to Magna Carta at Runnymede, Mr. Rhyne declared: "What do we mean by freedom under law? We mean a great deal more, surely, than mere obedience to written laws. We mean acknowledgement of the fact that there are moral limitations on civil power. We mean that human beings have rights, as human beings, which are superior to what may be thought to be the rights of the state or of society." Though spelled out more fully in later statements the essentials of Mr. Rhyne's view appear here: there is an order, a moral order, in the universe which is perceptible to man through his rational faculties. This order ascribes to the individual a status, a dignity, and cer-
tain fundamental rights. These rights antedate civil government and hence serve as morally, perhaps even legally, valid limitations on the power of government which primarily exists to safeguard those rights.

So stated, this view is a familiar one. It expresses the ancient belief in a law of Nature and of Reason. But unlike the classic view of Aquinas which postulated the Law of Nature as a criterion for human law to provide for the common good of the community, for Rhyne the central datum appears to be the individual with inalienable rights. Thus, Rhyne echoes the language of John Locke and the Declaration of Rights of 1688, of the American Declaration of Independence and the Bill of Rights — and of the Supreme Court of the United States in the period when it invalidated social legislation under the banner of the inviolable rights of liberty and property.

A fair appraisal of Natural Law thought is exceedingly difficult and requires far more time than is available today. Within the main stream are varying cross-currents, forming eddies of profound significance. They cannot be explored in full. We know that a belief in Natural Law has often been a rallying cry, enlisting men in the fight for human dignity and a fuller, richer life. Yet this same belief has at times served as a shield and buckler for those who resisted the felt needs of their times in blindness to the vision of a better tomorrow.

I would make only two specific comments on the utility of a belief in Natural Law as the basis for a theory of the Rule of Law. First, despite a widely shared confidence in man's rational faculties and in his capacity to perceive supra-mundane norms, history has not shown stable agreement on the substantive content of those norms. When Natural Law thinkers have seriously attempted to reconcile universally valid norms with the fluid needs of society in time and space, they have formulated the principles of Natural Law at such levels of generalization that the norms become purely formal, providing no significant guidance in solving the complex and harrying problems of the legal order. At the other extreme are those philosophers who, in attempting to delineate a substantive code of Natural Law, show a remarkable tendency to up-grade the positive legal system with which they are familiar to the level of cosmic norm. A central difficulty with Natural Law theory, then, is epistemological — how can we know it and how can we test the validity of the insights of those who offer precepts as the Law of Reason, of Nature, or of God?

The cardinal merit of Natural Law thought suggests at the same time its second basic inadequacy, even danger. The Natural
Law exponent has always stood ready to remind the positive legal order that it is not the ultimate criterion of justice, that the positive law is subject to evaluation, and perhaps, invalidation, by reference to a higher standard. It is, of course, entirely appropriate to remind those exercising civil power that theirs is a derivative and not ultimate authority, that it must be either justified and supported or condemned and displaced, by reference to a test of purpose -- a purpose defined by an extrinsic set of values.

In subjecting the positive law to such a continuing critique, much Natural Law thought has insisted that basic harmony with supra-positive standards is of the very nature of "law." Thus, the distinguished German philosopher, Gustav Radbruch, late in life and after the tragic experience of Nazi tyranny, appears to have concluded that certain moral restraints were implicit in the idea of law itself and that official action transgressing those restraints is not law, no matter how duly enacted, adjudged, or executed.

One can sympathize with this insistence on the intimacy of law and morals and appreciate its utility in resisting the tyrant, while at the same time recognizing the danger in it. Briefly stated, the danger is this. It is a regrettably short step from insistence that nothing is law unless it is right, to the conclusion that whatever is law, in terms of legal enactment or declaration, is therefore right. From this perspective can be seen the significance of the Nazi slogan -- Gesetz ist Gesetz, Law is Law. This is, of course, an extreme manifestation of the recurringly conservative impact of Natural Law thought -- a tendency to take the old, the familiar, the existent, the legally-enacted, and defend it from attack on the ground that it represents the natural order of things. Implicit therefore in Natural Law philosophy is the danger that it will devour itself, that instead of providing a significant basis for evaluating the positive law, it rather will substantially immunize the positive law from criticism and evaluation.

In brief summary, three basic meanings of the concept of the Rule of Law have been pointed out. The first is identified with certain assumed constitutional principles of 19th century Britain; the second emphasizes the conditions of a fair trial, subsuming much the same specifics as the more typically American concept of due process of law; the third represents a more pervasive effort to subject government and law to the restraints of an axiology deriving its validity from human reason, nature, or God. Each seems to me a partial view, susceptible of distortion.
Those who are familiar with the work of the International Commission of Jurists may question why nothing has been said of its developing concept of the Rule of Law. The omission at this point is intentional. I have tried to suggest certain basic emphases in Rule of Law thinking. The work of the International Commission of Jurists builds on these earlier formulations but is eclectic and much more broadly responsive to current needs. More will be said about the views developing in the Commission in my next lecture.

THE CHALLENGE OF THE RULE OF LAW

[In the first lecture, I identified three basic concepts of the Rule of Law, beyond its highly restricted connotation of public order maintained by the force of politically organized society: first, certain constitutional principles, particularly those ascribed by Dicey to 19th century Britain; second, certain valuable procedural safeguards of a fair trial; and third, those asserted universal and perhaps immutable principles, derived from God or Nature by the rational faculties of humans, available to guide and, in some views, to invalidate positive legal action. Without denying the significance of any of these emphases, I suggested certain criticisms, insofar as any one emphasis is advanced as the sole definition of the Rule of Law, and that concept, in turn, is offered as a general safeguard against abuses of the power of the modern state.]

[I turn now to an further analysis of the Rule of Law], but from a somewhat different perspective. I hope to come somewhat closer to the heart of the problem that underlies thought and discussion of the Rule of Law and then, proceeding functionally, to synthesize a concept somewhat more responsive to the needs of that basic problem.

Initially, it seems essential to consider what is meant by law, if the "Rule" thereof is to mean anything. This necessity is regrettable, for the literature overflows with much good ink spilled over this question. The discussion of the meaning of "law" has often been acrimonious and frequently arid. Why then must it be prolonged? Cannot this definitional problem be set aside so that we can get on with our chores?

In Shakespeare's Verona, Juliet inquires of Romeo, "What's in a name? That which we call a rose -- By any other name would smell as sweet." The obvious good sense which underlies the question and comment is very appealing. Why not conclude that
definition may properly be stipulative, and, if anyone questions what we mean by "a rose," solve the problem demonstratively by pointing out -- "This thing, this complex of stem, petals and fragrance, is what I refer to by the verbal symbol 'rose.' You may call it by a different name if you choose." In these circumstances, surely misunderstanding should disappear even if the questioner would have chosen to refer to the same physical phenomenon by another verbal symbol.

When we come to the term "law," the definitional problem is complicated by two facts of profound significance. The first of these is that our term, our definiendum, does not have a physical counterpart or referent which exhausts its meaning. No one can point to a thing and say, "That's what I mean by 'law'." We might say that the term "law" is an incomplete symbol -- only in part is its referent a physical thing or act; in large part the referent is an abstraction or generalization from immediate experience. Thus, the referent of the symbol "law" is an intellectual construction, and hence it is vastly more difficult to achieve clear understanding by a stipulative definition. The second complicating fact is that the verbal symbol "law" is an old one and has acquired a meaning or set of meanings prior to any stipulative definition now proposed. A lexical approach to definition is, therefore, feasible, and, if this approach is ignored in proposing a stipulation, the chances of misunderstanding and real communication failure are much increased.

Several discrete meanings of the term "law" are identifiable, some of which were referred to in the previous lecture. The most important of these follow in capsule form. To be mentioned and put aside immediately is the meaning of "law" in the natural sciences. In that context a "law" is only a descriptive generalization. It summarizes observed experience and suggests, subject always to the improvement of observation and measurement, that in the future similar phenomena under similarly controlled conditions will behave in the same way. Implicit in such a "law" is nothing of an "ought" quality, except perhaps in the colloquial sense in which "ought" is the language of prediction -- for example, in the seasonal statement: "Mickey Mantle ought to hit well over .300 this year."

Throughout those meanings of the term "law" now under consideration, there is ordinarily, if not always, present, expressly or implicitly, a quality of "ought," a sense of imposed guidance for volitional creatures able to act contrary to the "ought."

By and large, then, the various discernible meanings of "law," relevant here, are based upon its normative or "ought"
quality and differ primarily with respect to the source and validity of the "ought." Thus the extreme exponents of Natural Law insist that nothing can be law unless it is in accord with universal norms deriving their "oughtness" from Nature, Reason, or God. The positivist, on the other hand, finds the "oughtness" in the threat of a sanction applied by a political superior. Therefore, he defines law as the "command of the sovereign" (John Austin) or an officially formulated hypothetical judgment linking a conditioning circumstance with a conditioned consequence (Hans Kelsen). Others, like the Austrian jurist, Ehrlich, and the anthropologist, Malinowski, find "law" in the inner ordering of society, deriving its sanction and validity from unofficial, social processes.

But enough of such a review of meanings, which are offered only to suggest the lexical possibilities. I would suggest for use here a meaning of the term "law," coterminous with none of those suggested earlier and radically different from some. Adhering firmly to the positivistic tradition, I would define law as a specific technique of social ordering, deriving its essential character from its reliance upon the prestige, authority, and ultimately the reserved monopoly of force of politically organized society. This definition excludes from the concept of law such patterns of social organization in the quest for and distribution of goods as Malinowski observed among the Trobriand Islanders, interesting and important though they are. At the same time, this definition rejects the hypothesis of Natural Law that nothing is law unless it conforms to a certain order of values. Falling outside the scope of this definition also are the views of those positivists who survey the legal order and define law exclusively from the perspective either of a sovereign legislature or of the courts. Under the definition proposed, the constitution, a statute, the judgment of a court, the order of an administrative agency, and the action of the cop on the beat are all examples of law, for each brings to bear systematically the politically organized force of society to order human conduct.

Some may protest that under this definition the racist enactments of Nazi Germany or the suppressive regulations of the Union of South Africa are just as much law as the American Labor Management Reporting and Disclosure Act of 1959. This is true. Law, as here defined, has no moral or ethical coloration. Law, qua law, is simply amoral. Does this proposed definition of "law" leave available then any meaning for the Rule of Law other than that of public order preserved by state force? A consistent use of terms would seem to suggest a negative answer to this question. Therefore, I would prefer to consign to limbo the term "Rule of Law" and seek a useful conceptual framework for evaluating and criticizing the legal order.
Having postulated an essentially positivistic conception of law, I would, however, immediately abandon traditional positivism. To analyze and rationalize the linguistic and conceptual machinery of the positive legal order is an important task for the legal philosopher. It is, however, only one part of the job and today the less important part. The most pressing task which confronts jurisprudence today is the development of a viable basis for criticizing, evaluating, guiding, using, accepting, or ultimately rejecting the positive law.

If law be viewed from this perspective, what bases for evaluating it are available? Three such bases or modes of evaluation are worth brief consideration.

First, law may be evaluated by reference to the standard of utility. "Utility" for this purpose should not be equated with a Benthamite calculus of pleasure and pain. "Expediency" might be substituted for "utility," if it could be drained of its Machiavellian overtones. The Germans have the best word, "Zweckmaessigkeit," the appropriateness of means to ends, but it doesn't translate economically. A simple illustration may serve to clarify this point. Assume we have a saw which we want to evaluate by the first suggested standard. Relevant questions would deal with the appropriateness of its weight, length, pitch of the teeth, and keenness to its purpose as a hand-held cutting tool. On this basis, it might be called a good saw or a bad saw. This evaluation would ignore the use to which such a saw might be put, whether by a skilled surgeon amputating a gangrenous limb or a sadistic murderer disposing of his victim. Similarly, law is a tool, a technique. It can be deemed good or bad by this amoral test of utility, or appropriateness to whatever end may be postulated, to which the law is merely a means.

It is worth observing at this point that evaluation by the standard of utility has some distinct advantages, or perhaps presents fewer difficulties than some other types of evaluation. In the language of philosophy, utility poses a problem of "mediate" rather than "immediate" or ultimate values. The problem assumes or postulates a certain end or objective and merely inquires what is the most useful means of achieving that end. Two persons may appear to be sharply divided on an evaluative problem but, if preliminarily they can agree on a common objective envisioned, an ultimate value shared, they may have reduced their difference to much more manageable proportions. At such a point, scientific investigation may be undertaken and rational discourse employed in seeking agreement on the best means of
achieving the postulated objective. Such approaches to the resolution of dispute are not available, however, if the controversy relates to a choice of ultimate values. A great many of the divisive axiological problems in the legal order can be reduced effectively to this mediate level and thus made tractable. Thus this first standard is, I believe, a significant one.

In the second place, "law" can be evaluated by the standard of legality or, perhaps more accurately, of consistency. Hans Kelsen has taught us that the legal order is hierarchical and that pyramid from the basic or *grundnorm* are other norms representing various stages of progressive concretization. Any subordinate norm is law, according to Kelsen, if made in accordance with the superior norms in the hierarchy. While helpful, the picture Kelsen paints of the legal order is too symmetrical, too internally consistent, to account for all significant experience which for me is encompassed by law. Modifying Kelsen's "Pure Theory," I would therefore suggest that many things are "law," which are not authorized by the higher norms. An illustration may be found in the recent study of the administration of criminal justice in the United States, conducted by the American Bar Foundation. The study showed that in a certain precinct of a large city, police officers systematically conduct unprovoked searches of persons on the streets. To me, this police conduct is "law," since it is a technique of ordering or controlling human conduct used by persons who have or appear to have official force behind them. Yet unquestionably most of these searches are illegal under the guarantees of the state and federal constitutions. In appropriate instances, the "law" as represented by this police conduct may be evaluated in relation to higher governing norms with the conclusion that the former is "illegal" or "inconsistent." This may be a significant evaluation. The hierarchy of norms which permits it usually reflects important judgments as to how the state force shall be distributed, channeled, and controlled. It is worth noting, however, that this evaluation is not exhaustive, and further assumptions are needed if "legal" or "consistent" is to be equated with "good," and "illegal" or "inconsistent" with "bad."

Third, and finally, is that sort of evaluation we may call "ethical." At this level, the adjectives "good" and "bad," "right" and "wrong" may be employed most significantly. It is this type of evaluation that is today of paramount importance in the perplexities of determining what the Rule of Law means.

The fundamental difficulty here is to identify and delineate what ultimate values we accept in making an ethical evaluation of law. In determining those values, scientific processes
and reflective thought can make a significant contribution. They can spell out the logical consequences of various value postulates and identify the value postulates implicit in different courses of legal action. Value acceptances can be dealt with as facts. Through careful empirical investigation we can determine what values are, in fact, accepted and the extent of their acceptance in any particular society at a given time. But the purest scientific method cannot make ultimate value choices for any person or group, nor can it provide verification of the choices actually made. In the final analysis these choices depend on the individual's own Weltanschauung, his belief as to the nature of man, his place in the universe and in society. Each individual makes these value acceptances in the light of his religious convictions, his education, and his experience in society. Ultimately, however, each one must recognize that at this level he stands on faith and not on knowledge in any verifiable or transmissible sense.

This view of the nature of ultimate value choices is not offered in any sense of futility. I believe that in the Judeo-Christian tradition of the West there are broad areas of significant agreement on ultimate values. Obviously such an a posteriori approach does not serve to prove or to verify the values agreed upon, but such agreement in fact has great practical significance for the legal order.

An exhaustive catalog of these common value acceptances is not necessary here. A few, however, should be mentioned. First, is the value of man himself, of the individual as a creature of dignity and essential worth. Corollary to this are the values of liberty and equality which are nonetheless significant because it is difficult to define them with precision or to determine their specific scope. Also basic to this value structure is some degree of assurance of the material requisites of a decent life. Finally, but not last among these fundamental values in the Judeo-Christian tradition, is the opportunity for people to participate significantly in the control of their government.

In considering the means whereby the awesome power of the modern state may be channeled and controlled, I believe our primary attention should be on the ultimate values we, the inheritors of the Judeo-Christian tradition, accept and intend to preserve. All else may be considered then as mediate values, as means to secure desired ends. To be sure, the various concepts of the Rule of Law suggested [in the first lecture] are in a sense value-oriented. But too often value postulates were submerged. Each concept thus presented the risk of attributing ultimate importance to certain techniques which are often useful
to preserve essential values, but are also usable in a legal order which casts the dark shadow of tyranny. Instead, therefore, of any one of these concepts of a Rule of Law, I would posit the Ideal of Just Law, using "just" in its broadest inclusion to comprehend a viable balance of our fundamental value acceptances.

In the light of our shared agreement on basic values and our centuries of experience with government, is it not possible to be more specific and to suggest certain techniques which may maximize our chances of securing and maintaining this Ideal of Just Law? I believe we can and that these techniques should include the following:

First, a written constitution postulating certain fundamental rights of men. Certainly such a device is not essential to the attainment or preservation of the Ideal of Just Law, but there appears to be a widening perception of its utility to that end. For example, in addition to the 18th-century American Bill of Rights, the 20th century has seen the European Convention on Human Rights and new constitutions like that of the Federation of Nigeria.

Second, there is the device which, among the followers of Montesquieu, is called a system of checks and balances. To be sure, the necessities of modern government preclude the complete compartmentalization and separation of the three basic powers. Probably this has always been true. As my colleague, Hessel Yntema, has recently observed, "Montesquieu's conception was more realistic, namely, that there should be no such combination of power in one political organ, a total merger of the judicial with the executive or legislative functions for example, as to imperil political liberty."

Implicit in any viable system of checks and balances is the idea that the actions of individual officials and governmental organs are to be judged by reference to legal norms which have been articulated and promulgated with reasonable clarity. Insofar as Dicey and Hayek, in their discussion of the Rule of Law, emphasized the importance of formal definitions of governmental function and clear-cut allocations of power, we can endorse their views. To be sure, the requirement that governmental interference be supported by law imposes in itself no substantive restraints on government, nor does it determine how power and function will be allocated among the facilities of government. It is, nevertheless, of profound significance for two reasons: first, it provides a basis on which the action of one agency can be reviewed and checked, and second, it opens up to popular inspection and political response many of the most critical decisions affecting the incidence of public
force.

The third technique, critical to the maintenance of the Ideal of Just Law, comprehends those devices for regularized and reliable modification of official action by the assertion of individual grievances and popular demand. The unifying idea here is the ultimate responsibility of government to its citizenry, but this is manifested at two distinct levels. The first level involves ordinarily assertions of the interests of individuals and subgroups as defined by the prevailing general law. The technique or device which experience has proved essential to protect these interests is a full and fair hearing before an impartial and competent tribunal. In a sense, the existence and function of such a tribunal might be subsumed under the principle of checks and balances. That principle, however, normally suggests only intra-governmental restraints. The important point here is that the tribunal checks and balances other centers of official power on the initiative of private citizens who feel aggrieved. It should be clear that my emphasis is not on the importance of an independent judiciary for the settlement of private disputes. Rather, it is on the existence of tribunals to review official action. Such tribunals may be the ordinary courts extolled by Dicey, but they may just as appropriately be specialized administrative courts like the Conseil d'Etat in France.

The second, but by no means lower, level of governmental responsibility to its citizenry involves those orderly and conventionalized processes by which officials are replaced and laws changed to reflect changing patterns of social interests, values, and needs. It is not exaggeration to assert that the Ideal of Just Law cannot be maintained over extended periods if governmental response to changes in the dominant values and interests of the community either depends on paternalistic voluntarism, or can be secured only by violent revolution in the face of the enormous power advantages of the modern state.

So far I have spoken only of devices or processes available for making government responsive to the people. It remains tragically true that these devices lose their significance and may ultimately disappear or be seriously distorted, if they are not cherished and used by a concerned and informed citizenry. In the final analysis, the preservation of our fundamental values depends on the devotion of the people, of you and of me. No matter how balanced and ordered the formal structure of government, how competent and impartial the courts, how open and uncoerced the polling places, the Ideal of Just Law is beyond the grasp of a society that is unwilling to seek it with a full share of its creative energy and devotion.
It is evident, I am sure, that most of the discussion thus far has been negative in thrust, negative in the sense of being concerned to limit, to restrict, the exercise of official power. This negativism is characteristic of most thinking about the Rule of Law or of government under law. It is clearly revealed by Professor Harry Jones of Columbia University when he lauds "the healthy suspicion with which the sturdy citizen of a free society should regard officialdom and all its works." This suspicion and the safeguards it may bring into being are important. I believe, however, they are only a part of what is needed.

An affirmative aspect of the Rule of Law or, preferably, of the Ideal of Just Law exists side-by-side with the negative aspect. Professor Henry Hart, speaking at the bicentennial celebrations of the birth of Chief Justice John Marshall, stated the thesis well. He said:

The political problem is not simply negative. It is a delusion to suppose, as so many people have, that if only you can prevent the abuse of governmental power everything else will be all right. The political problem is a problem also of eliciting from government officials, and from the members of the society generally, the affirmative, creative performances upon which the well-being of the society depends.

I do not mean to suggest that governmental intervention, official management, is a panacea for all our ills. I do mean to say that in our complex technological society we will encounter problems which demand for solution more vision, more resources, more discipline, and sometimes more altruism than can be expected from individuals or voluntary associations. When such problems are encountered, I do not believe we should be deterred by any of the usual scare labels from using the resources of government and the instrumentality of law as a means to social progress. The result of such use may be a Cocoa Marketing Board to provide for the orderly disposition in international commerce of Ghana's principal export commodity. It may be a Tennessee Valley Authority to facilitate the economic development of a vast region. Particularly in the less developed areas of the world, such an affirmative response of government to pressing human needs seems to provide the only hope of bringing together sufficient capital resources to remove, through economic development, the grinding heel of poverty from the majority of the world's people.
In my previous lecture, I referred briefly to the concept of the Rule of Law developing under the leadership of the International Commission of Jurists. In general, it corresponds to the ideas I have advanced. If you have not already studied them, I commend to you the Commission's Declaration of Delhi and the supporting resolutions of the study committees. In brief, the Rule of Law is viewed there as a complex of value acceptances and of practical institutions and procedures which "experience and tradition in the different countries of the world, often having themselves varying political structures and economic backgrounds, have shown to be essential to protect the individual from arbitrary government and to enable him to enjoy the dignity of man." It is worth noting that while safeguards against official abuses are emphasized, the affirmative responsibility of government to secure conditions in which men can, in dignity, work out their destinies is also recognized.

In this brief series of lectures, an effort has been made to indicate the nature of the present challenge to law and responsible government and to suggest lines of fruitful response to that challenge. The response is needed from all people everywhere, but I believe the legal profession has a special responsibility toward fulfilling the Ideal of Just Law. We in the teaching branch of that profession must respond with programs contributing to a broader perception of professional responsibility and to a deeper awareness that the legal order must justify itself in terms of the unifying values in our society. Whether we lawyers, practitioners and teachers, will respond, or how, I cannot know. The tasks are awesome, and in many respects we are called by confusing voices across uncharted seas. I only hope we will answer that call in the spirit of the aged Ulysses, who could not rest content with victories already won but was impelled to exhaust his energies, even his life, in new probing of the Unknown. Thus I conclude with his words as he addressed his mariners before departing:

Come, my friends,
'Tis not too late to seek a newer world. 
Push off, and sitting well in order smite
The sounding furrows; for my purpose holds
To sail beyond the sunset, and the baths
Of all the Western stars, until I die.
It may be that the gulfs will wash us down;
It may be we shall touch the Happy Isles,
And see the great Achilles, whom we knew.
Tho' much is taken, much abides; and tho'
We are not now that strength which in old days
Moved earth and heaven, that which we are, we are --
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek, to find, and not to yield.

THE RULE OF JUST LAW

[In the spring of 1966 I resigned from the Michigan Faculty to accept appointment as Professor of Law and Political Science and Dean of the School of Law of Indiana University, beginning with the academic year 1966-67. The following talk was the first I gave in my new capacity. The remarks were made at the Law Day Observance of the School of Law on April 30, 1966. They were later published in 41 Indiana Law Journal 341 (1966). The talk made a somewhat surprising reappearance on the "Op-Ed" page of the St. Louis Post Dispatch which published a substantial excerpt without asking for or receiving any permission from me. Possibly the Law Review gave its permission, though I never inquired.]

By a joint resolution of the United States Congress and annual proclamations of the President, the first day of May in each year is designated Law Day, U.S.A. The President's most recent proclamation reminds us that "the great individual rights we value so highly carry with them corresponding obligations of citizenship: to obey the law -- recognize the rights of others -- resolve grievances by lawful means -- support law enforcement agencies -- encourage law obedience by others -- practice and teach patriotism -- and defend our country." It also emphasizes "the fundamental truth that our liberty, our rights to pursue our individual destinies, and our very lives are dependent upon our system of law and independent courts. Only under the rule of law, and obedience thereto, can we rightfully claim our heritage of individual freedom."

A principal purpose of our gathering and fellowship this evening is to participate in this national observance and thus, in the words of the President, "strengthen our national commitment to the rule of law." It is especially fitting, I think, that such a celebration be held in the law school of a great university. For here, the pervasive spirit of inquiry may temper the rhetoric of formally honored ideals with searching questions and dispassionate assessments. What do we, on this occasion, celebrate? And do our professional work and daily lives during the rest of the year keep faith with the great ideals of Law Day?

On this day we are asked to re-affirm and renew our commitment to certain fundamental values that have, in the main,
guided the development of this nation during the past 190 years, values whose roots lie deep in the ancient soil of Judeo-Christian civilization. Thus, we value the individual human personality and its claim to liberty and equality in which to develop and express its full potential. But we value also the society whose richly-diverse texture and complex demands are essential conditions for full individual growth and development. The implementation and reconciliation of these values have produced the remarkable variety of our institutions, including prominently those of the law. These institutions that implement and protect the basic values we cherish include clearly articulated legal norms to channel and control private conduct, and to provide both the guidelines for official action and the standards by which the legitimacy of applications of official power is determined. These institutions include independent and competent tribunals to determine the fact and apply the law to the vindication of private right, the protection of public interests, and the assurance that the application of public force finds warrant in the law. These same institutions include, as well, a legal profession learned in the law, faithful to its ideals of service, and always ready to counsel and to guide to peaceful resolution the inevitable conflicts of social life.

On occasions such as this, these institutions of the law are frequent and proper objects of our praise. They are essential to that system of wise restraints which is the indispensable support of ordered liberty. Equally essential, however, are legislative bodies deeply sensitive to our tradition and responsive, not only to the clangor of organized interest but also to the often amorphous aspirations of our people for social justice within the entire community. Finally, this survey of institutions critical to a regime of government under law must not omit an executive establishment vigorous in its execution of the law of the land, imaginative and humane in recommending and guiding changes in the law, and ever aware, as it perceives the enormous reservoir of power at its disposal, that no aspect of power is more impressive than its restraint.

Particularly in the years since the Second World War, we have come to express our devotion to these fundamental values and institutions in terms like those used by the President in his proclamation of Law Day, 1966, when he spoke of "our national commitment to the rule of law." I trust no one will think me cynical or captious if, on this occasion of solemn and proud affirmation of our legal heritage, I should express certain serious misgivings. These misgivings, I must emphasize, do not relate to our legal institutions themselves. Like all human creations, these make no claim to perfection; yet in the main the legal heritage of this richly-blessed land reflects much of the
noblest striving and accomplishment of the human spirit. My misgivings go, rather, to the way we speak of this heritage and to some of the possible implications of the phrase "the rule of law."

The first of my misgivings may be stated in the form of a question: when we speak of the "rule of law" or advocate "government under law," what implicit qualifications of "law" do we have in view? Must positive enactment, judicial decision or executive decree reflect the basic humane values of Western civilization in order to qualify as "law" within the meaning of the phrase? Many thoughtful people, adhering to a natural law view, have answered this question affirmatively. I confess my own inability to accept this semantic escape from a persistent and perplexing problem. Consequently, I am compelled to ask: when we venerate "the rule of law," does not this phrase claim something of our respect, something of our allegiance and sense of obligation, even for the grievously unjust law, for applications of the official monopoly of force that may do violence to the most compelling claims of the individual personality and of social life?

I realize that I am raising one of the most perplexing problems of legal philosophy. It is an ancient question. St. Thomas Aquinas raised it when he asked in the Summa Theologica whether law binds in conscience. Yet no problem is more contemporary: Martin Luther King asked it in his letter to certain clergymen written from a Birmingham jail. While I want to raise the question, this occasion does not permit an attempted answer. My purpose now is far more modest. It is merely to suggest the fear that when we extol "the rule of law," we may be tempted to gloss over the fact that not all law is "just law" or "good law." We need not reach back for examples to the Nazi brutalities implemented by law. Positive legal enactment today denies fundamental decencies of human existence to the majority of the people of the Republic of South Africa. In our own country, much state law, if unaffected by the noble demands of the Constitution, would do the same. I therefore fear that praise of "the rule of law" may lead us to accept mere positive enactment or judicial pronouncement, the mere status of a rule as law, as a sufficient moral imprimatur. If we do, necessary and desirable moral criticism of law will in some measure be stilled.

My second misgiving about the phrase "the rule of law" is more subtle, for it depends upon that often unnoticed reflection of attitude that can be revealed by a study of ordinary language. Without extended and tedious analysis, let me merely suggest that I find in the phrase something disturbing. It sug-
gests to me that the power to decide, to choose and to govern has been moved out of ourselves and the society in which we live, that this power has been ascribed to an external, materialized entity with an independent existence -- the law. If I am right in seeing this attitude reflected in the phrase, and if the use of the phrase carries any danger that it will nurture that attitude, then I feel entitled to indict the phrase itself as a mischievous distortion of the relation between law and society.

Perhaps I can make my point clearer by an analogy. Consider that remarkable instrument that has become almost the symbol of our advanced technological society -- the electronic computer. Capable of absorbing almost unthinkable masses of data, and, on request, organizing, correlating and returning those data for use, the computer has an enormous potential for supplementing human energies and expanding man's capability to use fully and rationally his accumulation of knowledge. So impressive is this product of modern technology, that some, at least, of its votaries sometimes speak as if the computer might render mere mortals redundant in all their functions, including the making of value choices and policy decisions. To such persons, a solemn occasion for declaring their commitment to "the rule of the computer" probably would seem entirely appropriate.

I take it to be clear, however, that, whatever its usefulness, the computer is incapable of producing anything that has not been put into it. It must be programmed, and that program must be designed and given content, either proximately or remotely, by human hands and minds, by those who intend to utilize it to perform tasks important to them. A legal order is, I would suggest, in some important respects like a computer. A good legal order can expand vastly human capability, by organizing and releasing through desired channels the knowledge, energies, and creativity of men in society. But like a computer, a legal order must be programmed and, at least in a democratic society, that program is designed, shaped, and colored by the social group, by you and me, as we express our value choices in our individual and communal life.

This viewpoint is not novel -- Holmes expressed it when he said that "the law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race." But the view needs constant emphasis. Such emphasis may help to obviate the danger I see in the phrase "the rule of law." This is the danger that we will shirk our moral responsibility for the moral content of the law. This is the danger that we will depend unduly on official agencies -- legislators, executives, and judges -- to eliminate racial dis-
crimination, further social justice, and protect the legitimate claims and aspirations of individuals. To achieve these ends, sound legal institutions are necessary but not sufficient. It was, I believe, to stress this view that one of the most distinguished American judges, the late Judge Learned Hand, once said:

"that a society so riven that the spirit of moderation is gone, no court can save; that a society where that spirit flourishes, no court need save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish."

Judge Hand’s insistence on a broader, social responsibility for nurturing and protecting our basic values, in which I fully concur, does not discount unduly the critical role of our legal institutions. It provides, however, a needed caution against the externalization of that responsibility in "a rule of law" or a "rule of the courts." If we fail, in this rich and beautiful land, to create or preserve a free and just society, the fault is ours -- yours and mine -- ours alone.

I am grateful for the opportunity to share this occasion with you in the School of Law with which I soon will have the honor to be associated. It is, I think, especially appropriate that in the law schools we should celebrate Law Day by reflecting on our common enterprise. If I may again invoke the computer analogy, I might suggest that it is the graduates of the law schools who bear a special responsibility to assure that the circuits of our delicate instrument are properly wired and that the program is well followed. But important as is this craftsmanship of our profession, the provision of technical skills is only a part of its role. As a result of historical causes far too complex for exploration here, the legal profession has acquired in our society a special responsibility for leadership. As the searching light of moral criticism is directed at our legal institutions, the community looks to the legal profession for directions on the way toward improvements. As that responsibility is met, we will move toward a broader and more reliable coincidence of "the rule of law" with "the rule of just law." But the role of the lawyer as legislator, executive, judge, counselor or advocate does not exhaust his functions. As a leader of his community, whose education and experience make him a special guardian of those great organizing values that give coherence and dignity to our society, the lawyer can and must make ever clear that official agencies alone cannot assure that those values will survive. And he must stand ready to warn and to admonish when those values are threatened by public or private action.
The faculty of this law school, my colleagues to be, and you, the students in this school, share a noble enterprise—the education of the lawyers of tomorrow. I look forward with pleasure to joining the enterprise here. In this community of mind, of spirit, and of common devotion to the great humane values to which we commit ourselves on Law Day, I know I will find, with all of you, work worthy of a man’s dignity and of the respect of his society.

LAW DAY REMARKS—SUPREME COURT OF INDIANA, MAY 1, 1967

[Each year the Supreme Court of Indiana sponsored a Law Day celebration, an occasion often used for honoring academically outstanding seniors in the secondary schools of the State. In 1967, I was invited to speak on such an occasion. The following talk was delivered on May 1, 1967.]

We have met today to celebrate Law Day 1967, the tenth anniversary of this solemn occasion. In his customary Proclamation, the President of the United States has adopted the words of Theodore Roosevelt: "No man is above the law and no man is below it." The President goes on to say—

All who cherish freedom should also cherish law. Liberty and law abide together. In that bond is the foundation of our liberties.

I ask every American to take law into his heart—not into his hands. I ask not blind obedience, but enlightened obedience. I ask patience too, for the law, like our times, will and must change. But America's fidelity to law must be eternal.

It is especially appropriate that we meet today under the auspices of the highest Court of this State, In the protection of those values of individual and social life that we cherish most highly, no institutions play a more significant, role than our courts. Whether our concern is with the settlement of private disputes between citizens or with the protection of the citizen from the overreaching arm of government, it is ultimately to our courts that we must resort for the calm, dispassionate and orderly resolution of conflict, Legislative and executive organs have increasingly varied contributions to make to the maintenance of vigorous, responsible and responsive government, but the historic central position of the courts is assured as we reaffirm our commitment to the Rule of Law on Law Day, 1967.
Law Day is an occasion for extolling our legal institutions, for acknowledging the blessings of ordered liberty under law that have been ours, and for rededicating ourselves to their preservation. On Law Day, 1967, however, we are called upon especially, in my judgment, to couple our praise and thanksgiving with a thoughtful reappraisal of the relation of our legal heritage to the pressing concerns within our society.

The United States has been and is a nation blest; clearly it is not today a nation content. Much of the disquiet among our fellow citizens is intimately related, I believe, to concern over the structure and functions of the agencies of government, over the rules of law under which we live, and over the social ills for which remedies in law are being demanded with growing insistence. Consider only a few of the more obvious examples of divisive public issues that relate directly to the legal order:

What is the proper and acceptable responsibility of the President and of the Congress with respect to the decisions on the commitment of lives and resources to a war that weighs heavily on the consciences of a large segment of the American people?

What is the proper and acceptable role of the federal judiciary in stimulating and directing a move toward more representative government at the state level and in the Congress?

What is the proper allocation of functions among the legislative, executive and judicial branches in eliminating the barbarity of racial distinctions from our law and our society?

What is the proper balance between the individual rights of an accused and the right of society to protection from dangerous and disruptive conduct, and between the right of an accused to a fair trial and the social interest in a free press?

These are issues that press for attention. Their demand for our careful and creative thought and for the adaptation of the legal order must dispel any aura of complacency that might surround a celebration, such as today's, of the grandeur and worth of our legal institutions.

It is not novel or surprising that our legal institutions are involved intimately with issues of pressing social concern. For law deals, and must deal, with the fundamentals of man's nature and personality and of his life in society. Nor is it surprising or novel that protest and demand for change should be
directed toward the legal order. This is, indeed, a health state of affairs, for law is or should be a primary tool for meeting and satisfying the needs of man in society. Such needs change and law itself must change, as the President has reminded us in his Law Day Proclamation.

One of the most troublesome problems today, however, does not arise from the fact that the legal order is in a variety of ways an object of protest, but from the fact that violation of law has become a major technique of protest. Understandably, many of us are deeply troubled by the use of that technique, and in our dismay we often do not distinguish, as we should, among the occasions on which violation of law as a technique of protest may be used. Let us think together for a few moments about four examples.

Consider first a state statute or city ordinance that restricts the use of facilities provided by the public on the basis of racial criteria. Though not the only avenue of protest against such an enactment, a common technique in recent years has been the attempt to use the facilities in violation of the enactment, in the hope that in an ensuing prosecution the invalidity of the enactment under constitutional guarantees of human rights could be established. Most of us would, I suspect, support this form of protest, as the Supreme Court of the United States has done. Our constitutional system would permit us to say, in fact, that no violation of law is involved, since the state or local enactment that transgresses the great guarantees of the Constitution is not law.

Consider next the enactment of a legislative body, acting within the unquestionable scope of its legal power, which commands the performance of acts that are repulsive to the conscience of some members of the community. What view should we take of their knowing refusal to obey the law in order to meet their own moral and ethical standards and to make a protest in order to awaken the consciences of their fellow citizens? The question raises complex and agonizing problems, and I have no easy solution for them. More than two decades ago, however, our Government gave its answer to the question, declaring in effect that the requirements of law may be so heinous that violation becomes not a privilege but a duty. On that basis a court sat in solemn judgment in Nuremberg and exacted from some of the accused the ultimate penalty for their failure to reject the mandates of their law.

Consider now the action of persons who may be deeply and legitimately concerned about a social problem, who want to dramatize that concern so that others in the society will share
it and join in the efforts to solve the problem. With increasing frequency today we see employed the technique of violating a law that is unobjectionable within itself, simply as a means of dramatic protest. Thus, a highway or railroad may be blocked to traffic to protest an unpopular and cruel war or an unreasonably low price for milk. Or in knowing violation of the law, payment or all or some part of a tax may be withheld to protest a government policy.

Consider finally the violation of law that grows, not out of particularized protest to limited aspects of governmental policy, but out of an alienation of the violators from the society that has imposed the law and seeks protection from it. This is the protest of total rejection; it seeks to destroy since it has no hope of sharing. It is a protest bred of frustration and nurtured on the perception that orderly channels toward economic opportunity and social acceptance are in large measure blocked. It is the protest of the Watts District in Los Angeles and of the Hough District of Cleveland.

As we ponder today the President's call for fidelity to law, I would suggest that we consider these examples of violation of law, their similarities and their differences. I suggest that we consider them, not to develop some facile rationalization for violation of law, but in order that we may, through understanding the well-springs of civil disobedience, progress to a better assured regime of fidelity to law.

We posit an incomplete ideal if we call for fidelity to law without calling as well for just law. Unless we take steps to assure that the rules and institutions of law change to meet the changing needs of human beings in society, unless we insist that avenues toward peaceful change in the legal and social order be kept open to all citizens, unless we demand that justice be administered with even hands to all, unless we use the instrumentalities of law to open the gates of opportunity to all without discrimination of race or creed, unless we abjure in our legal and governmental system all repression of the freedom of the human mind and of the dignity of the human personality, we are not entitled to call for or to expect fidelity to law.

In this gathering of judges and lawyers, held under the auspices of this high Court, a reminder that law may be unjust and may thereby forfeit same part of its claim to respect is especially appropriate. For no segment of our society carries a responsibility equal to the lawyers' for assuring that fidelity to law is deserved and that the Rule of Law does not become merely the Rule of Dominant Force. In every aspect of our professional lives we strengthen the Rule of Law and further the
ideal of fidelity to law or we deny them. It is therefore to us, the members of the legal profession, that I would issue the principal Law Day appeal--

To the private practitioner, that he represent his client with vigor and a high sense of responsibility, and that he give of his time and talents to assure representation of the indigent;

To the lawyers in legislative bodies and executive agencies, that they be ever mindful that the function of law and government is to serve the interests of all in an inclusive society, not solely its privileged segments;

To the judge, that he administer prompt justice under law without fear or favor;

To the teacher of law, that he instill in his students not only the knowledge and skills of the profession but also an appreciation of the lawyer's high calling to serve in the public interest.

If this appeal is heeded by the legal profession itself, I have complete faith that through periods of protest, social transition, and change in the legal order, the ideals of the Rule of Just Law and of fidelity to law will remain strong and vital.

THE UNIVERSITY, THE COMMUNITY, AND THE LAW

[In 1969, the stresses within the universities created by student protests against the Vietnam War and other social ills that students thought associated in various ways with that conflict were at or very near their peak. These protests contributed to traditional "town-gown" tensions, as the communities that surrounded and in many instances funded the universities looked with increasing concern on protests frequently characterized by extreme demands, disruptive and destructive behavior, and sometimes serious criminal conduct. As police were frequently called in to deal with protest activity, serious questions inevitably arose as to the proper role of the general community's law-making and law-enforcing institutions.

In this context, I was invited to address the Law Day Dinner of the Knox County Bar Association in Vincennes, Indiana on May 1, 1969. The tenor of the times and the malaise that infected the universities and ambient communities were well il-
Illustrated by a telephone call I received in Vincennes in the afternoon before the dinner informing me that during a huge student demonstration in the playing fields near the general university library, a substantial part of the library had gone up in flames. An assumption was easily made that the fire was part of the student protest, though that assumption ultimately was not sustained.

The following talk which I made to the Law Day Dinner was heard courteously but, I sensed without being told, with limited agreement and some discomfort. I believe this was the last Law Day occasion on which I spoke. There was some satisfaction, however, from the fact that, for whatever effect they might have, my views did reach an audience beyond the immediate listeners in Vincennes. The speech was published in *Res Gestae Magazine*, a publication of the Indiana State Bar Association and in Indiana University's *Alumni Magazine* (Item 31 in Appendix I). The American Bar Association awarded it the "Judge Edward R. Finch Law Day U.S.A Speech Award" for 1969.]

Law Day is, in the words of President Nixon, "an occasion for rededication to the ideals of equality and justice under law." The President, in his 1969 Law Day Proclamation, continues,

There was never a greater need for such rededication. Events of recent years -- rising crime rates, urban rioting, and violent campus protests -- have impeded rather than advanced social justice.

The President’s reference to recent events on the campuses of many colleges and universities prompts me to use this Law Day occasion to share with you some reflections on three institutions in which I know we have a common interest -- the university, the community, and the law.

I have spent most of my life in a university. I feel a deep commitment to its essential values and purposes, but I shall not dwell on these. With recognition of incompleteness and of the consequent risk of distortion, I want to reflect briefly with you on some features of the modern university that are related most directly to the ferment on many campuses today. I shall do this by trying to sketch in rough profile the student activist who sees most clearly, not the historic strengths and contributions of the university, but its current inadequacies and weaknesses.

The student activist is an idealist. He expresses his ideals in deep concerns over his society, his university, and his relation to each. Among those concerns there are, I be-
lieve, four predominant factors, each of which raises its own insistent issues -- war, race, poverty, and self. The activist sees American and Asian blood being spilled and resource consumed in a war which fills him with moral indignation and revulsion. I do not believe, however, that his concern over war is confined to the rice paddies of Vietnam. Rather, he rejects the belief that resort to violence in pursuit of national interests can lead to the decent society he seeks. The student activist rejects the age-old fetish of race and reacts with growing anger and frustration to those aspects of our society which led a recent Presidential Commission to declare that it is a racist society. The student activist is not unaware of the general affluence of our society. Indeed, the typical white student activist has come from an upper middle class background. But he sees clearly that intransigent stratum of brutal and despairing need that underlies the general affluence. Finally, the student activist is deeply concerned with his own personal identity in a mass society characterized more frequently by the computerized grade report or credit card, by polluted streams and foul air, than by an awareness that the fullness of man’s life is in his individual awareness and expression and in the love and compassion he directs toward others.

While I have stated these as separate concerns of the student activist, he sees them as profoundly connected. He is fully aware of the fact that the war in Southeast Asia pits the forces of the richest nation of the world, which is predominantly white, against a tiny, impoverished, and colored nation. He sees, as well, that the draft calls, the agonies, and the deaths in Vietnam have fallen especially heavily on Black Americans. He is keenly aware that the flow of national resources into the military budget makes it appear difficult to commit adequate funds to programs designed to alter historic patterns of racial disadvantage, to eliminate the cancerous blight of our cities, or to move vigorously to end the pollution of our environment. And all these factors, which the student activist regards as dehumanizing, bring into sharp focus his alienation, his difficulty in identifying himself with a society he regards as excessively materialistic, hypocritical, and insensitive to the basic needs and values of the human personality.

You may reasonably observe that these concerns go to general features of the society. Why then does the activist direct his angry protest toward the university? It is unduly simplistic to reply that he attacks the university because he is there and the university is the readiest object of his frustrations, his moral indignation, and his demand for change. Surely this reply is an appropriate part of the answer. The larger
part, however, is that the activist sees the university, the faculty, and many of the students as compliant uncritical supporters of government policy and social practice he sees as corrupt and oppressive.

In sketching this profile of the student activist, my purpose has been to describe -- not to justify. I have stressed the student’s deep concern over the world he confronts. I believe this stress is justified and that the concern projects a truly operative idealism. To complete this rough profile of the student activist, however, I should mention other characteristics. That the student activist is impatient is not surprising; if patience is a virtue, it is one to which few of the young people of any generation have been able to make a strong claim. But simple impatience is too often converted by our current students into a pervasive, simplistic demand for instant solutions to complex social problems. Among other characteristics, I should mention the moral arrogance, the intolerance of viewpoints different from his own, and the thinly disguised core of authoritarianism which are so easily detected in many of the student activists. Finally, I should mention the widespread disillusionment with rationality as a path toward solution of human problems and the apparently growing belief that freely expressed emotion is an adequate substitute.

In sketching this profile of the student activist, I recognize the risk of over-generalization. I know that student activists do not spring from a common mold. Their sharing in marked degree the characteristics I have suggested may justify, however, this projection of a single profile.

Since I have attempted to describe only the student activist, you may ask "Where stands the silent majority of our students?" I wish I could feel greater assurance in trying to answer that question. I can only speculate. I suspect, however, that, while the great majority of our students feel repelled in varying degrees by the tactics of activist groups, they share in very large measure the concerns and the ideals of the activists. The differences are less in kind than in degree of commitment, but there are surely important differences in accepted tactics. Yet when the so-called moderate students have reason to believe that the activists have been dealt with unduly harshly, they are more likely to identify, I believe, with the activists whose goals they approve and whose courage they respect than with that authority which appears harsh, repressive, and intransigent.

As a man of the university, I have tried to describe some of our students. Now as a man of the community, I want to speak
briefly of the developing attitudes there. Despite my long-standing commitment to the university, I reflect, as do you, many of the attitudes of a broader community. Like most of you, I have passed the fateful age of thirty and thereby have become suspect. Like you, I pay my taxes to support the schools and universities, which are so frequently challenged today, and have already sent my own children to study in them. Like you, I recall clearly the barbarities we fought against in the Second World War and therefore I have difficulty in accepting a view that would commit us to impotence in the face of international aggression. And also, like you I am sure, I recognize that viable solutions to complex social problems are not produced instantaneously even by people of the best of wills.

While I identify myself with much of the perplexity with which the broader community views protest and disturbance on university and college campuses, I also feel a deep concern over some of the attitudes I see developing in the community. These attitudes, it seems to me, too frequently and easily reject the possibility of a useful and creative student voice in the making of decisions, within the university and outside it, which affect vitally the lives of young people. They seem too frequently to indulge the assumption that the best response to campus protest is vigorous repression, rather than an effort to understand the causes and a concerned commitment to curing basic social ills. Before we yield to any temptation to deny these ills and to assert that all is well, let us honestly ask ourselves some questions. Are we convinced that our involvement, with the loss of life and the expenditure of resources, in Vietnam is justifiable? Are we satisfied that our lives could not be enriched by a reaffirmation of belief that in a profound sense we are our brother’s keeper and therefore must extend to him more readily the hand of compassion and love?

I have spoken of the university and of the community. May I turn now to the law whose profession binds us together. I need not emphasize to you the intimate connections which tie the institutions of the law to the university, to its activist students, and to the community. Our legal institutions structure and provide much of the support for higher education. But our legal institutions also demand from young people their service, perhaps even their lives, in a war they detest. Our legal institutions serve far more responsively the needs of an affluent corporate and middle-class society than those of the disadvantaged. We delude ourselves if we fail to recognize that the view of the law, of lawyers, of courts, and of police officers is totally different in the urban ghetto and on many campuses from what it is in the comfortable suburb. In the con-
text of our discussion here, we must recognize that it is the agencies of the law to which the community seems increasingly inclined to turn to deal with protest on the campuses.

If we appreciate these interconnections, what view ought we to take of campus unrest and of the university’s and the community’s response to it? What counsel can we, as lawyers and therefore peculiarly the custodians of a long human tradition, offer to universities and their students, to our fellow citizens, and, indeed, to ourselves. In conclusion, may I offer some suggestions?

To the disruptive student activists, I would say: "You threaten, perhaps unwittingly, the underpinning of law itself. The basis of the legal order is the monopoly of legitimate force reserved to those who act for the commonwealth. When private individuals or groups claim entitlement to use force to sanction their own demands, however noble they conceive their aims to be, the basic principle of law and public order is challenged. Without that order, without the civilizing restraints of law the lot of man today would be no less 'solitary, poor, nasty, brutish, and short' than when Thomas Hobbes first used these words to demonstrate the necessity of civil government."

To the student activist, I would offer, as well, the counsel of tolerance and moderation. I would not say, "Compromise or abandon your ideals," for from the driving power of these ideals can come a nobler society and a richer individual life. But those ends are in fact repudiated by any individual or group which claims the right to enforce on others its own orthodoxy. If life in America is to retain or recapture its richness and diversity, if the dehumanization of enforced conformity is to be avoided, a measure of tolerance, indeed of respect, must be extended not merely to those of like persuasion but also to those with whom we profoundly disagree. Judge Learned Hand described this spirit of moderation in these words:

It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognizes their common fate and their common aspirations—in a word, which has faith in the sacredness of the individual.

To the student activist, therefore, I would not urge the compromise of ideals or the suppression of protest. I would urge, however, rejection of violence and recommitment to this
spirit of moderation.

To my colleagues in the universities I would offer these words of counsel. We need to rededicate ourselves to the basic functions of a university -- to the unswerving search for truth and to instilling in our students an unquenchable thirst for it. If we serve those functions well, the university will not be -- today or at any time -- an uncritical service station to a complacent society. It will probe objectively and critically in its research and teaching the unknown outreaches of the physical world and the dark recesses of our society in which lurk prejudice, ignorance, oppression and injustice. If the university does that in proper measure, its relation to the community will often be uneasy for the critique of truth is often disturbing.

To my associates in the university, I would also say that if we maintain a true university, it must be a community which invites and assures real participation to all its members. Membership in that community must include all who share its purposes -- students, faculty, and administrators. We must, therefore, seek new ways to permit all members of the community to make their creative contributions to its governance and its functions.

Finally, to the university community, I would say that it is not a privileged enclave in which reliance on reasoned persuasion can be abandoned and the rule of force tolerated with any less tragic consequences than in the general society. I believe, therefore, that the time has come, indeed has passed, when the university must make clear beyond question that violence and intimidation will not be tolerated, however worthy the cause in which they are invoked. As a university teacher and administrator, I am prepared to say with President Kennedy, "We will not fear to negotiate, but we will never negotiate from fear." I know no surer way for the university to lose its soul than for it to capitulate to the rule of force -- from outside the university or inside it.

And now to you, as members of the larger community, but particularly as men and women of the law, I would offer this counsel. A demand that university students abjure violence cannot be fully sustained by a society that is itself committed to violence, whether that violence is reflected in international belligerence or in less obvious and more subtle ways -- by that pernicious violence to the human spirit that arises out of racial prejudice, by insensitivity to the needs of those who are ground under the heel of poverty, by unequal protection of the
law and grossly differential applications of police power, by violation of the physical environment with which a generous Providence has endowed us, or by the enforced submergence of every claim to individual identity and worth in a nameless, faceless, materialistic society. The age-old reign of violence over the bodies and spirits of men must be ended. If we of an older generation are to assert effectively to our university students the claims of peaceful resolution of conflict, of order and rationality, we cannot respond to their disruption with irrationality and repression. If we actually believe in the values of order, reason, and tolerance, we must live by them. That course surely requires that we, along with the young people in the universities, examine critically our society, and its institutions and act to adapt them to meet human needs. If we can do that, I believe we are entitled to hope that out of today's ferment will come not only better colleges and universities but a more just and decent society.

Law Day can become too easily an occasion for uncritical praise of our revered institutions, a mere validation of the status quo. We lawyers must always be mindful that law can become obsolete; it can be oppressive and unjust. We need to take note that on this day President Nixon has not asked simply for our commitment to law, but for a "rededication to the ideals of equality and justice under law." I believe such a rededication, if made, could become a magnificent arching bridge over the gap that separates the larger community and the law from many of our university students today.

PART TWO

THE AFRICAN EXPERIENCE

HOW FIRM A FOUNDATION

[The following item is one of only two selected for inclusion here that was not delivered as a speech; it was in fact a book review, published in the University of California Law Review 1/. I have included it for two reasons: it reveals much about my thinking on African constitutional development and, perhaps more relevantly, it elaborates the critique of Natural

Law thought which I discussed briefly in the first Rule of Law lecture, supra, p. It may serve usefully, I hope, as a bridge or transition piece between Parts I and II.

On being invited to review Denis Cowen’s new book *The Foundations of Freedom*, I assumed my qualification, if any, lay in a long standing interest in African legal institutions, particularly those of the so-called "emergent" societies. Regrettably, this does not suffice. One needs the competences and insights of a keen student of contemporary political events in Southern Africa, of constitutional law on a broadly comparative basis, and of legal and political theory in order to deal adequately with this provocative little volume.

Professor Cowen is already widely known in this country. His academic attainments as Professor of Law in the University of Cape Town need not be recounted. It suffices to mention his wide ranging, humane scholarship of which this book provides ample evidence. Perhaps more because of his service as constitutional adviser to the Basuto people in the reforms of the fundamental law of Basutoland and his participation on the side of the colored voters in the great constitutional struggle over the franchise in South Africa, one turns to this book with great expectation of deep insight into the present and future of that troubled and tragic land.

Broadly classified, Professor Cowen’s discussion may be considered under three headings: 1) an analysis of the evolution of racial policy and law in the Union with an assessment of its present impact and accomplishments; 2) a consideration of certain constitutional devices which the author argues would better the situation and 3) the presentation of a philosophical position which Cowen believes is the only reliable underpinning for viable reforms.

From the historic practice of racial segregation in the Union Professor Cowen traces the development of the present policy of apartheid or separation. Apologists for the system tend to stress its affirmative aspects and speak not merely of separation but of separate development. The unreality and utter futility of the proposed Bantustans as effective devices for separation are here clearly revealed. Cowen demonstrates also what is too frequently overlooked—that the repressions involved in efforts to implement apartheid taint the whole society; they impinge not merely on the black and colored but on the white as well. The ruthless attack of the Nationalist government on the constitutional safeguards of minimal political participation by colored voters has undermined general confidence in basic institutions and left gnawing doubts and troubled consciences even...
among the dominant white minority. Cowen do not, of course, attribute the division in South African society solely to governmental policy and legal devices. The divisions, the hostilities, the fears are embedded in the society itself, deriving not merely from ethnic differences but from tremendous cultural disparities as well. Nevertheless, Cowen believes that certain unifying forces remain strong---the raw fact of economic interdependence, the tenets of Christianity at least professed by the whites, the persistent urge of Western civilization to an ever greater inclusiveness, and the love of their land shared by South Africans of all colors.

While insisting that education can contribute by exploding some of the myths, like that of racial inferiority, on which apartheid rests, Professor Cowen would expect to find the real catalyst to change in an overarching counter-fear--the fear of the ultimate consequences of apartheid. Change thus induced would hopefully lead to a true non-racial democracy in South Africa. Extensive legislative reform would, of course, be essential to wipe out the expressions of both racial segregation and separation. Cowen's primary attention is not on the details of legislation, however, but on the processes and devices of a reformed constitution.

We need not concern ourselves here with the technical problem of how a sovereign legislature brings into existence a constitution significantly limiting its powers. I see no reason to question Professor Cowen's analysis and conclusion that this is entirely feasible. It suffices to say that Cowen argues for a rigid constitution, that is, one exceedingly difficult of amendment with substantial limitations on legislative powers. Among these limitations should be safeguards of universal adult suffrage and other fundamental human rights. The latter include "personal liberty and the right to a fair trial; freedom of association and of assembly; freedom of religion; freedom of the press and freedom of speech." Also included should be non-discrimination and equal protection of the law guarantees. Cowen reviews the arguments for and against the power of judicial review and concludes that it provides by far the most effective protection of such constitutional rights. To an American his arguments and conclusions are perfectly palatable and may appear fairly obvious. They take on added significance, however, against the background of English suspicion of written constitution and court-guarded constitutional rights.

In addition to a judicially enforced, constitutionally entrenched Bill of Rights, Professor Cowen proposes certain other constitutional devices for South Africa. Power is safest when divided, and he thus argue for federalism rather than unitary
government. He also would favor a second legislative chamber or Senate, elected on the basis of a system of proportional representation and having as one of its principal functions the guarding of the constitution and its Bill of Rights against precipitate amendment. Professor Cowen is rather unenthusiastic about the relatively new-fangled councils of state, but favors the use of Special Commissions to investigate complaints of discrimination, attempt reconciliation and, this failing initiate court proceedings. It bears emphasis that Cowen does not see constitutional reform as the universal solvent. In connection with basic psychological and emotional changes, however, he believes it can make a valuable contribution to allaying the fears of South Africans of all colors and to the maintenance of decent government in the Union.

Cowen's philosophical discussion proceeds on two distinct levels, and the second limits and qualifies the first. After offering non-racial democracy as the only acceptable alternative for South Africa, he carefully analyzes the substantive and procedural aspects of democratic philosophy. As a substantive philosophy of government, democracy involves two basic ideas or principles: 1) primacy of individual human worth as the ultimate determinant of the relationship of man to organized society, and 2) recognition of the variety and complexity of social lift. Implicit in the first are the attribution to man of rationality, volition and responsibility for his actions and insistence that all associations and organizations "exist to enable men to fulfill their nature as men." The second argues that men's diverse potentialities will be best realized through efforts of individuals and varied groups, and requires the abjuration by any single association, specifically by the state, of pretensions to being the sole, necessary channel to individual and social well-being. Procedurally, democracy demands the active, manifested consent of the governed for the power of government to be deemed just.

Cowen fully recognizes the complexity of democratic method. Rejecting the notion that South Africa presents a special case, except perhaps for slight restrictions accepted on an interim basis, he favors universal adult suffrage. The actual procedure by which group decisions are to be reached, whether by simple majority vote or by some other means, presents more difficult questions. Cowen's acceptance of majority rule is at best qualified. He insists that majority decision makes little, if any, moral claim on the minority unless the minority has had full opportunity to express and propagate its views and thus to enjoy the possibility of becoming the majority. Even if these conditions are met in the formulation of group decisions, Cowen still fears the tyranny of the majority. He would, therefore,
place the fundamental human rights beyond the easily exercised power of the majority by the constitutional devices mentioned earlier.

Cowen's devotion to such limitations on majority rule leads him to the second level of his philosophical discussion. He seeks higher norms which validate certain values and entitle them to almost absolute protection, even from the adjustment seemingly implicit in democratic method. These he finds in natural law. In a final chapter, "Under God and the Law," he traces the evolution of natural law speculation and indicates his preference for the great formulations of St. Thomas as the "foundation of freedom" in South Africa or in any other country which would effectively bridle arbitrary power of government.

Thurman Arnold once said that "most of the literature of jurisprudence... is tedious, not as hard subjects like physics and mathematics are tedious, but as throwing feathers, endlessly, hour after hour, is tedious" I hope to avoid contributing to the tedium. The case for and against the natural law viewpoint has been restated innumerable times, A further detailed refutation is not needed here. I, too, have great admiration for Aquinas, not only because he posited a view of man with which I can live comfortably, but because he recognized, as few of his followers have, the limits of human reason and thus avoided the absurdity of elevating to a universal and immutable level a variety of transient positive laws.

Certainly today, as rarely if ever before in man's history, there is need for thoughtful and prayerful clarification of attitude on such pressing questions as: Who are we? What are the true non-negotiable in which we believe? How can we give them maximum protection in a hazardous world? The answers to such questions must be meaningfully related to the legal order, to family and social contexts far too delicate for the blunt instruments of the law, and to international relations which, strictly speaking, know no law. Perhaps one should not cavil when concerned scholars couch their gropings for significant supports for or restraints on the exercise of legal and governmental power in terms of a "natural law." Cavil or no, my own objections remain firm and rest on two basic points:

(1) The exponent of natural law occupies an epistemological position, the unsoundness of which undermines his purpose. He insists, whether the higher norms are said to have a divine or humanistic origin, that they are "knowable" by the use of man's rational faculties. I have no sophisticated theories to advance, here or elsewhere, on the essential processes and limitations of man's knowledge. I can, however, suggest the difficulty with the
epistemological underpinning of natural law argument insofar as the world of practical affairs is concerned. The natural law norm, as such, helps to reconcile competing human desires and wills only insofar as it can be given fairly specific content and its validity then demonstrated to the rational rejector or doubter. The inescapable fact that human history does not reveal stable agreement on the substantive content of natural law norms belies any claim to self-evidence. Beyond that, the difficulties with the usual lines of proof are well illustrated by Cowen's single-sentence leap over the gap between the "is" and the "ought": "... ultimately, in God's created order, being and oughtness are identical." This may be so, but modern logic offers no aid in its proof. I do not need to deny the existence of the higher norms which natural law affirms. Far more modestly, I hope, I need only question the transmissibility of claimed knowledge of their existence or content, to make my point for present purposes. Nor, for that matter, do I need to insist that all real knowledge is transmissible. Yet knowledge that lacks this quality is of limited utility at best. At the age of twelve I may have known that I kissed Suzie behind the barn, but if she denied it, how could I convince a doubting world that I had the makings of a lover?

Cowen's own attitude on the means of knowing the higher norms and, to some extent, on their substantive content appears ambivalent. If he attributes to all men the essential rationality which discloses the norms, how does he account for the South African Nationalists and specifically their leaders, many of whom he considers "men of high integrity, no less honorable than their opponents ... honestly believing their policy to be in the best interests of all." On what basis is the "reason" of such men to be declared less capable of gaining access to the "higher norms"? On the other hand, Cowen declares that he starts "with the premise that when entrusting power to human hands, it is essential not to believe in the sweet reasonableness of man." The meaning of this premise is unclear. It may mean that though all men have reason, they cannot be relied on to use it. It may mean that though guiding norms are rationally perceived, men's actual conduct, judged by these norms, is unreasonable or it may mean that while the dictates of reason provide reliable guides in many areas of human affairs, some other control is essential in allocating and channeling power. If the latter to his position, he seriously impugns the significance of his rationally derived higher norms for positive law, which finds its essential character in the reserved monopoly of power or force that lies behind it.

In Cowen's elaboration of the substantive content of the natural law, I find unresolved conflicts or tensions. As he
notes, natural law thought became increasingly individualistic in the seventeenth and eighteenth centuries. This he attributes to individual human will's masquerading as reason with the result that the natural law itself came to he merely a derivative of individual rights and not their source. Cowen believes that a system of substantive natural rights could be developed from the earlier natural law, while preserving the restraints of a divinely ordered system. As a logical exercise this doubtless could be done, but I am inclined to think that such a change of emphasis would involve great distortion of Thomistic thought. The central concept in Aquinas' discussion of law was "the common good." Quite plausibly it can be argued that maximizing the common good requires opportunity for individual expression and realization of potential. Insofar as conflict arises between such individual interests and the common good, however, Aquinas seems committed to protecting the latter. Cowen, on the other hand, while insisting that individual liberty and social and economic security are not mutually exclusive ideals, and that a viable balance can be prudentially determined, seems to suggest that in the event of ultimate conflict some hard core of individual rights should prevail. Thus, he remains in the later individualistic natural law tradition, though insisting that he validates his position by rational perception of a divine order and not by the sanctification of individual desire or will, the sort of thing fellows like John Locke tried to pull off.

With the substantive content poured into natural law molds by many of its exponents I can readily agree. Yet their insistence that this acceptance rests on knowledge repels Far better, it seems to me, to say "these values are the fabric, not of our knowledge, but of our faith, as, St. Paul put it, 'the substance of things hoped for, the evidence of things not seen'." I only fear that the speciousness of a claim to knowledge, at least in any transmissible form, detracts from a solemn declaration of faith which otherwise might stir men's hearts and kindle their devotion to the basic decencies that civilized life seems to me to require.

(2) The second objection can be stated far more briefly. It is trite to point out that in its historic impact natural law thought has been as frequently conservative as liberal or revolutionary. The tendency to identify the established, the familiar, with the natural in recurrent. Similarly, there is a dangerously short step between insistence that only that positive law is valid which coincides with the natural norm and sanctification of the legally enacted itself. Professor Cowen criticizes Kelsen for offering a theory which can "legalize political absolutism, and identity law with sheer power and domination." Perhaps Kelsen has done that, if one understands
"legalize" within the framework of the Reinerechtslehre. It has always seemed to me, however, that a cardinal merit of Kelsen was his insistence that he was not offering a theory of justification, that, in fact, law could not in any sense justify itself. Properly understood, Kelsen thus contributes to a healthy insistence that law, valid law, can also be bad law, and that it must be evaluated by extrinsic standards of ethics, religion, or morals. This insistence is too frequently muted by those who insist that "law" is itself a value concept.

Aside from his natural law persuasion, Professor Cowen has made a valuable contribution to thought about law and government in South Africa. He has brought together in highly readable form many insights into the South African situation from literature not readily available to the non-specialist. His constitutional suggestions are of interest, though their practical influence seems doubtful. One can only hope that the moderate optimism he professes for developments in the Union is warranted. The international isolation of the Union, the growing resentment toward it in the United Nations, and the seemingly waning patience of its African majority suggest greater agonies ahead. The awakening of Portuguese Africa way in the not too distant future deprive the Union of the buffer provided thus far by Angola and Mozambique against black Africa's continental pressure toward freedom and justice. If real optimism that change can be accommodated without disaster seems beyond reach, one nevertheless continues to hope.

The voices of Africa are many. In the United Nations they speak in fluent French and Oxford accents. They chant "Free-DOM" in Accra and "In-de-pen-DANCE" in Leopoldville. But in the gathering gloom of the Union of South Africa one may hear the insistent murmur of Sharpsville and Cato Manor, of massed humanity facing the guns armored cars of the modern state. As Prime Minister Macmillan has warned, the winds of change are blowing through Africa and the white minority in the Union cannot divert them. To them the voices of Time speak out:

Surely a house so strong and hold,
(The wind in rising, my son.)
Will last till time is a pinch of mould!
There is a ghost, when the night is old.
There is a ghost who walks in the cold.
(The trees are shaking, my son.)
* * *
All night long like a moving stain,
(The trees are breaking, my son.)
The black ghost wanders his house of pain.
There is blood where his hand has lain.
It is wrong he should wear a chain.
(The sky is falling, my son.)

Comment: BEGINNING THE GHANA ADVENTURE

The expected retirement from the Michigan Law Faculty of Professor Burke Shartel in about 1957 made operational the assignment to me of the primary teaching responsibility in the Law School for "Jurisprudence." Shartel's interests were largely in legal method; he offered only one course, called "Jurisprudence," and the Faculty had shown no interest, as far as I could determine, in a diversity of theory courses. When I became the responsible Faculty member, I recommended that we abandon the use of "Jurisprudence" as a course title on the ground that the word was overworked and unrevealing of the content of a course and that all members of the Faculty with interests in general theory be encouraged to develop and offer their own courses. These recommendations were adopted, and my first offering was a basic course entitled "Introduction to Legal Philosophy."

While appreciative of the utility of a study of legal method, I was primarily interested in the values that guided the development of legal norms and sought effectuation through them. Generous support from the Rockefeller Foundation enabled me to spend the academic year 1955-56 at the University of Heidelberg. While I was formally a candidate for a doctorate (a status made attractive by tax considerations), I had no significant interest in the degree. Rather, I wanted a year to read widely and deeply in both classical legal philosophy and the newer thought stimulated by the Nazi experience, as well as to develop a facility in German which I thought, mistakenly, I would need in my later work. On returning to Ann Arbor and resuming teaching, however, the view emerged that it would be useful in pursuing my interests to have not merely an academic exposure to the value issues in the legal order, but to pursue empirical research in an actual system in which efforts were being made to instill new values in the legal order and to use the instruments of the law oriented to those values in programs of planned social change. The venues in which such studies might be pursued included, I thought, possibly all of the new polities spawned by the breakup of colonial systems in which new elites were grasping the reins of power in government and law.

Against this background, I asked my research assistant to give me a memorandum responsive to several questions concerned mainly with the logistics of research, e.g., receptivity to foreign research scholars, official languages, and calendars of
local universities and courts. Another critical factor was the size of the country. I had no interest in organizing a research project that could be carried out only by a large team. On the basis of the report of my assistant, I decided to carry out the research in Ghana. With continuing support from Rockefeller, I made my first trip to Ghana in 1960, not even vaguely aware at the time of the challenges, satisfactions, and hazards that lay ahead.

In January, 1962, I planned to be in Ghana for a month to pursue my research, but also to participate in a conference on African legal education and law development sponsored by the Law Department of the University of Ghana. African participants came from other Anglophone countries, as well French-speaking areas. The other American invitees included Jim Paul of the University of Pennsylvania, Max Rheinstein of the University of Chicago, Arthur Sutherland from Harvard, and John Bainbridge of Columbia who administered a program funded by the Ford Foundation to assist developing African legal education efforts.

The conference almost broke up at its inception because of the dissatisfaction of the French speakers with the lack of translation facilities. As the conference proceeded, however, it was increasingly clear that legal education in the host University was approaching a crisis. Faculty and student morale was extremely low. At that time, Law was not a separate faculty, but rather a department in the Faculty of Arts. The head of the Department, the only Professor who managed with a small staff of Lecturers, was John Lang. Lang was an English solicitor with no experience in education, a good, kind man of the best intentions but lacking much needed political skills and handicapped by the essentially paternalistic attitudes that many of the English expatriates brought to Africa. Soon after the conference opened, we learned that in a dispute with the University administration, Lang had tendered his resignation. It seemed probable that the tender was simply tactical, a pressure device, and that Lang was surprised by its ready acceptance with immediate effect.

After the conference ended, I planned to spend the following three weeks on my own research. A day or so later, however, I received a message from Nana Kobina Nketsia, an able, educated Chief who was serving as the Interim Vice Chancellor of the

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8. Originally this effort, aided administratively by the Institute of International Education, operated under the acronym SAILER (Staffing African Institutions of Legal Education and Research). Later, with enlarged funding from Ford, it became the International Legal Center.
University, asking me to call on him. When we met, he surprised
me by asking, with few preliminaries, if I would be willing to
come to Ghana for at least two years as successor to John Lang.
I had not known Nana Nketsia and was unaware then and remain un-
certain today why he decided to extend this invitation to me.
Since he and I were not acquainted, I assume that someone else
must have proposed me, though I do not know who.

I had never thought of any role in Ghana other than that of
a research scholar, pursuing an interest in legal theory; I had
never thought of myself as an Africanist (present or future). I
found the prospect of an activist role in Ghana's development
exciting, but I was also keenly aware of the hazards in that
role for everything I had come to Ghana to do. I had worked hard
for more than two years to establish relationships of trust and
confidence with leading figures in government and politics that
would encourage them to speak candidly with me with full as-
surance that nothing they said would be revealed in any way that
could be personally attributed and, therefore, possibly damag-
ing. It seemed clear that if I took on an active, operational
role, the kind of neutrality and acceptability to all that I had
cultivated for research purposes would be imperiled and perhaps
entirely lost. At the same time, I had to ask if that loss would
not be justified if I could contribute in some way to the
development of a capable legal profession for the country.

My response to Nana Nketsia is described succinctly in a
letter I wrote to Arthur Sutherland at Harvard shortly after my
return to the United States. I had expressed the view that
Lang's efforts had been ineffectual and that he was using ex-
pressions of support from American academics for his own pur-
poses. Arthur had heard of my view and objected somewhat to that
interpretation. My letter dealt with both his criticism and my
own reaction to the invitation to succeed Lang. I quote:

"I can only say at the moment that the reports of my going
to Ghana are like those of Mark Twain's death, greatly ex-
aggerated. At the close of the Accra Conference, I was asked by
Nana Nketsia, the Vice Chancellor of the University, if I would
come as John Lang's successor. It seemed to me then that neither
the University nor I was in a position to deal with a definite
invitation, and that it would be much more fruitful for us to
explore relevant attitudes quite informally until I left Ghana.
Since I had never contemplated anything other than research ac-
tivity in Ghana, the question raised by the University obviously
called for discussions with my family and University. I indi-
cated that if the University [of Ghana] ultimately decided that
it wanted to make a definite offer, I would give it the most
careful consideration in the light of my impressions of the
situation there and of family and University [of Michigan] reactions. Preliminary discussion here has not raised any seemingly insuperable obstacles to my undertaking a two-year secondment to Ghana. Thus far I have heard nothing more from the University and it is entirely possible that a decision has been made not to pursue the possibility.

"I was perhaps too cryptic in my suggestion about avoiding all appearance that American support to legal education in Ghana was provided ad hominem. I fully share your view that this has not been the motivation of any support with which I have been familiar. The unfortunate fact remains, however, that American help in being and in prospect has been used there as a kind of personal lever. Parenthetically, I might add that although our evaluations of Professor Lang's contribution in Ghana might differ, I have no doubt whatsoever of his sincerity and good intentions. The personal tragedy involved in the circumstances surrounding his departure distresses me deeply and I fully share your hope that his actual leaving may be as warm and friendly as possible."

Discussions with authorities of the University of Michigan were fully supportive of my going to Ghana, if I chose, and an extended leave was assured. Reactions in the family were somewhat divided. Marilou was ready to take the next plane, our daughter Anne, then sixteen, was enthusiastically negative, and our son Kent, twelve, showed a sort of quiet neutrality. Within this pattern, when the invitation from Ghana was reaffirmed, we decided to accept it.

It was clear that expenses associated with the Ghana project, while many of the home-front expenses continued, required funding beyond the salary provided by the University of Ghana. Quite reasonably the University sent to the United States State Department a request for supporting funds. Fortunately, even before I had an opportunity to express my own objections to such a funding arrangement, the Department had recognized the hazards and had forwarded the funding request to the Ford Foundation which responded promptly and generously. Thus, the way was cleared. Arrangements were made for Anne to finish her secondary schooling in Switzerland, while Kent elected to accompany us to Ghana.

As I have mentioned, instruction in Law in the University of Ghana was structured in a Department of Law within the Faculty of Liberal Arts, though all of the courses were traditional law courses in the English mode. In addition to the University program, however, the Ghana Government had established a separate Law School in Accra to offer evening instruc-
tion. This School was under the direction of the Director of Legal Education, a statutory officer who also served ex officio on the General Legal Council, a statutory body having plenary responsibility for admission to and governance of the legal profession. There is reason to believe that the impetus for establishing the Ghana Law School was not merely to provide a route to qualification for older persons already in jobs who perhaps lacked qualification for University admission, but also to add to the legal profession a contingent of lawyers more favorable to the Government than the traditional, elitist Bar trained in England was thought to be. I believed that continuing the separation between the two programs of legal education was wasteful of scarce resources and would not be functional to sound development. I indicated, therefore, that if I came to Ghana I would want responsibility for directing both programs. Consequently, I was appointed Professor of Law in the University and Director of Legal Education of Ghana. During my first year in Ghana, the University moved Law instruction from Departmental status to a separate Faculty, and I was appointed Dean of that Faculty. The tenure I had agreed to was to be two years in duration. As I will indicate later, it lasted only about eighteen months.

My arrival in the University of Ghana came at a fortunate time: it coincided almost exactly with the beginning of the Vice Chancellorship of Dr. Conor Cruise O'Brien. Shortly before, he had ended his assignment as Head of the United Nations Mission attempting to deal with the separatist movement in the Congolese Province of Katanga. Before taking that assignment on the invitation of the Secretary General, he had been the Irish Ambassador to the United Nations. I had not been acquainted with O'Brien before we began our tasks in Ghana, but very quickly friendship and a close working relationship developed.

A VALUE ANALYSIS OF GHANAIAN LEGAL DEVELOPMENT
SINCE INDEPENDENCE

[The University of Ghana originated as an affiliated College of the University of London, staffed largely by the English; its graduates received University of London degrees. Shortly after independence, the umbilical cord to London was severed and the University of Ghana became an independent institution.

Not surprisingly, this change in formal status did not immediately or substantially alter the institutional ethos. The relationship between the University and the Nkrumah Government...
was chronically tense. The Government, not without reason, regarded the University as a center of elitism, and basically as a residue from the colonial past. While the Government funded the University generously, indeed extravagantly in my view, its dissatisfaction with and suspicion of the institution was patent. Unfortunately, the Government was unable to articulate in ways that would have been coherent and perhaps acceptable to many in the University community the grounds of dissatisfaction or the aspects of the University program and life style it would like to see changed. The result was mainly a running attack on symbols, such as the continuation of the English practice of students' daily wearing short academic gowns and the retention of the Oxbridge pattern of organizing student life in "Colleges" with students dining at "Low Table," and rising for a Latin grace when faculty members came in to "High Table." One might perhaps have expected, or at least hoped for, a more sophisticated and understanding response from the University, but it did not develop. Every Government complaint about the preservation of a colonial remnant in an independent country was seen by many in the University as an attack on academic freedom. Indeed, about the time I went to the University of Ghana, an editorial appeared in the respected English journal NATURE attacking specifically the Government's criticism of students' academic gowns as an attack on academic freedom. I have no doubt that later a faction within Dr. Nkrumah's Convention Peoples Party did become active enemies of academic freedom; at the early stage to which I now refer, however, I think disquiet over elitism, retention of symbols from the colonial period, and the belief that the University's academic programs were unresponsive to the country's needs were the most important basis for Government-University alienation.

One feature of English university life whose retention I favored was the inaugural lecture, expected of each new appointee to a professorship. Ideally this presentation introduced the new member to the university community, perhaps stimulated a contribution to the institution's intellectual life, and suggested the direction in which his or her scholarship might move. The following lecture on legal development in Ghana was my inaugural lecture delivered in the Lecture Theater of Commonwealth Hall on May 24, 1963. Donald Akenson, a Canadian historian, later described the lecture as the only serious mistake I made during my tenure in Ghana,9 a characterization I would question on two grounds: first, I think it unduly charitable; I'm sure I made far more mistakes than he discovered or pointed out. Second, I'm doubtful that the lecture was a mistake, except in the

raw political sense that it provided ammunition to those who wanted to attack the University, using me as their convenient target. If the lecture had not provided that ammunition, surely another source would have been found.

As I looked over the audience at the lecture, I noted the presence of several people prominently associated with the strident extreme of the Convention Peoples' Party, some of them journalists whose diatribes were daily features of the political press. And surely, when the political attack on the University and on me several months later reached cruising speed, some of the views attributed to me on the basis of the lecture reappeared. For example, I was charged with making a public defense of the apartheid laws of South Africa! In any event, time has brought me no repentance for any views I expressed in the lecture, though it has provided insights into the ways the political game is played by some.]

Mr. Chairman, My Lord Chief Justice, My Lords, Your Excellencies, Ladies and Gentlemen:

Before turning to my subject, I beg your indulgence for a few very personal words. As I approach the end of my first year in the University of Ghana, I am encouraged by the significant development in legal education which has occurred. In this, many people have played important roles, but two groups merit special mention. The first of these is the General Legal Council of Ghana. The Council is a statutory body including all of the Justices of the Supreme Court, the Attorney-General, certain appointees of the Minister of Justice and the Chief Justice, and representatives elected by the Ghana Bar Association. In my capacity as Dean of the Faculty of Law I have the honour of serving with this able and dedicated group which has been charged by Parliament with a wide range of responsibility for legal education, admission to the Bar of Ghana, and the good government of the legal profession. An important ingredient in the success of any law faculty is the confidence and support it receives from the leaders of the Bench and Bar. The General Legal Council, representing every segment of the profession in Ghana, has been generous and unfailing in support of the Law Faculty of the University. I would, therefore, with respect, pay full tribute to all members of the Council, and especially to its distinguished Chairman, Sir Arku Korsah, Chief Justice of Ghana.

The members of the Faculty of Law, as well, deserve full recognition for the vital part each member has played in our work. In this period, when the tasks to be performed have so completely challenged the human and physical resources at our
disposal, they have laboured well for the present and built solidly for the future. The capacities and scholarly integrity of these men have placed this Faculty in the forefront of legal education in Africa: Justice Nii Amaa Ollenu, Robert Seidman, Samuel Asante, Kwame Afreh, William Ekow-Daniels, Thomas Rose, Joseph Agyemang and Kwasi Gyeke-Dako. A time-honoured tradition provides me the opportunity to address you on this occasion. The honour you accord by your presence here this evening, however, is equally due to each of these men whom I am privileged to have as both colleague and friend.

THE CONCEPT OF LAW

I shall speak to you this evening about certain aspects of the law of Ghana. If we are to avoid confusion in discussing law, it is essential at the inception that we specify our meaning of this central concept. The nature of law has been a perennial problem of jurisprudence, and a preoccupation with it has doubtless contributed much to the tedium of the subject. Thurman Arnold once observed that "most of the literature of jurisprudence...is tedious, not as hard subjects like physics and mathematics are tedious, but as throwing feathers, endlessly, hour after hour, is tedious." Without being, I hope, more than necessarily tedious, I shall indicate briefly what I mean when I speak of law.

For many of its votaries, law involves some essential order of values. These values may make positive demands for implementation by the manipulation of public force or may play only a negative role, setting the outer boundaries beyond which the public force may not go. In this view, any enactment not serving the postulated values would not be law. To others, law, as such, is value-neutral, being merely a technique of social ordering available for use in support of any value judgment that the manipulators of the technique entertain. In this view, the technique finds its essential identification in an ultimate reliance on the organised force of a society. I am of this latter mind. Like most men, I could, if called upon, suggest those values which represent my preferences or my strongly-held convictions of what a decent life requires. At the same time I must recognise that many men do not share my preferences, and a number of legal orders do not protect my fundamental decencies. Nevertheless, I recognise the apartheid enactments of South Africa, which I abhor, as law in as full a sense as the prohibitions of racial discrimination in American legislation, which I strongly support.

It is unnecessary here to offer further explanation or
defence of this completely instrumental conception of law. Even those who reject it or in some way limit it will nevertheless recognise, I believe, that its use can open wide ranges of fruitful social inquiry. In any society those who manipulate the technique, which I call law, reflect their value judgments as they select the purposes or ends in aid of which the technique will be used. As a mere hypothesis at this stage, I would offer the suggestion that the values selected for implementation through the systematic application of public force rank high in the hierarchy of goods perceived by those able to commit the force. Thus, if the data in the legal storehouse are carefully studied and analysed, one should be able to outline the organising values of a society and to sense at least the tension points at which the muscular pull of change challenges the bony commitments to the past.

It is within this conceptual framework that I propose to examine briefly certain developments in the law of Ghana since independence. First, these developments will be described and analysed in their purely positivistic dimensions. It will then be possible to consider their value implications.

LEGAL DEVELOPMENTS SINCE INDEPENDENCE

Constitutional changes

The transfer of sovereignty from the United Kingdom to an independent Ghana on March 6, 1957, brought changes of profound significance in the legal order. Most obvious of these, of course, was the transfer of full power over and responsibility for the management of the public force to African hands. Less obvious but equally significant were the developments, some brought into operation on independence and some occurring thereafter, by which legal power was structured and allocated among the various organs within the new state.

Through most of history the people who lived in the area of modern Ghana were little influenced toward unity by either their indigenous leaders or the Europeans. Even when the European presence on the Guinea Coast was no longer dispersed in national economic rivalries, British administration of the Gold Coast dealt with the Colony, Ashanti and the Northern Territories as discrete units. Until 1946, when the Burns Constitution included five Ashanti members in the Legislative Council sitting in Accra, the law-making function for Ashanti was totally in the British Governor and imperial agencies. Representation from the Northern Territories in the central legislative body did not come until the Coussey Constitution of 1950. Thus, until virtually the eve of independence the colonial power deferred
basic steps which might have fostered in the British dependencies of the Gold Coast some greater perception of interrelation.

British colonial policy, as formally announced, attempted to nurture and support the institutions of indigenous government. In southern and central Ghana, these found their characteristic expressions in the small Akan state, the independent town or village of the Ga-Adangbe people, and the Ewe division. While various combinations of these units were formed from time to time, largely for military purposes, no stable grouping ever emerged except in Ashanti. There, under the leadership of the Paramount Chief of Kumasi, as Asantehene, a powerful military confederation was formed, but civil government remained almost exclusively a function of the constituent states. Nevertheless the sense of a larger regional identification which developed early in Ashanti played an important role in the processes by which public power in independent Ghana was later to be structured.

As has been noted, constitutional changes in 1946 and 1950 forged some links between the Colony, Ashanti and the Northern Territories, but the rapid drive toward independence brought into sharp focus the basic lack of a common identification within the new country.

The Reports of the Watson Commission in 1948 and of the Coussey Committee in 1949 considered not only reforms in the constitutional structure of the central government but also the allocation of powers and functions among regional and local units. Both of these Reports recommended a substantial decentralisation, but the underlying theory throughout was that regional administrations were to be merely agents of the central government exercising such powers and functions as might be defined by legislation. With the organisation of the National Liberation Movement in September, 1954, however, the nature of the debate over the structuring of the Independence Constitution and the status of regional organs underwent a significant change. The issue was no longer the rational allocation of functions between a supreme central government and its regional agents; the issue raised was the very nature and power of the central government itself.

The constitutional platform of the N.L.M. was federalism, a division of powers and functions between the central government and regional agencies, each of which would have its constitutionally defined areas of competence. It is noteworthy that the N.L.M. had its greatest support in Ashanti, where the Confederation had fostered a strong regional loyalty. The Convention Peoples Party, on the other hand, did not oppose some dis-
perspective of governmental functions among regional organs, but its central conviction on the constitutional allocation of power was unwavering: the central government must be supreme.

It is unnecessary now to review in detail the work of Sir Frederick Bourne, who, as Constitutional Adviser, rejected federalism, the parliamentary elections demanded by the British Government to determine the extent of popular support for C.P.P. views, or the last-minute negotiations of Mr. Lennox-Boyd, the Secretary of State for the Colonies, seeking a reconciliation of the competing views. The Independence Constitution itself was a compromise, though in the main the views of the Convention Peoples Party prevailed.

The Constitution required that Parliament should establish in each of the five regions of Ghana a regional assembly to exercise effective powers in the fields of local government, agriculture, animal health, forestry, education, communications, medical and health services, public works, town and country planning, housing, police and such others as Parliament might determine. Within each of these fields, however, the Constitution made quite clear the supremacy of the central government, as well as the fact that any specific power or function in the several fields could devolve on the regional assemblies only by Act of Parliament.

The only constitutionally assured function of the regional assemblies was to review certain kinds of proposed legislation with the possibility of exercising a qualified veto. In certain areas Parliament could legislate only by a procedure which included approval by two-thirds of the regional assemblies, including any assembly directly affected. These specially protected areas included the modification of those provisions of the Constitution which defined the basic governmental structure and the public service, guaranteed regional organisations and chieftaincy, and assured compensation on the compulsory acquisition of property. The same procedure was required for any bill abolishing or suspending any regional assembly or diminishing its powers or functions. Other provisions of the Constitution were designed to protect the territorial integrity of the regions from action by the central government.

Thus, it can be said that the constitutional order with which Ghana achieved independence reflected a variety of local loyalties and considerable suspicion of unified national authority. No initiative for legal or governmental developments was given to sub-national bodies, however; their constitutional function was entirely negative -- to check, delay or prevent certain kinds of action by the central government.
At the time of independence, no regional assemblies existed. These were later established by the Regional Assemblies Act of 1958, their functions being limited to advising and making recommendations to Ministers of the central government. The constitutive Act does not make it entirely clear whether a regional assembly might take the initiative in giving advice and making recommendations or whether even this function was to be performed only on ministerial request. Nor did the assemblies themselves survive long enough to permit experience to define more fully their role in national life.

There is little reason at this time to speculate on the course of development that might have occurred if the opposition political groups had not decided to boycott the first regional assembly elections in 1958. That decision was in fact taken, and only candidates for the Convention People's Party stood for election. Thereafter, with C.P.P. forces fully in control of both the central government and the regional assemblies, and against the background of recurrent political boycotts by opposition groups, it is hardly surprising that steps were taken immediately to consolidate governmental power at the centre. In December, 1958, Parliament passed an Act to repeal the constitutional restrictions which had required the assent of regional bodies for amendment of the Constitution and certain other purposes. In accordance with the constitutional requirement being repealed, this Act was approved by the regional assemblies. The clear legislative supremacy of Parliament, thus established, was almost immediately exercised in the repeal of the Regional Assemblies Act and the dissolution of the existing assemblies.

The legal framework of national unity thus seemed complete. Nevertheless, the Government in submitting to the people in 1960 a White Paper on a Republican Constitution asked for a further mandate to maintain the unity of Ghana. This was given, and the present Constitution declares that Ghana is a "sovereign unitary Republic." Only by a popular referendum can the unitary and republican form of government be altered.

Less dramatic than the constitutional structuring of unified national power, but in many ways as important, have been the statutory enactments by which local government has been reorganised and related to the centre. It is possible here only to summarise these developments. A much fuller analysis of the evolving formal structure is needed, supported by thorough empirical studies of these institutions of government which stand closest to the ordinary citizen in his daily life.
On the eve of responsible African government in the Gold Coast, local government powers and functions were vested in Native Authorities created by order of the Governor. While the legislation authorising establishment of the Authorities made it entirely clear that designation depended on the fiat of the central government and not on chiefly status as such, the Colonial Government in general followed the practice of designating as the Native Authority for an area a chief and his council. Since the same persons also functioned as the State Councils in the various states of the traditional order, it was often difficult to determine the capacity in which they acted in taking a particular step. The Native Authorities system did not work well, and even the Coussey Committee, on which the traditional authorities had strong representation, conceded in 1949 that "the existing system of local government has proved unable to meet the requirements of an efficient and democratic administration." The correctives applied by the central government since 1951 have related directly to the structure of local government; they have also affected profoundly the status and functions of the traditional authorities themselves.

Local government

Almost the first major piece of legislation enacted under Dr. Nkrumah's Government was the Local Government Ordinance of 1951. It authorised the creation and grant of local government functions to Local, Urban and District Councils on which popularly elected members would ordinarily constitute a two-thirds majority. The remaining one-third were to be appointees of the traditional authorities. The performance of the new councils was disappointing, in large part because many were established on the geographical base of small, traditional states which possessed neither the population nor the resources to permit them to organise local services effectively. In 1959, the Government introduced corrective legislation; the old District Councils were abolished, and on ministerial orders many of the small Local Councils were consolidated into larger units. At the same time, the members of all councils who had been appointed by the traditional authorities were eliminated, and all local government bodies became entirely elective. The present scheme of local government, organised under the post-Republic Local Government Act of 1961, involves about sixty-five urban and local bodies which are supervised and related to the central government by administrative personnel responsible in each region to a Regional Commissioner, a political functionary with the rank of Minister to whom certain local government functions are delegated by the Minister of Local Government. In this scheme, the traditional, sacred and local repositories of authority and responsibility have been definitively replaced by
elective, secular organs related to the national centre under articulated criteria of rationality and efficiency.

INTERACTION OF ENGLISH LAW WITH CUSTOMARY LAW

The pre-republican system

Turning now from the formal structures of public power, within and through which legal force is directed and applied, we will consider the evolving content of the legal norms themselves. In the first instance it is desirable to consider this matter at the general level. Specific enactments may be considered later.

A cardinal feature of the legal order inherited by Ghana from the United Kingdom was a pervasive dualism, that is, a body of law derived from the colonial power and applied in a discrete system of courts co-existed with a body or bodies of indigenous or customary law applied mainly in a system of so-called Native Courts. In order to avoid chaos some scheme was necessary to delimit the sphere of operation of each body of law and each system of courts and, insofar as these spheres coincided or conflicted, to determine which should prevail.

The general standards defining the relations between English-derived law and customary law in the pre-independence Gold Coast were posited by the imperial power in the Courts Ordinance of 1935. These standards employed two different techniques for relating the different categories of legal norms. The first, which can be called the technique of horizontal ordering, involved the assignment of discrete areas of application to each set of norms in the system. The second, which we will refer to as vertical or hierarchical ordering, related the bodies of law and applying courts as superiors and inferiors. While both these techniques were used in the pre-independence Gold Coast, there was an ultimate resort to hierarchical ordering, that is, the imperial power defined the hierarchy itself and assigned to each set of norms its areas of application.

The elements of English-derived law applicable in the Gold Coast, briefly listed in the order in which they would prevail in any case of conflict among them, were imperial laws expressly applicable in the Gold Coast or brought into effect there by Order in Council, ordinances enacted by the local legislative body, statutes of general application which had been in force in England on July 24, 1874, doctrines of equity and finally rules of the common law. Clearly reflected in this hierarchy are the idea of legislative supremacy and the moderating influence of English equity. It should be observed also that an historical
test determined the reception of English statutes of general application. The use of such a test created a number of troublesome "mechanical" problems for the Gold Coast lawyer attempting to find the local law and also tended to preserve in the Gold Coast legal norms which had been changed or abolished by reform legislation in England.

This body of English-derived law coexisted with a number of bodies of customary law in force in various parts of the Gold Coast. The relations between the two systems were defined by a horizontal order whose criteria were primarily ethnic. In causes to which the parties were "natives," the primary law presumptively applicable was customary law. A "native" could lose the benefit of customary law, however, if it appeared either from an express contract or by implication from the nature of the transaction out of which the question arose that he had agreed to have his obligations regulated exclusively by English law. On the other hand, if the parties to the cause included both "natives" and "non-natives," English law was presumed to control. This presumption was rebuttable, however, and the courts were authorised to apply customary law if they determined that "substantial injustice would be done to either party by a strict adherence to the rules of English law."

Even within the areas thus assigned to it, customary law was not supreme, but was hierarchically related to certain limiting principles. Customary law could be applied in any court only insofar as it was not "repugnant to natural justice, equity and good conscience" or "incompatible either directly or by necessary implication with any ordinance." These limiting criteria were interpreted and applied by the courts, in the main by the superior courts staffed principally by English personnel, though it was, of course, possible for a Native Court to exclude customary law on such grounds.

The formidable range of problems arising in the administration of this pluralistic legal order can only be suggested here. Some problems arose out of the interpretation of the provisions of the Courts Ordinance itself. Did the cut-off date in 1874, which clearly limited the reception of English statutes of general application, apply to English common law and equity as well? What is a statute of general application? May parts of a statute be of general application and thus received, though other parts clearly are not? In what circumstances would an agreement between "natives" that customary law should not govern be implied? In what circumstances would the court's perception of injustice foreclose the application of English law where not all parties to the case were "natives"? Many questions such as these were not fully and satisfactorily answered before the Courts Ordinance itself was finally repealed.
Some of the most difficult problems arose in ascertaining the customary law when the general hierarchy of norms indicated its applicability. This was, of course, less a problem in the Native Courts, where the members were presumed to know the custom and could apply it on the basis of their own knowledge, than in the superior courts whose judges were actually forbidden to rely on such knowledge of customary law as their prior experience might provide. In the superior courts, therefore, a party relying on customary law was required to plead and prove it. While the Judicial Committee of the Privy Council had recognised the possibility of the courts' taking judicial notice of certain customs which had become notorious through frequent proof, this means of avoiding the inconvenience and difficulty of extended proof was not in fact utilised by the courts. Proof of the customary law continued to be offered in the form of authoritative books or manuscripts, such as the work of John Mensah Sarbah on Fanti law, or by the testimony of chiefs, linguists, or others who could be qualified as experts.

The proof of customary law in each case by the introduction of evidence may certainly be criticised on the grounds of inconvenience and expense. The method also touched the sensitive nerve of emergent national pride, since to require proof by witnesses suggested that customary law was not real law but merely an operative fact. Yet there were advantages in the method. The strongest claim to respect which customary law can make is that it reflects the consensus of the community as manifested in actual usage. In the constant flux of society such usage will change. Proof of the customary law on a case by case basis, therefore, should provide the maximum assurance that the law applied will keep in step with the changing life of the people. There is surely less certainty that this will occur if customary law is established by judicial notice of what has been proved in earlier cases, or by the binding declarations of traditional councils, another method authorised by Gold Coast legislation.

The grant of independence to Ghana in 1957 did not alter in detail the order of legal norms just described. To be sure, the supreme position in the hierarchy was occupied after March 6, 1957, by the constitutional Order in Council, rather than imperial legislation of the British Parliament. Otherwise, the pre-independence body of law was left intact.

Re-organisation since the Republican Constitution

(1) New doctrine of stare decisis. The most important revisions in the hierarchy of legal norms of Ghana became effective
on the creation of the Republic on July 1, 1960. These deserve careful analysis in detail, but here we can do no more than suggest changes which may prove to be especially significant.

First, the Republican Constitution contains a novel set of provisions dealing with the cardinal feature of a common law system, that is, the doctrine of precedent or *stare decisis*. The doctrine itself is not, of course, a new arrival in Ghana. During the colonial period the courts in the Gold Coast were bound by the decisions of the West African Court of Appeal and of the Judicial Committee of the Privy Council. On the other hand, decisions of the English Court of Appeal and the House of Lords were in theory not binding but in practice were treated as if they were. On the advent of the Republic, the possibility of appeal to the Privy Council was eliminated and the Supreme Court of Ghana became the tribunal of final resort. Thus the question was posed—what effect in republican Ghana would be attributed to pre-republican decisions of the Supreme Court and of various English tribunals.

Article 42 of the Republican Constitution speaks to this question with superficial clarity:

The Supreme Court shall in principle be bound to follow its own previous decisions on questions of law, and the High Court shall be bound to follow previous decisions of the Supreme Court on such questions, but neither court shall be otherwise bound to follow the previous decisions of any court on questions of law.

This article appears to be an unequivocal declaration of independence for the superior courts insofar as the decisions of non-Ghanaian courts are concerned. The stability of legal institutions and the relative conservatism of judicial attitudes, however, make it inevitable that English decisions will enjoy for a long time a high degree of persuasiveness in Ghana. One may hope, nevertheless, that the Supreme Court and High Court will not be reluctant to re-examine long-established English precedents to determine their responsiveness to the developing needs of this country.

When one turns from the status of foreign decisions to the functioning of the doctrine of *stare decisis* within the present judicial hierarchy of Ghana, much of the certainty in article 42 disappears. If only the decisions of the Supreme Court are in the future to be binding, what is the "Supreme Court" for this purpose? Is the court as constituted under the Republican Con-
stitution to be deemed to be a new court, so that only decisions under the Republic are fully authoritative? Or is a theory of antecedent and continuing existence to be applied? If the court is deemed to have had a pre-Republic existence, how far back in time will its earlier life be traced -- back to independence in 1957 or some earlier date? These questions remain unanswered.

Even with respect to decisions of the Republican Supreme Court, the stringency of the commitment to stare decisis is unclear. In Great Britain the view now prevails that the House of Lords is absolutely bound by its own prior decisions. If the ravages of time render their principles dysfunctional to social needs or the demands of justice, the Lords are incapable of applying correctives other than through the technical creation of distinctions. Any outright overruling of established doctrine requires an Act of Parliament. Does the Republican Constitution of Ghana commit the Supreme Court to such futility in the face of its earlier decisions which may call for modification? Arguably an affirmative answer is required, since article 42 declares that the "Supreme Court shall in principle be bound to follow its own previous decisions on questions of law." In this provision, however, the key words seem to be "in principle." If they mean only that nothing in a case shall bind except its "principle," the words are patently redundant. Not even the most devoted adherent to stare decisis has ever suggested that any aspect of a case is binding other than its "principle" or ratio decidendi. If one assumes, therefore, that the constitutional fathers did not intend a redundancy, what purpose do the words "in principle" serve? I would suggest that they might be taken to mean "in general" or "ordinarily." If so interpreted, the stringent English doctrine of precedent would not prevail in Ghana by constitutional mandate.

These questions do not represent a mere academic exercise. They go to the heart of the role of the judiciary in keeping the tension between stable legal institutions and social needs and values within tolerable limits. It seems to me at least doubtful that legislative bodies in most countries today have either the time or the interest for making those periodic adjustments in established doctrine that social change may demand. Within rather broad limits, I think the courts are the agencies best equipped to perform this function. I would, therefore, hope that the Supreme Court of Ghana in interpreting the Constitution and defining its own role in the processes of legal change will shun English judicial passivity and claim for itself a more affirmative, creative function.

(2) The place of customary law. The second significant change in the structure of legal norms effected on the creation
of the Republic has to do with the status of customary law. It will be recalled that in the older order there was an initial presumption that customary law was applicable in any case between "natives," and, in cases between "natives" and "non-natives," it applied if the court concluded that injustice would result to either party through the strict application of English law. The Courts Act of 1960 makes an understandable effort to avoid such an ethnic criterion for determining the applicable legal rules. The details of this effort need not concern us here. It suffices to observe that the old starting presumption of the applicability of customary law has been replaced by a presumption that common law prevails. This presumption is, of course, rebuttable, but any person who wants his cause controlled by customary law must act affirmatively to establish to the satisfaction of the court that there is a relevant rule under some body of custom that the person can claim as his "personal law."

The term "common law" has a much broader inclusion under the Republican legislation than the older English usage would suggest. It includes the traditional common law rules, the doctrines of equity, the English statutes of general application which had been in force in Ghana immediately before the Republic, and any rules of customary law which may be assimilated because of their suitability for general application. Thus, the common law which now enjoys an initial presumption of applicability need not be entirely the English law which has been received but may include, as well, certain rules of customary origin.

The procedures by which customary law rules may be assimilated into the common law of Ghana are provided by the Chief-taincy Act of 1961. They have not yet in fact been used, and no customary rule has yet been assimilated. It would now be hazardous indeed to attempt to predict the future of this assimilation technique. Even should it be employed frequently, the resulting common law rule of customary origin would differ basically from the traditional customary law. Common law is national, while customary law is essentially local. Common law is built around the stabilising frame of stare decisis, while customary law reflects more directly the evolving life of the community. Thus, to bring into the common law the customs of some particular community does not merely alter the term by which they are described. Their scope of application and their future treatment in the legal order are also basically changed.

PROGRAMME OF LAW REFORM

The third significant development in the legal order of Ghana can only be suggested here. Adequate discussion of it
would require several substantial volumes. This is the major programme of legislative reform which was begun in 1960. Mention has already been made of the fact that much of the applicable legislation in Ghana had been received from the United Kingdom as of July 24, 1874. Once received, this legislation was unaffected by later reforms in Britain which altered or repealed it domestically. Equally important was the fact that some major legislative innovations in Britain were never made applicable to the Gold Coast or Ghana.

Since the creation of the Republic, a sweeping attack has been made on these legislative inadequacies. Much of the old received legislation has been repealed, thus clearing the ground for new building. Measures which have stood the test of time and still seem appropriate in Ghana’s circumstances have been put into modern language and re-enacted by Parliament. Some partial codifications have been attempted, as in the Contracts Act of 1960. In some instances legislative efforts have been preceded by major studies which examined the relevant problems in depth and proposed solutions. Such a study by Professor L.C.B. Gower, then of the London School of Economics, has produced a Companies Code Bill. Another by a commission under the chairmanship of Mr. Albert Adomakoh led to draft proposals for an Insolvency Bill and another on Companies Liquidation. A new Criminal Code and Code of Criminal Procedure have been enacted. Many more examples could be cited.

Relatively little of the reform legislation has been radical in its innovation. It seems quite clear that English and Irish models have been preferred, though on occasion American experience has been examined and solutions found workable there adopted. In general, the approach has been pragmatic and eclectic. The quality of draftsmanship, particularly in the earlier Acts, has been high, though it must be said that the Marriage, Divorce and Inheritance Bill which the Government has promulgated for public criticism appears to represent the nadir of the draftsman’s art. In fact, however, one is inclined to suspect that the inadequacies of this Bill arise from uncertainty and hesitation at the policy level which not even the most skilled draftsman could overcome.

Time presses further discussion of legal developments themselves. The remainder of my remarks will be directed toward an axiological examination of the major changes in the legal order of Ghana since independence. Against the limited background available, conclusions must, of course, be highly tentative. Nevertheless, an examination of legal institutions with a view to their guiding value assumptions can be most revealing of
certain powerful forces that, with others, trace the vector of social change.

No legal order with which I have any familiarity reflects a single, totally consistent scheme of values. Rather, the law usually reflects a number of antinomies, most of them recurrent in the various systems. For example, the law of the United States, which is frequently pictured as the last bastion of capitalistic individualism, reveals to even the most casual observer an extensive pattern of regulation in the public interest, that is, legal norms oriented mainly to the values of the community. In the Soviet Union on the other hand, the New Economic Policy of the 1920s did not exhaust the need to recognise more fully in the law and other official action the value of the individual, his personality and creativity. By and large, therefore, the axiological analyst sketches a value profile of a particular society by locating the critical fulcrum points where the weight of a certain value acceptance counterbalances its antinomic competitor.

The value of nationhood

In the evolution of the law of Ghana over the past decade, the value of nationhood has been dominant. I use the term "nationhood" rather than "nationalism" in order to emphasise that the effort through legal, political and social means has been to create the perception of a new value and to organise its expression internally rather than to implement externally a set of developed and articulated national aims. The legacy of the colonial era to Ghana was a collection of separate territorial units having some important ethnic, economic and cultural differences and with little perception of the bonds which might draw them together. Since the advent of responsible African government, legal devices and techniques have been consistently used to neutralise sub-national power centres, particularly the traditional authorities, and to organise all legitimate power on a national basis. This is seen clearly in the successful struggle for a unitary and not a federal government, in the concentration in Parliament of plenary sovereignty, except where expressly limited by a reservation of power to the entire people. It is seen also in the revisions of the legal structure of local government, and in an important course of legislation we have not had time to discuss whereby the chiefs have been deprived of independent economic power. It is manifested as well in the constant pressure on customary law, with all its local variations, in favour of a uniform body of national common and statute law.

While nationhood has thus far been the dominant value, the voice of a competitor has also been heard in the land. This is
the continental thunder of Africa or, at least, of a larger unity which can erase some of the grosser irrationalities of the national boundaries bequeathed by colonialism. In the main that thunder has been remote, but it has been constant. Its sharpest peal thus far sounds in the Republican Constitution which authorises Parliament to surrender the sovereignty of Ghana to a union of African states and territories. At the political level, though thus far not perceptibly at the legal, it appears also in efforts to forge a meaningful union of Ghana, Guinea and Mali.

One of the most persistent value competitions in legal theory and in the practical orientation of a legal order is that between the individual and the community. In the traditional orders of the Gold Coast, like most of Africa, the community represented the dominant value. The basic unit of social, political and legal life was the family, and legal institutions gave it a high degree of protection. While the evolving legal order of Ghana is certainly not directed by rampant individualism, it seems quite clear that a shift in favour of individual values has occurred. Political power is structured on a one man-one vote basis. At both the local and national levels, the new structure vests governmental powers and functions in elective bodies, leaving the traditional authorities, grounded on collective-family units, only a ritual significance. One of the most direct manifestations of this individualising process is the new Marriage, Divorce and Inheritance Bill, whose provisions on inheritance strike deep toward the legal roots which support the extended family. Others can be found in many of the major pieces of reform legislation which provide a more rational legal framework for an increasing range of individual economic activity.

It must be re-emphasised that the aggrandisement of individual values just suggested stands out mainly in relation to the traditional order which the colonial régime at least attempted to nurture. While it seems clear to me that legal developments in Ghana since independence have moved the individual closer to the centre of the stage, he does not occupy it alone. Community values have surely prevailed in the project for public development of the Volta Basin and in the creation and operation of the harbour facilities at Tema, as well as in the legal devices for national administration of stool lands and other resources. Nevertheless, the guiding values of most legal change in independent Ghana appear to be predominantly individualistic.

The competition between individual and collective values is often paralleled by that between democracy and autocracy. As
Ghana's legal development has tended to stress individualism, the legal structuring of its basic governmental institutions has been guided by democratic values. Popularly elected governmental bodies at both local and national levels, the elimination of special representation from the traditional authorities and major economic interests, the constitutional affirmation of popular sovereignty and the entrenchment of certain constitutional devices to permit their change only after a referendum of the people, all these reflect an option for democratic principles. On the other hand, the attraction of autocratic direction may be seen in the declared preference for a one party system, in the move, which was firmly rejected by Dr. Nkrumah, to make him President for life, and in the provisions of the Republican Constitution, thus far unused, granting special legislative powers to the first President of Ghana. It may be fairly said that thus far the democratic values have predominated in the formal structuring of legal and governmental institutions, while the autocratic values have tended to determine the realities of political life in Ghana. In this respect, of course, Ghana's experience is not unique. In most of the new countries, the leadership group which has directed the successful drive toward independence has tended to claim a dominant or exclusive role in guiding the early years of post-independence development.

In Roscoe Pound's famous epigram that "law must be stable and yet it cannot stand still," is summed up one of the most persistent value competitions in all legal orders. I would be inclined to reject the notion that stability is a necessary characteristic of some objective concept or idea of law. At the same time, I would insist that the value of stability, of a fairly deep and firm channel to control the currents, whirlpools and eddies of social life, has been at all times and in all places perceived as a guiding value in law. The sharpness of the perception, the firmness of the value acceptance has, of course, varied with time and place. The currents of social life always challenge to some extent the restraining channel. If the restraint is too great, there is flood which finds or cuts a new channel that better accommodates the pressures of the flow. One should not press this analogy to the point of assuming, however, that the process always runs from social pressure as cause to legal change as effect. The analogy might be corrected by observing that a skilled engineer can cut a new channel into which at the appropriate time the stream may be diverted. So, to some extent at least, can the legislator, the judge, the administrator, affect the flow of social life by innovations in the legal order. I say to some extent because we still know far too little about the extent of effectiveness of law as an instrument of planned social change. I do not assume the infinite plasticity
of social life; hence, I do not assume that it can be shaped and directed fully at the will of the manipulator of the legal technique.

At the moment, with respect to developments in Ghana since independence, we do not need to determine where the principal well-springs of legal change may lie -- in the broad social group or in a narrower élite. Our question is merely this -- which value, stability or change, has dominated the legal order. The answer seems clear indeed. Changes in the formal structure of legal power, in the extent and variety of official functions, in the relations between constituent elements in the pluralistic legal order, and in the various substantive aspects of public and private law have been great. Some of the more significant have been summarised earlier. On occasion, changes have been made too precipitately; errors have occurred which greater deliberation would have avoided, and correctives have been called for.

Again, however, a word of caution is needed. The force of "the wind of change" in Ghana, to use Mr. Macmillan's felicitous phrase, has been strong indeed, but it has not been cyclonic. The changes have been ordered within a continuing legal tradition. Only in fixing the ultimate locus of legal power has the break with the past been complete. The constituent elements of the old legal order have been preserved, though the relations among them have been altered. Models to be considered in drafting new statutes have been sought first of all in familiar systems of law. The basic techniques of legislation, of interpretation and of common law trial and decision have been preserved. Nor has reliance on familiar customary patterns been foreclosed despite the attractions of a uniform national law.

I have attempted to articulate some of the guiding value judgments in Ghana's legal development in the familiar terms of the legal theorist. Other terms having their own significance have been used by political leaders. We have heard much of the development and expression of the African personality, in law as well as other spheres. If such expressions have tended to suggest the postulation of an inflexible governing concept, of an overriding doctrine, they are refuted by the actualities of Ghana's legal development over the past decade. That development has been peculiarly non-doctrinaire. At the formal opening of the Ghana Law School in January, 1962, Dr. Nkrumah declared that "the law should be the legal expression of the political, economic and social conditions of the people and of their aims for progress." Such a relativistic and pragmatic approach has in my judgment led to the implementation of the value acceptances described in the evolution of the law of Ghana since independence.
COMMENT: GHANA, THE CURTAIN FALLS

Even the least perceptive observer of Ghanaian politics would have recognized by the fall of 1963 that a crisis was approaching. The political opposition had resorted to terrorist activities; already there had been at least two attempts on Dr. Nkrumah's life, in one of which he was wounded by the explosion of a grenade thrown toward him at a public appearance in the Northern Territories. The assertive domestic and Pan-African rhetoric of the Government had quieted, and the President was virtually a recluse in his official residence, Flagstaff House. Two former Ministers in the Nkrumah Government and three other persons associated with the Opposition had been brought to trial for treason before a Special Court. Still, these developments appeared to have little direct or immediate impact on the University, and I, at least, was sufficiently absorbed in University and Law Faculty problems and developments that I expended little energy in contemplating or worrying about the general political landscape. All of that began to change rapidly in October, 1963. I will review here the general developments in late 1963, and in an Appendix will provide a more detailed account of their impact on me and my tenure in Ghana.

The opening shot across the University's bow was fired in October, 1963, when the President came to the University to speak at the formal opening of the Institute of African Studies. Since his talk had been written in the University, largely by Thomas Hodgkin, Director of the Institute, we readily recognized a surprising addition—a pointed attack on the Law Faculty. I was not mentioned by name but was a target only by inference; the central thrust was that the Faculty should be "Ghanaianized." Immediately after the President's speech, I provided an aide memoire summarizing developments in the Faculty for Conor who called on the President the day after his talk. When Conor suggested the possibility that the President had been misinformed, pointing out, for example, that the present majority of the Law Faculty were Ghanaians, Nkrumah responded with surprise, "Do you think Professor Harvey is moving too fast?" After further discussion of what Conor presented as healthy development of the Law Faculty, the President urged that I should be retained as Dean to continue this development. Conor told Nkrumah that he had already raised this possibility with me, but that I felt that my obligations to my home University necessitated returning to the United States at the end of the academic year when my initial appointment was to expire.
Any encouragement we found in the President’s conversation with Conor was fleeting. It soon became obvious that, whatever the President’s personal view might be, an influential wing of his Party and Government was determined to be rid of me and to expand influence over the education of lawyers and perhaps more generally over the University. Very soon Conor was told by the Minister of the Interior and representatives of the Special Branch of the C.I.D. that the University should dismiss me. Conor indicated that the University had no basis for such an action and would not take it. These demands were repeated from time to time. I informed Conor that as long as the University was satisfied with my performance and I believed it possible to continue my work without any compromise of standards, I had no intention of resigning. As Government demands for my dismissal became more insistent, Conor informed the Government representatives that, if I were forced out, he would think it necessary to resign as well. I certainly thought, as I’m sure Conor did, that this threat would be a significant deterrent to the Government’s effort. Conor had an international stature and visibility that would have made his ouster or forced resignation an acute embarrassment to the Government.

In November, the Special Court for the Treason Trial returned its judgment. While it announced conviction of the two defendants long associated with the political opposition, it acquitted the the former members of the Convention Peoples Party, including two former Ministers. The political press reacted with outrage. It immediately saw an insidious connection between the actions of judges who refused to convict enemies of the State and the kind of education of lawyers the University was providing. Charges in the press that I was an agent of the C.I.A. were repeated. On the legal front, the most significant development

10. For some time such charges had been familiar. I regarded them as sufficiently ludicrous that they warranted no attention from me. Indeed, I’m not at all sure what I could have done to rebut them, but their being taken seriously was illustrated after I left Ghana when my brother, a senior agent in the F.B.I., said to me casually, "What were you doing for the Agency in Ghana?" When I assured him that I had no relationship with "the Agency," he responded, "Really, Burnett, you don’t have to be coy with me; we’re in sister agencies."

I met my first known C.I.A. agent in about 1969 when he called on me, wanting to discuss a number of Ghanaian political figures who were expected to be prominent in the civilian Government to be formed after power was relinquished by the Army and Police. I told him that everything I had thought worth saying out of my experience in Ghana was published and in the public domain. I added that, insofar as my research depended on
was the beginning of the process for amending the Constitution to make the tenure of judges dependent on the pleasure of the President.

Clearly a crisis was impending, but we in the University had no clear view of its shape or its resolution. In this state of affairs, Marilou, Kent and I left Ghana at the end of term in mid-December for a long-planned swing around Africa, primarily to visit other universities and law faculties. It was my hunch that, if the Government were truly determined to force me out, the most effective ploy would be simply to refuse to readmit me when we returned to Ghana in January. As a simple immigration matter, the action would have attracted a minimum of attention internationally, and, locally, possible critics of the ouster would have no opportunity to organize any opposing effort. There was little we could do to prepare for this possible ploy, but I did make arrangements to secure the custody and later removal from Ghana of the sole existing copy of an almost completed manuscript of a book on which I had been working.

We returned to Ghana in late January and never had a more expeditious processing by the immigration authorities at the airport. Clearly the pressures had eased or I had demonstrated what a poor prophet I was. A few days after our return, I began to feel unwell but had gone to the University in the morning. In late morning Conor called, asking me to come to his office. He informed me that he had had another, much more insistent, demand from the C.I.D. for my dismissal. Both of us reaffirmed the positions we had defined earlier. When I went home for lunch, whatever my illness was claimed me and I took to my bed. Up to that time, I had not shared with my Faculty colleagues informa-

(footnote continued):

interviews, I had routinely assured those who spoke with me that nothing they told me would be used in any form that would be personally attributable. I intended to honor that assurance fully, but, subject to it, I would be glad to talk with him. We had two extended meetings.

Idle curiosity prompted me in the mid-seventies to invoke the Freedom of Information Act to ask the C.I.A. for a copy of its file on me. To my amazement, I discovered that a file had been opened in about 1955 when I was a very young member of the Michigan Law Faculty. There were, of course, a number of deletions from the file, but nothing disclosed to me was particularly negative. The most disquieting aspect was the appearance that many of the informants must have had their contact with me in the University of Michigan or in St. Andrew’s Episcopal Church!
tion about the pressures on me and our program; I did not want to alarm them unduly or imperil morale, and I had continued to hope that Conor and I could manage the crisis. I decided that this reticence must end; so I sent word asking the Faculty to meet at my home that evening. While the meeting was in progress in my bedroom, officers of the Special Branch arrived and handed me a Deportation Order allowing me twenty-four hours to leave the country.

Conor arrived at my home about thirty minutes after the Faculty meeting ended. My main concern was to persuade him to abandon his threat of resignation, for I believed that he stood as the principal, perhaps the sole, possibly effective force in resisting the Government’s attack on the University. I said bluntly that if he wanted to go out like a White Knight with strong international approval, he could resign and accompany me. On the other hand, if he valued the University, as I knew he did, he would stay and resist, even though it was inevitable that some critics would attack him for not taking a more dramatic opposition stance. Later, when he had come to New York as the Einstein Professor of the Humanities at N.Y.U., this prediction proved to be distressingly accurate.

11.

In late 1966, following a debate between O’Brien and Irving Howe on some aspects of American foreign policy, Mrs. Stephanie Harrington wrote to the village VOICE (November 17, 1966) suggesting that when Conor was asked to make some "public gesture" about the Nkrumah Government’s dealings with the University, he had limited himself to "private protestations," rather than resignation. In the November 24, issue of the VOICE Conor made his own defense quite effectively, but I thought I should add my own. My letter appeared in the December 15 issue of the VOICE:

"When the Ghana security police delivered a deportation order to me, my first thought was that I must contact Dr. O’Brien and, if possible, persuade him not to carry through his announced intention to resign in protest if Government pressure on the University led to my exclusion. When I saw O’Brien an hour later, I told him that I thought a protest resignation was the safe course for him; it would protect him from the kind of charges Mrs. Harrington has made. At the same time, it would have been disastrous for the University which was then a prime target for extremists in Dr. Nkrumah’s party. Many of us had fought hard for the integrity of the University, but O’Brien had an irreplaceable combination of assets for continuing the fight: 1) a sensitive awareness of what in the nature of a university is non-negotiable, 2) a political stature that gave him some protection from dismissal and expulsion, and 3) guts. I have no doubt that Dr. O’Brien’s decision to stay in his post served the interests of the University of Ghana, while it imperiled his
In Appendix II, I have provided a more detailed account of the final phase of my work in Ghana and of Marilou's truly heroic accomplishments in arranging our affairs, getting Kent off alone to friends in New York and then on to Ann Arbor, and negotiating our departure for Britain. The doctors firmly vetoed any immediate travel for me, and through the efforts of Conor and Bill Mahoney, the American Ambassador, a brief extension was allowed. About a week later, we left for London where I entered the Hospital for Tropical Diseases at St. Pancreas. After a month in London, we returned to Ann Arbor. When I was able to resume some work, I prepared an extended report for the International Legal Center, the Ford Foundation and the Rockefeller Foundation on the project in Ghana and its conclusion. In identifying the causes of our difficulties in Ghana, I can do no better today than to cite the relevant portions of that report, as it appears in Appendix II.

(footnote continued):

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In a crisis like that in Ghana in early 1964, men must act on their judgments of what is right and useful. Mrs. Harrington is entitled to her post hoc assessment. My judgment and that of senior Ghanaians in the University was that O'Brien's decision was the right one for the University we were trying to develop and sustain. That remains my view. Criticism like Mrs. Harrington's fits into a disturbing pattern one often sees in the statements of spokesmen for liberal causes: the prime objective seems to be verbal proof that they are on the side of the angels rather than effective contribution to freedom and human dignity."
is in the public interest?" Unquestionably my old and good friend, Conor Cruise O'Brien, was in attendance. Conor had announced his presence by using the repeated response of the Ghana Government in 1964 when he had tried to get a specification of the charges against me that underlay my deportation: the Government's only response was that my continued presence in Ghana was not in the public interest.

Conor told me that he had been invited to attend the dinner and participate as a commentator on my talk. He said he would be aided by some indication of what I intended to talk about. Enjoying my advantage, I assured him that I intended to talk about "automation." Conor had to suffer through the talk before making, as usual, insightful comments on Ghanaian developments.

As I have reviewed the text of the talk on the judiciary in Ghana, I have become acutely concerned that I attempted too much in the brief time available, with the result that the essential points I wanted to make are obscured. Therefore, with the loss of some historical accuracy, I have edited the talk somewhat so as to make clearer the message I hoped to convey: that neither traditional institutions nor the colonial experience cultivated a prizing of judicial independence and that the political imperatives of post-independence Africa are equally unlikely to foster an inclination to develop truly independent courts, but that with understanding of the African experience and present aspirations, we should be patient witnesses to the important values that can be served by judges free to apply the law as they understand it, even though they may err from time to time.

I begin with a story that, at least in broad outline, is familiar, I suspect, to all of you.

In November, 1963, a Special Court sitting in Ghana, comprising the Chief Justice and two other members of the Supreme Court, concluded a Treason Trial which had been going on for about three months. The principal defendants were three prominent former officials of the government and the Convention People's Party, two former Ministers and the former Party Secretary; the two lesser defendants were, or had been, associated with the opposition. All had been ably represented by counsel during the course of a long and rather tedious trial.

On December 9, 1963, the court handed down its judgment: the two lesser defendants were convicted, but the three principal defendants were acquitted. The reaction was almost immediate. On December 11th, only two days after announcement of the judgment, the President dismissed the Chief Justice from that office, and a few days later Mr. Justice Van Lare, another of
the Justices who had heard the case, resigned from the judicial service. The Chief Justice, after being dismissed from that particular office, remained a member of the Supreme Court, but shortly thereafter he too resigned.

Following the enactment of legislation authorizing it, the acquittals of the three principal defendants and the convictions of the two lesser defendants were annulled. Subsequently they were tried by another court under a new procedure and sentenced to death. I believes, however, that these sentences have not been carried out up to this time.

The concern of my remarks tonight is not specifically with the trial itself, the evidence adduced, or the guilt or innocence of these particular accused. Rather, it is with the status and function of the judiciary in Ghana, in the revolutionary climate that prevails there. Some light may be thrown on this by the general background and the immediate aftermath of the Treason Trial.

Briefly, by way of capitulation of what I suspect is familiar to all of you, the cardinal feature of the legal order in the Gold Coast, or as it is now, Ghana, and in most parts of former British Africa was and is a dual system of courts: Native Courts, as they were once called, administering various systems of customary law to the great mass of the population, and a system of superior courts administering received law, and now, of course, an increasing amount of national legislation.

During the early stages of British rule, the Native Courts had a somewhat ambiguous status. Until reforms that took place under Colonial Ordinances in the 1930’s and 1940’s, the prevailing theory was that the Colonial Government merely recognized and acquiesced in the continuance of certain courts within the indigenous societies, and the members of those courts served by reason of their status in the traditional regimes. Under the reform legislation, however, the theory changed; Native Courts were created by official Act and brought within the framework of colonial government. Unquestionably the colonial government tried to effect certain improvements in the operation of these courts, but a number of features, and if you will, many inadequacies, remained. Moreover, additional ones were introduced.

The first was that members of the courts were appointed by the Governor or Governor-in-Council without any stated criteria of qualification; they had, understandably, absolutely no protection of tenure, and were fully subject to administrative discipline, suspension or even dismissal from their posts.
The second feature that I think worthy of notice is that proceedings in the Native Courts were subject to review and modification by administrative officers of the colonial government, and finally, I think it remained true throughout their existence that the Native Courts were replete with corruption, dilatory procedures, political bias, and general incompetence.

I am not reporting to you my own views. I am reporting the views of commissions that studied the operation of the courts, the last of them being a commission headed by Sir Arku Korsah, who later became Chief Justice. His commission reported in 1951 a set of conclusions that showed the ineffectiveness of the colonial reforms. In 1958, legislation was passed substituting a regime of Local Courts for the Native Courts. These are under the supervision of the higher judiciary, but I think the evidence demonstrates that the operation of the Local Courts has remained quite unsatisfactory, and that to a very considerable extent they lack the respect or the confidence of the people.

Now, alongside the Native Courts existed the superior courts. At the moment I am not concerned with their formal hierarchy. I would like, however, to point out some developments that are relevant to the status and function of judges as they were revealed, I think, at the time of the Treason Trial. During the colonial period itself, the Supreme Court judges were appointed by Royal Letters Patent, and served at the pleasure of the Monarch. All other judicial officers of the Gold Coast were appointed by the Governor and, as best I have been able to determine by careful examination of the law of the Gold Coast, there was no legally articulated protection of their tenure or of their independence during this period.

As independence approached, however, the concern of the colonial power for judicial independence became considerably more pronounced, and in the Constitution of 1954, the so-called Nkrumah Constitution, a provision was included that judges of the Supreme Court could be removed from office only on resolution of the Assembly, passed by a two-thirds majority of all members, on stated grounds of misbehavior or infirmity of mind or body. In addition, there was a separate provision which protected them from diminution of salary during their terms of office.

It bears emphasis, however, that below the level of the Supreme Court, none of these protections was available. It also bears emphasis that in the lower order of the judiciary, the courts remained very closely identified with the administration, because of the fact that District Commissioners exercised judicial powers as magistrates.
The grant of independence to Ghana in 1957 affected the judicial order very little. The dual court system remained, and protection of the tenure and independence of judges was not extended beyond the Supreme Court level, where it had previously existed.

There were some important changes in the general legal order of Ghana in 1960, when the country became a Republic. The right of ultimate appeal from the Supreme Court of Ghana to the Privy Council was terminated. For the first time, all judicial power was inside Ghana.

Under the Republican Constitution, all appointive power over Superior Court judges was vested in the President. The Constitution did not state any qualifications for judicial office and did not require confirmation of the President's appointments by any other body. The judges of the Supreme Court and the High Court enjoyed constitutional protections of tenure and salary of much the same kind as I mentioned earlier. However, the Chief Justice specifically was removable from office by the President. The White Paper that had presented the Constitution to the people offered as the official explanation for this unfortunate provision that the Chief Justice, as the administrative head of the judicial system, ought to give loyal cooperation to the President.

While the constitutional guarantees did not extend below the level of the Supreme Court and the High Court, the Judicial Service Act, which was enacted at the same time, did include some rather important guarantees of a fair hearing for judicial officers at the lower level in cases where they might be brought up for discipline. But even those protections did not extend to Local Court judges who remained fully subject in terms of appointment, discipline, dismissal, etc., to the actions of the relevant Minister. This, then, was the general position of the judiciary at the time of the judgment in the Treason Trial which I mentioned earlier.

One other innovation in the court system does bear mention. In 1961, in a period of political tension following a politically motivated strike, Parliament passed legislation authorizing the creation of Special Criminal Courts to be manned by three judges. Such courts were authorized to proceed summarily in the trial of a specified range of criminal offenses. They were to operate without a jury or assessors under a restricted application of the Code of Criminal Procedure, and the accused had no right of appeal from their judgments. The President's prerogative of mercy was, of course, available in cases of conviction.
It was such a court as this, a Special Court sitting as a Special Criminal Division of the High Court of Ghana, composed of Chief Justice Sir Arku Korsah, Justice William Van Lare, and Justice Edward Akufo-Addo, which tried the five defendants charged with treason and acquitted the three principal accused.

As I have suggested, the reaction of the President and others to the judgment was immediate and vigorous, to say the least. The President removed the Chief Justice from office; the Attorney General summoned a press conference and described the judgment as a "travesty of justice." The Evening News, a Party organ, commented as follows:

"The courts, ideally an instrument of Socialist education and discipline, not of class insolence and subversion, ye have made a den of thieves, assassins and corruption.

"And the voices of the people say away with them. No more shall we entrust such vital machinery in the hands of the class enemy."

I might simply state, parenthetically, that there were those with imagination or acumen sufficient to see a relationship between the acquittals and the kind of legal education that was going on in the University of Ghana. And they perhaps were right in a certain sense as I will point out in a moment.

The reaction of the Government, of officialdom, and of the Party press was not restricted to vituperation, however. The President moved, without delay, for summary power of dismissal over Superior Court judges. Since those provisions protecting the judges' independence and tenure in office were entrenched in the Republican Constitution, both a favorable plebiscite and parliamentary approval were required, if the President was to achieve his objective.

The plebiscite was held and by a reported overwhelming vote the proposed amendment was approved. It was simply inserted in the Constitution, following the protections of tenure and independence which I mentioned earlier, providing "that the President may at any time for reasons which appear to him sufficient remove from office a Judge of the Supreme Court or a Judge of the High Court."

On the 2nd of March, 1964, in the exercise of this power, President Nkrumah dismissed from the Supreme Court Justice Akufo-Addo, who was the last member of the Special Court panel.
that had tried the treason defendants still in judicial office. He also dismissed two other Justices of the Supreme Court who had not even been involved in the Treason Trial. Somewhat later he dismissed, without any explanation or statement of cause (none being legally required, of course) Justice Henry Prempeh of the High Court in Kumasi.

It would be easy at this point to work toward the conclusion of these remarks with some facile cliches about Ghana's unpreparedness for political independence, about the evils of black authoritarianism, and what have you. I would hope to avoid any conclusions of that kind, although as substitutes I can offer no guaranteed insights into either the past or the future of judges, or the value and status of judicial independence, in Ghana or anywhere else. I can only hope, in a few concluding remarks, that I may be able to place Ghana's judicial experience and its problems in a clearer and realistic perspective.

There are several points I would like to make. The first is simply that I do not believe that the experience of the judges in Ghana reveals any peculiarly Ghanaian or peculiarly African problem.

Experience in this country, highlighted in the 1930s with a court-packing plan rather crudely designed to solve the problem created by the Supreme Court's voiding of social welfare legislation enacted by a democratically elected Congress, and again today when the Supreme Court is under severe attack from racists and quite decent exponents of more vigorous enforcement of the criminal law, provides a basis, I think, for raising the question, what do we mean by an independent judiciary and how highly do we prize it? What sort of price are we willing to pay for it?

What do we mean by an independent judiciary? From what do we want our judges to be independent? What is it we want them to be independent to do? A part of the answers to these questions would surely be clear to all of us. We want our judges to be independent of political pressure or calculation of political gain or loss, so that they may apply clearly formulated general rules to specific cases without regard to factors other than those determined by the rules themselves to be relevant. But in a group of this kind, it needs no argument to establish that this basic function does not comprehend fully the scope of the judicial office.

What about the cases that lie outside the clear core of the rule, where judges must resolve penumbral uncertainties by creative choice? In such cases, of what is the judge to be independent? Is he to be independent of his own political philosophy,
his own moral commitments, of the general community's value structure that he may not be able to establish empirically but which he may in some way sense? Is he to be independent of the views of the dominant political leadership of the state, which may have been invested through the democratic choice of the people?

Now these are important questions, and they are hard questions which the usual cliche of judicial independence doesn't really answer for us. As we search for answers, however, the long history of our own institutions, which we sum up rather grossly in the doctrine of separation of powers, aids us. But to what extent does Ghana share a similar institutional history and tradition?

In response to these tough questions, time permits only a few summary suggestions.

The first of these is that in the traditional societies of Ghana, there was nothing that I can detect that might be regarded as an embryonic doctrine of separation of powers. The chief and his councillors exercised "executive" powers. They also sat as a court, and, insofar as there was law-creation by human fiat, as against the slow accretion of custom, it was again the chief and his councillors who exercised the legislative powers.

This is the traditional background. Against it, it seems to me quite clear that British tutelage in the Gold Coast during most of the colonial period hardly fostered a doctrine of separation of powers or nurtured the value of an independent judiciary.

When Native Courts came to be established, their members (and note that they were "members" and not "judges") were fully subject to discipline, suspension, or dismissal by executive officers. As I said earlier, the lowest level of the colonial court structure, with which most of the people of the country probably were more familiar than they were with the superior courts, comprised the District Commissioners, who ordinarily were not legally educated and who combined executive and judicial functions in the exercise of which they did not enjoy the protections of independence with which our tradition cloaks our judges. Only in 1954, as I have said, were these protections extended to the judges by express enactment, and then only for judges at the level of the Supreme Court.

Finally, I would mention one further factor, though with considerable hesitation and only because it seems to me neces-
sarily relevant if one is determining the desirability of guaranteeing independence to the judges of Ghana. My own studies in Ghana produced evidence that rather strongly suggests that the ordinary Ghanaian views lawyers as a devil's mixture of greed, mendacity, general untrustworthiness, and arrogance. In the data I gathered, the judge is a special sub-type of the general class, but he fares somewhat better in the general community view. As a matter of fact, he fares considerably better. Yet, approximately one-third of the people whose views I examined indicated a common belief that the judges were under the control of the executive, were biased in any case having political overtones, and could be influenced, privately, as was said, by "money or drink." This didn't mean getting the judge drunk; it meant providing presents of various kinds.

Fortunately, I found that popular regard for the judges improved as one moved toward the top of the judicial hierarchy. Nevertheless, if one considers the general image of the legal profession in Ghana, it would be surprising if guaranteeing the independence of judges would be a dominant social value.

Today in Ghana, as in all of Africa, the society is in the throes of a revolution, of aspiration if not of actuality. Its dominant political elite is using law and other instrumentalties of the state to further rapid social change. That elite, whatever its ideological bent, is going to be concerned about the status and function of the judiciary and is going to try to shape it so as to make it functional to the revolution. If, as tends to be the case in Ghana, the political leadership regards the judges as unduly dominated by a foreign culture, as dangerously conservative and thus unsympathetic to the aspirations of the revolution, it is not surprising, whatever our ultimate evaluation might be, that systematic attacks are made on judicial independence, which is seen as a prerogative to decide cases on the basis of personal preferences without reference to the viewpoint of the political leadership.

We would condemn, I am sure, a judge who, behind firm guarantees of independence, used his own ideological persuasions as the operative basis for his judicial actions, and refused to find the facts in accordance with the evidence, or refused to apply a clear rule of law. In the Ghana Treason Trial, I strongly suspect, without knowing, that President Nkrumah believed that the Supreme Court had committed such indefensible judicial acts. I believe, however, that he was wrong. In my judgment, the Special Court did not acquit because of an anti-state or anti-Nkrumah bias, or even because there was a reasonable doubt on the evidence adduced as to the guilt of the accused. Rather, it acquitted, probably reluctantly, because the government simp-
ly did not make a case that would have enabled a court operating within the range of judicial decencies to convict these particular defendants. I suggested earlier that those critical of the Special Court's acquittal postulated a connection of similarity between the judicial action and the kind of legal education my colleagues and I were providing in the University of Ghana. The latter was thought subversive. As I said at the time, if it is subversive to teach students that the state bears the burden of persuading with evidence that conviction is warranted, the Law Faculty was indeed subversive.

In conclusion, then, I would say that the judgment in the Treason Trial offered no possible justification for the President's humiliation of the judges of Ghana or for the constitutional steps that were taken to subordinate the higher judiciary to the President's whim.

But putting aside the case in which the judge may have violated the clearest duties of his judicial office by basing his action on factors irrelevant under a clear and applicable rule, what should we say about the risk that the highest courts, behind their protections of tenure and independence, may exercise their creative choices within the penumbral area so as to shape the governing norms in line with personal preference but in conflict with the developing sense of the community and contrary to the views of the dominant political leadership -- which may be democratically elected? Should a society tolerate and even institutionalize protections for a judicial oligarchy given to such conduct, a judiciary that is usually in no sense democratically responsible?

This is a tough question. It is an important question, and I would simply suggest to you that my answer is yes, and a resounding yes.

Certainly if our concern is with the judge who violates the clearest duties of his office, virtually every system provides some mechanism for removing that kind of judge from office on the basis of objectively stated grounds of misbehavior or, possibly in some cases, infirmity. Where the problem is one of judges performing their function of law creation contrary to community need or democratically formulated and expressed desire, the expedient of legislative correction or even constitutional modification is also available.

Admittedly these processes are slow and cumbersome and it is not surprising that the impatient leadership of revolutionary Africa should chafe under the necessity for invoking them. Yet it seems clear, to me at least, that human history up to this
point has rather clearly demonstrated that if you concentrate too much political power in a single organ of government, as by granting judicial powers to the executive or the legislative body or making the judiciary subject to the whims of the executive, than you have placed in mortal danger man's hope for political liberty and satisfaction of some of the most deep-seated claims of the human personality -- whether it be the human personality in Africa or in the United States. It is from this perspective, it seems to me, that we may, with sensitivity and patience, add our voices to the call for judicial integrity and judicial independence in Ghana or in the United States, or anywhere else in the world.

THE RIGHT TO COUNSEL IN AMERICAN LAW

[The remarks below are an excerpt from a talk I gave on August 7, 1968, to the Second Annual Conference of Bench and Bar, held at the University of Ghana. The main body of the talk does not merit inclusion here; it reviews a line of development familiar to all American lawyers. I include the excerpt because the talk was given on my first trip back to Ghana since my departure in 1964. The occasion thus provided me an opportunity to reaffirm the great affection I still felt for the country and its people.]

My Lord Chief Justice, My Lords, Ladies and Gentlemen:

The American writer, Thomas Wolfe, one of my great pleasures when I was young, once wrote a book entitled You Can't Go Home Again. That proposition, stark and depressing in its finality, is much in my mind as I return to Ghana, which I once regarded as home and in which I had the privilege of living and working with many of you. Wolfe's rejection of the possibility of homecoming is, I'm sure, based on the fact so clear to all of us—that the rule of life is change: change in our surrounding circumstances, as well as change in ourselves. On this return to Ghana, I am deeply impressed by the changes which have occurred since I left in early 1964. I need not recount those changes, since I am sure they are obvious to all of you. I am sure they are welcome to all of you, as they are to me. While less obvious and less significant, I am also sure that I too have changed in the years since my departure. Yet in one aspect, I am sure no change has occurred, that is, in my deep and abiding affection for this country, for the University of Ghana, and for the large number of you for whom I have had the opportunity over the years to know, to respect, and to regard with warm friendship. The English poet Browning once observed that one who could see his
heart would find engraved there the word "Italy." Similarly, on the roll of my deepest attachments is inscribed the name of Ghana. While I recognize, therefore, that I can't go home again, in the sense of recapturing in full measure the surrounding circumstances, the critical relationships, the attitudes and state of mind which Ghana embodied for me in an earlier period, I am equally sure that I shall always have a strong feeling of homecoming when I return to your country and to the renewal of contact with my friends here.

It is a pleasure and an honor for me to speak to you today on a subject of profound significance to the legal profession, to those members in active practice, as well as to those who have received the high honor of appointment to the bench. This subject has to do with the right to legal counsel. I shall devote most of my time to a report to you on the developing perception of that right in my own country, where a series of decisions of the Supreme Court of the United States over the past few years has moved the right to effective representation by counsel from the wings of the constitutional theater to the very center of the stage. I hope this report of developments in another country, which shares with Ghana common origins in the humane traditions of English law, will be of interest to you and will stimulate your own consideration of the most appropriate response to the need for legal services in your own country.


I have reported these developments in my own country as matters of assured interest to colleagues in the legal profession. It would be presumptuous of me to try to suggest what implications you might find in these American developments which may be relevant to the developing constitutional and legal order of Ghana. Certainly some aspects of the American experience, particularly the problem of conflicting sovereignties in a federal system, should not recur in your own elaboration of the right to counsel. On the other hand, you here in Ghana and we in the United States face a number of common problems. Each country has a segment of its population which cannot afford to provide legal assistance for itself in the private market place. Each country, thus far, has relied largely on the altruism of private members of the bar to provide legal services to the indigent. In each country the supply of lawyers, in gross, is probably inadequate to cater for a greatly expanded clientele, including...
not merely the range of traditional users of legal services but the number of indigents who in the past have found it necessary to confront the power of the state without legal counsel. And in Ghana, in the United States, and in every other country, the private citizen cannot safely rely on the paternalistic benevolence of government to maintain fundamental decency in the ever widening range of contacts between officials and the citizen.

You are now in a creative and optimistic phase of your national life. A new constitutional order is emerging to channel national energies and official power into productive courses for the benefit of all citizens. May I therefore conclude these remarks with a respectful suggestion for your consideration. Should you not give thought at this time to the extent to which the new constitutional order of Ghana should guarantee the assistance of counsel to all persons, at the expense of the state if necessary? To you, as the leading members of that profession to which the nurture of the rule of law is especially committed, I would suggest with respect your clear responsibility to bring graphically to the attention of your fellow citizens the indispensable role of the lawyer and the ultimate responsibility of the state to see that access to legal counsel is assured to all. The view I suggest to you was admirably stated by the International Commission of Jurists in the Conclusions of the 1959 New Delhi Conference, in the following passage with which I conclude:

Equal access to law for the rich and poor alike is essential to the maintenance of the Rule of Law. It is, therefore, essential to provide adequate legal advice and representation to all those, threatened as to their life, liberty, property or reputation who are not able to pay for it. This may be carried out in different ways and is on the whole at present more comprehensively observed in regard to criminal as opposed to civil cases. It is necessary, however, to assert the full implications of the principle, in particular insofar as "adequate" means legal advice or representation by lawyers of the requisite standing and experience. This is a question which cannot be altogether dissociated from the question of adequate remuneration for services rendered. The primary obligation rests on the legal profession to sponsor and use its best effort to ensure that adequate legal advice and representation are provided. An obligation also rests upon the State and the community to assist the legal profession in carrying out this responsibility.
DEMOCRATIC VALUES, SOCIAL CHANGE AND LEGAL INSTITUTIONS
IN THE DEVELOPMENT PROCESS

[In 1967, Arnold Rivkin, an officer of the World Bank, on leave to serve as Regents' Professor of African Studies in the University of California, Los Angeles, organized a "Colloquium on Institution Building and the African Development Process." The core group in the Colloquium comprised forty to fifty faculty members and graduate students, with visitors attending many of the sessions. I presented the following talk to the Colloquium, the subject being in effect assigned. Had that not been the case, I am not sure I would have undertaken such an ambitious subject in such a restricted format. The talk, as presented, was later modified slightly to make its form appropriate for inclusion in a book edited by Professor Rivkin, entitled NATIONS BY DESIGN (Item 28 in the Bibliography).]

The subject of this paper may be formulated as a question: what role can law and legal institutions play in inculcating or preserving democratic values, while stimulating and guiding the modernization of economies, social structures, and political processes? I have been careful to frame the question in terms of the role that can be played, rather than the role that is being played. To answer the latter question would invite, indeed require, more empirical data than I or anyone of whom I am aware now has. This essay, therefore, will be analytical, not descriptive. As the reader will detect, I am uncomfortably aware that analysis also needs an empirical base and that legal scholarship thus far has provided a relatively inadequate one. Arguably, however, analysis responsive to the "can" question may proceed on a narrower factual base than description would require.

The question utilizes three key concepts that call for analysis: first, value, and more specifically "democratic values"; second, law and legal institutions; and third, "modernization" as a particular kind of social change. Adequate analysis of any one of these concepts is too large a task for this paper, even if I were competent to undertake it anywhere. Therefore, I shall indicate only briefly, with little supporting analysis or argumentation, the meanings I shall ascribe to these key concepts in the later discussion. In this way, I would hope, in Lon Fuller's neat phrase, that even if I am clearly wrong, I will be wrong clearly.

I take a "value" to be merely a specific focus of human desire that may be, and often is, manifested objectively in a
claim or demand advanced by an individual or a group. If there exists, aside from such values, an order of true or real values, these are deemed irrelevant as beyond the range of human cognition other than by intuition or revelation. Such routes to knowledge, however significant they may be to those advantaged by valid intuition or gift, share the critical limitation that the knowledge to which they lead is not inter-subjectively transmissible in any reliable way. When my intuition conflicts with yours, how can you persuade me, or I persuade you? We merely tolerate each other, or we fight.

It is often useful to distinguish between ultimate (immediate) and instrumental (mediate) values. Roughly corresponding to the two categories are the concepts of ends and means. At the level of instrumental values or means, we may have a basis for resolving conflicting desires through scientific inquiry and rational discourse—if we can agree on an ultimate value to which the instrumental value must be related as means. Important though the distinction may be, it is not the universal solvent of value conflict or competition. Almost always a particular value choice is both ultimate and instrumental, that is, while we may desire something as a means to a further end, we also attach to it certain ultimate or non-instrumental preferences. Similarly, in human experience, it is rarely entirely clear that a particular value, though prima facie immediate, is not in some measure a means to an end only dimly perceived. Consequently, while certain value judgments may be moved within the range of cognition by resolving them into choices of instrumental values, that is, by making them questions of fact, the fact that the means-ends categories are not mutually exclusive prevents in many cases a fruitful resort to factual inquiry and rational discourse.

Within this axiological framework, "democratic values" are viewed as only the preferences or desires of some men in certain times and places. They would perhaps acquire a special order of importance if they were deemed to be part of a common denominator of desires of all mankind. The factual support for such a premise in by no means clear, however. Even though validated only as desires, claims or demands, democratic values may appear more important by reason of the fact that at certain times and places men have thought them desirable enough to risk all, including life, for their preservation.

Beyond the general status that can be ascribed to "democratic values" under the non-cognitivist and relativistic axiology presented here, what further elucidation of them can be provided? For the purpose of this essay, I shall take "democratic values" to comprehend the claim or demand that government find
its validation in the consent of the governed. An effort to par-
ticularize beyond this fundamental claim -- to inquire whether
the consent must be manifested in a particular way, whether it
may be granted en bloc for all time or must be renewed periodi-
cally, whether it must also involve continuing active involve-
ment by the governed in the affairs of government, and what con-
cept of man himself is implicit in the basic claim -- such an
effort involves one in an infinite diversity of detail and in-
numerable subtle gradations. At the risk of gross over-
simplification, therefore, I will restrict the concept of demo-
cratic values to the fundamental claim, recognizing a variety of
approaches to its realization.

The only justification for this summary statement of value
theory is that it confronts directly and at the inception a con-
cept of law that must be examined briefly and laid aside. This
is the natural law view or actually views that have appeared in
innumerable guises over the centuries. I am not concerned here
with that variety of natural law thinking that invokes a higher
law merely as a standard of justice, a means of identifying the
unjust law. Some natural law philosophers, have held, however,
that a certain irreducible value content must be found in any
norm in order for it to qualify as law. If the adherent to such
a natural law position is also a democrat, he is able summarily
to avoid or dispose of much of the discussion in this essay
merely by asserting that the implementation of some minimum of
democratic values is essential for the achievement of law. Non-
democratic enactments, whatever effect they may be given by at-
tendant sanctions, he simply would not regard as law.

While I share the value preferences of many who hold a
natural law view, I regard most natural law thinking as a snare
and a delusion. I find no contribution to clear thought in an
insistence that law, in order to be law, must adopt any particu-
lar value content. To me, law is merely one among many techni-
ques for ordering, controlling or channeling human conduct; it
requires commitment to no particular values. This is not an ap-
propriate occasion for an extended analysis of that technique,
though some brief comments on it will be offered later. Nor is
it, in fact, necessary to press to its ultimate the view that
law, as technique, is value-neutral. One might agree with H.L.A.
Hart that any discussion of law presupposes a social arrange-
ment for continued existence, not a suicide club, and that law there-
fore necessitates a minimum value commitment to survival. Such
agreement, however, would not involve the further view that law
has any irreducible content of democratic value. Insofar as that
value is concerned, law may be regarded as fully a value-neutral
technique. An understanding of law's relation to democratic
values must depend, therefore, on a study of the value prefer-
ences of those in the society who are in a position to utilize the legal technique and of the ways in which those preferences are introduced into the legal order for implementation.

One further distinction must be suggested in this abbreviated analysis of the concept of law. The most characteristic expression of law is the norm. Following Kelsen, we may regard the legal norm as a hypothetical judgment—a coupling of a conditioning circumstance with a conditioned consequence: if and only if A, then B—if one takes another human life with malice aforethought, then he shall be hanged. The coupling of circumstance and consequence is not causal but purposive, dependent upon the intervention of human agents who, it is contemplated, will intervene to produce the consequence in order to effectuate the purpose implicit in the norm. The norm is not realized most fully, however, when the conditioned consequence results. For the purpose implicit in the norm is not primarily that the murderer be hanged, but that human life not be destroyed. That purpose is most fully achieved by the forbearance from murder by all members of the society. In a stable and successful legal order, that forbearance is induced not only by the legal norm but by religious, ethical, and social standards as well.

The norm, traditionally the most characteristic expression of law, remains of central importance today. Over the last century or so, however, changes of profound significance have occurred in virtually all societies. These have affected the expectations directed toward government, and they are reflected, therefore, in the roles of official actors within the legal order. From the traditional roles of norm creation and execution, that is, of defining the norm and, on the happening of the conditioning circumstance, intervening to produce the consequence, official actors have come to assume in most societies more pervasively active roles. Instead of relying on private conduct induced by general norms for securing desired actions and for achieving their purposes, those who manipulate the legal technique now frequently address norms to official actors so as to pattern their conduct for the actual doing of desired tasks. This manifestation we may refer to as the law as "institution." It is not novel. A court, for example, is the expression of law as institution. In contemporary societies, however, this manifestation of law has become much more frequent; it involves official actors in a far wider range of tasks, e.g., the provision of social services such as transportation or the planning and implementation of economic development.

This preliminary sketch of concepts would be incomplete without a brief discussion of development. This concept is invoked by two terms in my subject—"social change" and the
"development process." Presumably more is intended by the first than the basic premise of social fluidity. Certainly no society is absolutely static. Change occurs everywhere, though vastly important differences in the rate of change may appear in different times and places. The term "social change" is relatively ambiguous as to the direction or quality of the change, however, and on this ground alone we might prefer different and more precise terminology. "Development" enjoys an aura of approbation and might serve to suggest the kind of values or claims now being advanced in many parts of the world. It may also suggest, however, a teleological view of social movement that many would reject, and on that ground I have rejected it in favor of the concept of "modernization."

In the present discussion, I take modernization to encompass a technique involving the purposive employment of scientific method to achieve knowledge of physical and social causality in order to design means rationally related to achieving satisfaction of values, that is, of human desires, claims or demands. These values may cover the broad spectrum of human wants, and the means for satisfying them may involve social structures, economic arrangements, and political processes.

In the light of this statement of the conceptual apparatus, it is possible to break down the initial question into possibly more precise and useful components. Three questions emerge. 1) What role can the value-neutral technique of law, manifested as both norm and institution, play in satisfying the claim of men in society that their government be validated by the consent of the governed, or in stimulating the advancement of such a claim? 2) What role can law, so conceived, play in stimulating and guiding modernization of the social, economic and political life of a society? 3) To what extent are these two roles compatible?

It in probably now evident and will become increasingly clear that theorizing about law in relation to human values has both an affirmative and negative thrust. The affirmative presses the question: how can law be employed to maximize the realization of values? This question may be put either from the perspective of a governing elite that wants to use law to realize its own values or from the perspective of the governed. The negative, on the other hand, usually emphasizes the problem of controlling law, and ultimately those who manipulate it, so that it does not serve to deny or defeat the values of the governed. The latter question has been considered frequently in the long history of political and legal philosophy. It is the central theme of much of the contemporary concern about the "Rule of Law."

Without denying the importance of the negative thrust, however,
I would suggest the desirability of equal attention to the affirmative. Both will be considered in the following discussion.

As I turn to the first question, it is necessary to sketch briefly a set of factual hypotheses in order to relate the analysis to contemporary Africa. Many of the indigenous peoples of Africa lived under traditional governmental and legal orders that had a fundamental democratic underpinning. This was often obscured by a tendency to combine in the same functionary the roles of secular ruler and priest and by the restriction of eligibility for chiefly office to certain royal lines. Very commonly, however, each royal line presented a number of eligibles, and choice among them was expected to result from pervasive consultation, not voting in a modern sense, but an approach toward consensus. Further evidence of democratic tendencies in traditional systems was the possibility of removing from office a traditional ruler who failed to perform to the satisfaction of his people.

Generalization about African law and legal-governmental institutions is hazardous, and here the hazard can be avoided. For our concern is with modern African government and law. The extent to which democratic values were implemented in traditional institutions is irrelevant, since these institutions are in no meaningful sense the antecedents of the governments and basic legal orders of post-colonial Africa. The independent national governments of Africa are the progeny of colonialism, not the successors to traditional groups and their governmental arrangements. An African government that received the imperium from the departing metropolitan powers can not, therefore, derive its legitimacy from the consent accorded to traditional regimes. The new national units usually comprised an aggregate of traditional units or fragments of units with disparate governmental and legal orders. If popular sentiment could have been gauged accurately on the eve of independence, it is doubtful that significant agreement would have been found on the scope of the society to be organized into a national state, on any order of unifying values within the new national group, or on a useful set of symbols for those values. On occasion, independence was preceded by a plebiscite or election, and the colonial apologist might contend that it provided democratic validation for the new regime. More realistically, however, the results might be regarded only as a manifestation of desire for the departure of an alien power, not as a truly consensual grant of power to a new government. I doubt, therefore, that most of the legal-governmental orders in Africa even at their inception stood on democratic values.
Even if it were assumed that the constituent elements of the new nations were democratically united at independence, it would seem quite clear that the evolving legal-governmental orders in most cannot claim continuing validation through democratic choice. The hallmark of post-independence Africa has been frequent change or merely abrogation of constitutions. In most states progressive efforts have been made to concentrate the power to manipulate the techniques of law in the hands of elite groups, civil or military, whose claim to govern by consent can hardly be seriously advanced. It is not surprising in these circumstances that the new national governments of Africa

It has been fashionable in many quarters to justify this movement toward government by non-democratic elites on the ground that it was essential for the achievement of modernization. Certainly few Africanists, if any, would contend that the traditional authorities, whatever their democratic support, could have been relied upon for successful modernizing initiatives. Stimulation of and guidance for modernization had to come from and through new governmental agencies and laws. Yet surely experience is now sufficient to indicate that authoritarian government by an elite provides no assurance of modernization, of rational, scientific efforts to satisfy the desires, and demands of the people. Although the sacrifice of democratic values does not assure modernization, however, it may in the circumstances of contemporary Africa be essential to achieve law at the level of the new nation states. Opening the door to democratic choice could in many places loose such an array of centrifugal forces oriented toward traditional groupings that the fragile structures of the new nation state could not survive. The question whether new and more viable groupings, with governments validated by democratic choice, would emerge from the breakdown of the nation states spawned by colonialism, and, if so, when, leads to speculation too extreme for useful pursuit here.

The earlier analysis indicates that the failure of a legal order to rest on consent and thus to implement democratic values does not deprive its enactments of the character of law. Thus, an elite group within a certain territory that has been able to monopolize sufficient sanctioning force for its enactments to make them generally effective is entitled to insist that they are law, even if it admits candidly what no elite is likely to concede—that its power to rule is in no sense grounded on the consent of the governed. As long as its power remains intact, the elite is able to make law and to accept for attempted satisfaction in the legal order such values as it chooses. It is possible, though not likely, that an elite without democratic
support would opt for democratic values, thereby risking the possibility that it will be ousted and the entire order fragmented. If such an elite were unwilling to open the door to democratic choice sufficiently to imperil the entire governmental and legal order but were, nevertheless, committed to an ultimate satisfaction of democratic values, we may ask what contribution toward that long-range satisfaction its norms and institutions might make. Though the factual premises may and probably do for-sake reality, the question deserves serious consideration.

A non-democratic government that values and aspires to democratic legitimization might gain it or open the possibility of gaining it by successful efforts to maximize the realization of the non-political desires, claims, and demands of its people. Thus, success in maintaining the public peace and rendering human life more secure, in furthering economic modernization and improving the standards of life and health, and in dealing with citizens generally as if their interests are worthy of respect would be contributive. Coupled with such activities might go educational programs designed to cultivate in the citizens the perception of a community wider than their traditional groups, encompassing the entire nation, and of an identity of interests that can be furthered adequately only by a governmental and legal system comprehending the nation. Important in this effort is the discovery or development of symbols of national cohesion, some of which might be "legal." In the United States, for example, the unifying symbolic value of the Constitution is well recognized, even though many people would dispute or reject its specific interpretations when they are known. Finally, even within the political arena, democratic choice and participation might be nurtured at the level of local government under constitutional or statutory delegations of limited power to be exercised subject to supervisory control at the national level of government. Many of these efforts obviously involve the use of law as a tool for modernization which will be considered later.

A governing elite with ultimate democratic aspirations might also further its aims by the ways in which it structures its own power. One of the persistent dangers of elitist regimes is that significant power will be progressively concentrated in fewer and fewer hands. Such a progression in the allocation of power seems usually to be paralleled not only by deterioration of any commitment to democratization of government, but also by the denial of a wider range of human values. An elite without democratic support that desires to arrest this progression or, for that matter, a democratically chosen government that seeks to impede any movement toward undemocratic usurpation of power, has available a number of legal techniques that human experience has shown to be useful to these ends. Whether or not the effort is described in the traditional American terminology of "checks
and balances," it is prudent to disperse governmental power widely enough that the individuals and groups sharing power may impose mutual restraints. Equally wise is an insistence, vigorously implemented, that official actors find their authority to act in clearly articulated norms. Such an insistence does not preclude official discretion, but it counsels against the grant of unlimited discretion. Where grants of discretionary authority are needed, as will often be the case, discretion should be limited by articulated standards and purposes, by reference to which the conduct of the official actor can be reviewed. Values of great importance to individuals may be defined in and their greater protection assured by a Bill of Rights that is not easily subject to revision and is enforceable against executive or legislative action by an independent judiciary.

Such techniques are familiar, and experience in many societies has found them useful. It bears emphasis, however, that they are only techniques, not guarantees. They will rarely be utilized by an undemocratic elite, for they impede the augmentation and preservation of its own power. And even when adopted and entrenched by a democratic government, they may be and frequently have been subverted by elites able to array an overriding power. The effectiveness of all legal techniques must be assessed, therefore, in the light of the power ratios within the society.

In brief summary of the argument thus far, we may say that the achievement of law does not depend on the implementation of democratic values. On the contrary, in the social fragmentation of contemporary Africa, the achievement of law at the level of the new nation states may well require substantial rejection of democratic values, if the latter require the consent of the governed for legitimization of the power of government. It is theoretically possible, but factually improbable, that a non-democratically chosen but democratically inclined elite may take certain steps leading toward an infusion of democratic values in the legal order and an ultimate democratization of government. Thus far, the brief experience of independent governments in Africa justifies little optimism for this development, but the longer experience of the Soviet Union may provide a thin basis for hope. In the final analysis, the greatest and probably the only effective assurance of democratic government is the strongly and persistently advanced claim of the people of a society that government and law be validated only by their own consent. The prevalence and vigor of that claim in Africa today is fairly subject to dispute. Where the claim has been advanced and implemented, it has frequently
focused or a level and form of government that cannot respond effectively to the claims or demands for the fruits of modernization. To those claims, which are probably asserted in Africa today more vigorously than the claim for democratic government, we will now turn.

I will assume that the desires, claims or demands for the fruits of modernization—particularly more and better food, health, and material well-being—are widespread among the people of Africa. A similar assumption with respect to modernization itself, as an instrumental value, is probably not warranted. Among the African governments we will assume not only a desire for the fruits of modernization, but some degree of commitment to the technique as well. The latter assumption may, of course, be seriously questioned. Too frequently the new African governing elites seem committed primarily to the increase and preservation of their own power and perquisites, to conspicuous consumption in the midst of general privation, to prestige expenditures rather than productive investments, and to settling old accounts on actual or imagined wrongs, rather than construction of a new social cohesion and cooperation. In the present discussion, however, we will assume an enlightened government, firmly committed to modernization. The question may now be posed, what role can the legal norms and institutions of such a government play in stimulating and guiding modernization.

In this part of the discussion, the distinction suggested earlier between law as norm and law as institution becomes especially relevant. The effectiveness of law as general norm depends on communication of the norm to and understanding of it by the persons whose conduct it is intended to affect. Perhaps more importantly, it depends in large measure upon their internalization of the law's implicit values so that compliance is, in the majority of cases, not the result of threatened sanctions. In the absence of such internalization, the effectiveness of the norm depends heavily on the immediacy and certainty of the occurrence of the conditioned consequence following the conditioning circumstance. Consequently, for the law manifested as norm to have significant effect, one must have either substantial internalization of the values implicit in the norm and, thus, voluntary compliance by most of the people, or assured and probably frequent resort to the ultimate sanctioning force behind the norm. For the effectiveness of law as institution, neither voluntary compliance with desired standards of conduct nor efficient and forceful organs of government are irrelevant. It does seem clear, however, that understanding and cooperation of the people are less critical, if effectiveness for the law is sought primarily through the conduct of official actors who are charged specifically with the actual doing of the desired acts. An over-simplified illustration may make the point clearer. A
government desiring to improve transportation facilities between two large towns might consider at least two expedients: first, a general norm imposing a fine if any driver of a private vehicle between the two towns does not stop at a central depot and load his vehicle with passengers and goods waiting there for transportation; second, the establishment by the government itself of a bus and truck line to provide the needed service. The second approach obviously depends for its success on less widespread private action and, therefore, less official policing to secure the desired action.

The significance of the foregoing distinction emerges clearly in the light of two factors: 1) the enclave phenomenon that characterizes African societies and 2) the relatively sophisticated action required for modernization. We will consider each briefly.

A characteristic feature of African societies, produced out of the colonial experience, is the existence of a relatively advanced enclave within or, perhaps more nearly accurately, on the wider, less advanced society. Typically the latter depends on subsistence agriculture or pastoral activities, has a minimal level of education or even literacy, is relatively static, and has most of its significant relationships governed by customary law. The enclave, comprising the expatriate community and a thin stratum of more affluent Africans, tends to be urban, better educated or at least literate, engaged more frequently in salaried employment, business or a profession, is more mobile, and is governed either entirely or in a broad range of its relationships by metropolitan law and modern local enactments. This is the enclave phenomenon in its most obvious form. In reality, however, the broader, less advanced society itself may be considered an aggregate of often highly disparate ethnic enclaves, each differing from the others in aspects as significant as their collective differences from the Europeanized enclave.

Little discussion is required to make the point that modernization requires action that is usually more extensive, sustained, complex and purposive than traditional forms of social organization and control could or would have stimulated or perhaps even tolerated. An adequate illustration of the point can be found in the well-documented efforts in West Africa to clear tsetse-infested bush. Lack of understanding of the purpose of the action, doubt of its effectiveness, and superstition combined to place even this modest action well beyond what could be achieved along traditional routes and almost beyond the capabilities of colonial agencies.
Against this background, assessment of the role of law in stimulating and guiding modernization suggests the following conclusions. Within the advanced enclave, law as norm often can be a reasonably effective tool for modernization. Communication of the norm, understanding of its purposes, and acceptance of its objectives will frequently be sufficient to induce a wide range of compliance with relatively modest official interventions for enforcement purposes. Outside the enclave, however, the problems of effectuating law as norm tend to become too great when the norm is innovative and geared to the needs of economic or social modernization. To be sure, within this segment of the population many norms of the customary law are quite effective. As has been suggested, however, customary law and the institutions through which it is applied are rarely functional to the needs of modernization.

Even within the advanced enclave, where economic activity is above subsistence levels, conduct required for modernization often cannot be induced and guided simply by general norms. For example, saving for re-investment rather than consumption, or choosing the type of investment for any surplus earnings, requires planning and coordination of action beyond what a general norm can usually induce. Consequently, law as institution, frequently manifested as an official planning agency, is required, even though its actions and decisions may ultimately need the support and sanctions of legal norms as well.

If the foregoing analysis is correct, it would seem that law's most fruitful role in modernization processes within the broad social group would involve its manifestation as institution. This necessity has been and will continue to be reflected in Africa, for example, in government schools, state corporations, and planning commissions, that is, agencies created by law and staffed by public agents charged with the responsibility for organizing and frequently carrying out modernizing activity. While emphasizing the central role of law as institution, however, I do not intend to minimize unduly the importance of the legal norm. Reliance upon the latter manifestation or technique of law should be preferred where it offers the prospect of reasonable effectiveness, since the burden it imposes on scarce public manpower and other resources is lighter than a public institution would impose. Furthermore, even when an institution is necessary or desirable, its activity usually needs the support of norms, some directed broadly to the social group, but many specifically directed toward other officials. For example, the work of a planning commission can be defeated unless other officials are required to supply it with reliable data and to implement its decisions within the sphere of their own activity. For these purposes, norms addressed to officials play an indispen-
sible role in supporting the institution.

The view advanced here on the role of law in modernization involves substantial reliance on public activity in many aspects of social and economic life which we in the developed societies remit to the private sector under varying degrees of regulation by norm. I hope to make clear, however, that this view is grounded entirely on functional considerations related to existing circumstances in Africa, not on any doctrinaire preference. I would hope that the modernizing activities of the various institutions created by law would serve to move the general population toward levels of understanding and value agreement that would permit greater reliance on modernizing private activity guided and regulated by general norms. If modernization is the assumed objective, however, it seems essential to rely primarily on those persons committed to the objective and the relevant technique and possessing the requisite knowledge and other resources. At this stage of African development, such persons and resources are concentrated overwhelmingly in the public or governmental sector.

In Africa, a heavy reliance on the law as institution carries with it a potential for democratization that deserves brief mention to re-emphasize a point made earlier. Consolidation of governmental power in a single leader or a compact elite presents the maximum risk that democratic values will not have been satisfied at any time or that initial democratic legitimization will be eroded through increasingly authoritarian action. Effective assertion of a claim to be governed only by their consent is very difficult for the people who lack organization or resources. As a leader or elite creates institutions, however, some dispersion of power among them is inevitable. In theory, the various institutional power centers could maintain full cohesion and mutual support for the preservation of an undemocratic and repressive regime. In fact, however, a new institution that shares governmental power is potentially a competitor for a larger share. Institutional competition may introduce patterns of mutual restraint, and as such competition develops, popular support may be sought by one or more of the institutions simply to improve its own competitive position. It appears possible, therefore, that institution-building may not only impose restraints on the broader elite among whom power is dispersed but also contribute indirectly to democratization of the regime.

Progressive modernization, whether by unregulated private activity, by the general guidance of legal norms, or by the activity of public institutions, presents the indispensable requirement of a peaceful society in which at least human life is
relatively secure. Beyond that, some security of property, both public and private, and of expectations induced by promises, is probably essential as well. Unless one imagines an utopian society that is peaceful and secure by reason of its inherent homogeneity and coherence, the postulated requirements necessitate a government, an identifiable group of actors, that has sufficiently monopolized force to impose peace, assure the requisite degree of security, enforce its norms when they are breached, and organize and staff the legal institutions required for its programs. Obviously the existence of such government is debatable in many parts of contemporary Africa.

With this consideration, our discussion has completed its circle, for we are brought back to the interrelation between the implementation of democratic values and the achievement of law. The general lack of social homogeneity and coherence in Africa today makes difficult or impossible in many places the organization of national governments based on democratic choice. With increasing frequency, therefore, one encounters elites, civil and military, with no plausible claim to democratic support, seeking a sufficient monopoly of force that they can secure their own positions and achieve a legal order of national extension. If one indulges the assumption that such elites, or some of them may be committed to the values of modernization, one still confronts the question whether they will be able to achieve the law required for minimum social peace and security or for active modernizing efforts. Without the support of democratic consent, the monopolization of force for the achievement of law and effective legal action is an awesome task.

I would be happy to conclude on a more hopeful note. Relevant examples like Nigeria, however, do not stimulate optimism on the prospects of reconciling democratic values, national legal institutions, and the processes of modernization, and on a relatively short-term basis I am not optimistic. For the much longer run, without assurance or even great optimism, I would suggest as the basis for continued effort the hope that through the cycle of social upheaval, official corruption, governmental collapse or overthrow, and new gropings for power, there will be at least halting progress toward social cohesion and mobilization. If a government proves itself capable of governing and is committed to modernization, I think it deserves support and assistance, whether or not it rests on democratic consent. For if modernization does occur, the government in time may receive such consent. If the people continue to withhold their consent, modernization may facilitate their ultimate replacement of an undemocratic government by one of their own choice.
SOCIAL PHILOSOPHY AND THE DEVELOPMENT PROCESS

[The following talk was made on November 29, 1966, to the Meeting of the American Section of the International Association of Philosophy of Law and Social Philosophy, held at Washington University, St. Louis. I’ve felt much doubt about including it here, since it lacks context—the numerous papers presented and discussions on them. I finally decided on inclusion because the views expressed cast some light on the genesis of my involvement with Ghana and also on some of the attitudes that continued to guide my work.]

It is a pleasure to be here, to participate in the discussions of this conference, and to share the thinking of many old friends and able colleagues. It is a special pleasure for me, however, since the agenda of the conference relates to what I have come to regard as the central set of issues facing legal scholars, social scientists, and perhaps even philosophers. These are the issues arising on the inter-face between law and other techniques of social ordering and the development processes that hopefully are beginning in many parts of the world.

My task in these brief remarks is a difficult and challenging one. The challenge has come to seem more awesome as I have read and studied the principal papers and the responses and, yesterday and today, have listened to the discussion of them. The task, as I understand it, is not to comment specifically on the written or oral contributions to the conference, but to essay a general view, an assessment, if you will of the enterprise in which we here are engaged. Thus, I confront, with you, the basic questions: do legal and social philosophers have anything to contribute to an understanding of the problems of development and to their solution? If they do, is the course we are following in this conference a fruitful one for realizing that contribution?

Our Program Committee has given careful thought to the format or structure of our discussions, in an effort to assure that in general we consider the same questions. The Committee has asked us to share certain starting assumptions and then to deal with problem cases, making specific reference to suggested approaches to solution.

Without questioning in general the utility of these techniques for focusing discussion, I would offer a few comments and suggestions on the assumptions proposed and the ordering of problems. Some of the assumptions are so clearly warranted that any comment runs the risk of becoming a quibble. Others are more
troublesome. Are we, for example, really warranted in assuming
that the effective use of modern technology for economic
development "entails radical social change?" What does the as-
sumption# in fact mean? That the utilization of technology
necessitates antecedent social change of radical proportions? Or
that the exploitation of technological advance for economic
development inevitably will produce such changes in society? Or
are we asked, to some extent, to indulge both assumptions? The
ambiguity of the proposed assumption may stimulate a further
question: what grounds do we have for making any assumptions?
What is the actual state of our empirical knowledge of the in-
terrelation of modern technology and social change? With this
question, however, I begin to anticipate some thoughts I will
try later to develop briefly.

We also are asked to assume that social change can be more
peaceful -- and this is assumed to be good or desirable -- if
"arbitrary uses" of political power are prevented; and fur-
ther, that "such prevention requires established patterns of
thought and actions and institutions of application, but it
begins with achieving consensus upon the distribution of author-
ity to decide or act on central issues of modernization." Here
again, my capacity for assumption is seriously strained by ques-
tions as to what I am asked to assume. Perhaps I would be aided
by a clearer understanding of the relevant concept of arbitrari-
ness in the uses of political power. Certainly, one needs ex-
plication of the critical process by which patterns of thought#
action and institutions of application of political power may
become "established," in the Committee's terms, so as to prevent
its "arbitrary" use.

Assumptions doubtless are needed to structure our thought
and discussion. Whenever we make such assumptions, it is im-
portant that we identify and articulate them. At the same time,
it is surely indispensable that we strive for complete clarity
on the meaning of these bases of our dialogue.

The agenda style at philosophical meetings in recent years
has aimed, it seems to me, at a relatively sterile level of ab-
straction. For example, the subject proposed may be simply "com-
munity" or "responsibility." Here the Program Committee has
abandoned such abstraction and has attempted to focus discussion
on certain fundamental problems in the development context. Per-
haps this effort is only a concession to the common lawyers'
aversion to abstraction, but I feel the Committee should be com-
mended for its insistence that we are philosophizing in the con-
text of actual problems that press in upon us.

Turning now to those problems, perhaps I err in assuming
that the Committee saw a logical order of priorities from Prob-
lem A through Problem C. If they did, then I must say, with respect, that the order proposed involves, in my view, a curious inversion. It seems to me more plausible to begin discussion with the problem of loosening the social fabric sufficiently to introduce a potential for innovation (Problem C), to move then to a consideration of the appropriate forms of social organization to accommodate whatever changes may be desired (Problem B), and to conclude with discussion of such problems as marshaling capital resources and entrepreneurial and technological skills for accelerated economic development.

I mention this matter of priorities to emphasize the conviction that social and political adaptations are pre-conditions to economic development. This view confronts directly a fallacy that aid programs often reflect, that economic development can be effectively stimulated by a substantial capital in-flow and imported technology with little regard for the surrounding social and political institutions. If this appraisal is correct, we perhaps may buttress it by the course we follow in our own deliberations.

Today, a substantial part of the world’s population is enjoying a quantity and quality of material well being that would have been almost beyond imagination even two decades ago. An even larger part, however, remains under the awful burden of poverty, disease, and ignorance. The dichotomy between the rich and the poor, the haves and have-nots, is not novel. What is novel is the breadth of the gap between them and the rate at which it is widening. Two other elements combine with this increasing disparity to precipitate the concern that the agenda of this conference reflects. The first is the world-wide communications system that makes today’s events in Togo or in Thailand today’s news in St. Louis or Seattle. That same system with somewhat less efficiency makes the Ghanaian or the Congolese at least vaguely aware that his condition of life contrasts starkly with that of his counterpart in the United States, France, or the Soviet Union. The consequence is a radical change in the pattern of demands, expectations, and hopes of a substantial part of the population in the less developed parts of the world. The second element is a development in the social sciences and in government that seeks to attain an understanding of the critical processes of man’s life in society, and to develop effective programs through planning and governmental intervention in various aspects of individual and social life, so as to ameliorate the lot of the less advantaged.

We are citizens of a major power that is deeply involved with these problems in many parts of the world. We are human
beings somewhat sensitive to the plight of others. Hence, we have a double concern with the success of contemporary attacks on poverty and disease. The critical question before us in this meeting, however, is whether philosophy, particularly those branches most concerned with the social and legal order, has any peculiar competence to contribute to the success of these efforts. Within certain guidelines, my answer to that question would be "yes." In the next few moments, may I suggest a view on the nature of that contribution and relate it to our discussion here.

The first contribution of further philosophical activity has been anticipated by some of my earlier remarks. The conceptual apparatus we employ in discussing development problems requires elucidation. Examples readily come to mind. In our agenda, we encounter such concepts as "obligation," specifically the obligation to contribute capital for modernization; "right" especially the right to participate in certain critical decisions on social organization; and "authority" to participate in decisions and actions to remove obstacles to modernization. Almost without exception, contributors have accepted and employed such concepts without attempting explication. One notable exception is Professor Jenkins who has submitted a careful and useful analysis of the concept of authority.

If one examines the relevant literature on development and especially if one works in less developed parts of the world, the need for analysis and clarification of our conceptual baggage becomes crystal clear. The more naive American will be shocked to discover that in many parts of the world, "capitalism," to him one face of the great American epic, is a dirty word. "Socialism," which he has been conditioned to fear, is quite acceptable through most of the underdeveloped world, though, in Africa at least, it usually becomes "African Socialism," a variant that still awaits explication. Philosophical inquiry into the meaning of such concepts may settle the mud in our thinking. Equally important, it may help to open some of the channels of intercultural communication, without which the most effective attack on underdevelopment cannot be made.

Consider other examples. What do we mean by "modernization"? Some time ago, in Ibadan, Western Nigeria, I sat through a conference that included legal scholars from several countries. Our subject was the "modernization" of African law. After an extended period of puzzlement, I concluded that the operative test of modernization was the extent to which an African state adopted or received contemporary English law. It seemed to matter little whether that law was functional to the needs of English society, and even less what relevance it might have to
African circumstances. Such a concept of modernization might be understood, but I doubt that it would have been defended even by my colleagues in that conference. They simply had not examined with thoughtful care the content of the notion of modernization they sought to employ.

A final example will conclude this point. The principal paper submitted on Problem C, removing obstacles to social change, presents a careful analysis of the concepts of value and authority. It concludes that "authority to direct change must vest in individuals and groups who belong to the society being changed." This is an appealing position. I would suggest, however, with respect, that it avoids or disregards a crucial issue that inevitably arises in implementing the position. What does the proponent of this view mean by "society"? Are existing national boundaries to be taken as definitive of the metes and bounds of the several societies that may exist in a given area? Or is account to be taken of sub-national or supra-national tribal, linguistic, and religious factors as well?

The complexity of the concept of "society" may be fully illustrated by the state of affairs in contemporary Africa. The colonial scramble for Africa took little or no account of either the natural features of the land or the characteristics of the indigenous people. In the main, the present national boundaries have followed the colonial demarcations. Consequently, indigenous groups having some sense of a unifying identification have been divided--the Ewe between Ghana and Togo, the Yoruba between Dahomey and Nigeria, the Somali among Kenya, Ethiopia, and the Somali Republic. It is not surprising, therefore, that among the most difficult tasks of African national leaders has been and is the nurturing of a new organizing value--the Nation--to bring together for effective social and legal action the diverse elements within their borders. In such circumstances, we surely will agree that one would assign a directive role in social change to persons or groups "within the society" must assume the burden of careful elucidation of the operative concept of society.

This concluding illustration leads naturally to mention of the perspective and background I would suggest for philosophers addressing the problems of development. At the risk of transgressing the universalist urge present in all of us, I would suggest that we philosophize in context, that is, insofar as we are able, from within the social matrix whose development we seek to understand and perhaps to influence.

About ten years ago, as I tried to project my own work in legal philosophy, I reached the conclusion that, for me at
least, armchair speculation in the secure confines of an American university was not sufficient. There seemed so little knowledge of matters I believed important: the actual operation of law in society, the forces that shaped it, the processes by which value acceptances within the society were able to enlist the public force on their behalf, and the extent to which the tools of law were or could be made effective for reshaping the value acceptances within a society, and thus for guiding and implementing programs of planned and accelerated social change. It occurred to me that in the new nations, where the reins of power were being transferred to new hands, some of these processes could be studied with great benefit. Out of such study, I hoped would emerge some practical help in the development process, and possibly some insights of general application into the nature and utility of law.

The perspective for legal and social philosophy I am proposing is extremely difficult to achieve. I would not offer my own limited efforts as a standard of what can or should be done. Relevant social data for much of the less developed part of the world are insufficient but are increasing. Much of the investigation of indigenous legal systems lacks the rigor lawyers require, in part because legal scholars have not responded to any great extent to the challenge offered by legal institutions in the under-developed areas. If legal scholars and philosophers attempt in these areas the systematic value analysis urged upon us by our Program Committee in this meeting, they must recognize grave cross-cultural hazards. It is easy to attribute to legal institutions in other societies the same value implications we assume or believe similar institutions have in our own society. It is surely possible to overlook other significant value acceptances being implemented or affected by law in an alien culture, merely because such acceptances are unfamiliar in our own.

These hazards are real, but they are not insurmountable obstacles. They should serve only to induce a modesty in the claims we make for our efforts. They should not discourage the efforts. If we try to relate our axiological analyses to relevant social forces, we may further significantly our understanding of the interplay between values and the techniques of law. In addition, as we consider the range of choices suggested by our present agenda, we may see more clearly which of them are actual living choices. True, we face the risk that the views we may develop will be wrong, but I suspect we diminish what seems to me the far graver risk -- that we will be merely irrelevant.

I suppose it is clear from my earlier comments that my view of the contribution of legal and social philosophy is essential-
ly methodological, not substantive. I will not pause to battle the view that our substantive philosophical predilections, our value acceptances, are a universal panacea. Even if they were, or we believed they were, we would face a critical inability of persuading others, and the effort to persuade or to coerce acceptance would create its own grave problems. If legal and social philosophy is seen as methodological, as presenting a mode of inquiry and elucidation, it has an important role to play. A part of that role has been suggested earlier in my comments on the necessity for conceptual clarity. At the axiological level, however, the role includes exploring the critical value premises that underlie and support existing legal and social institutions and norms. It includes the identification of the value implications of alternative courses of action that may be under consideration. Further, it includes the effort, insofar as possible, to resolve conflicts or competition of values, as they seem to arise, from the level of ultimate or immediate values to that of instrumental or mediate values. If this is done, the range of application of scientific inquiry and rational discourse is extended. When such a resolution cannot be effected, the role of philosophy includes the clarification of those immediate values between which a choice may be required.

I come now to a final suggestion on the contribution that can be made by social and legal philosophy, which in turn suggests a guideline for further effort. Philosophers often possess a companion qualification. Social philosophers may also be social scientists, legal philosophers also lawyers. In these companion roles, they frequently have a sensitive awareness of man's accumulated experience with various techniques or instruments of social ordering. Consequently, once critical value choices have been made by those to whom a society has committed the power to make effective decision, they may be able to suggest some of the norms, institutions, and techniques that experience elsewhere has shown to be effective in maximizing the chosen values. Illustrative of such a contribution, familiar to all of you, is the Working Paper on the Rule of Law in a Free Society, prepared for the International Congress of Jurists that met in New Delhi in 1959. The authors of the Paper did not undertake to postulate a set of objective, universally valid values, although they did indicate the belief that there is a widespread, though embryonic, consensus on "certain fundamental ideals concerning the purposes of organized society." With such a consensus assumed, they moved on to consider the "practical experience (of mankind) in terms of legal institutions, procedures and traditions, by which these ideals may be given effect." This mediating role between the ideal and the practical, between value and legal or social techniques, is one that can be played fruitfully by the participants in such meetings as this.
In conclusion, may I leave one further thought with you. Our topic is "Law, Morality and Social Change." Understandably, our Program Committee has directed our attention toward the so-called Third World--to Africa, Asia, and Latin America, where recently awakened demands have focused the world's attention on development processes. This is a proper emphasis, but I would balance it with this suggestion. Human efforts through law and other social institutions to mobilize and channel energies in the interest of economic development, cultural enrichment, and peaceful conflict resolution are not limited to the Third World. Poverty, disease, ignorance, and social unrest are world-wide. I am sustained by the hope, indeed the belief, that the insights we develop into the interplay of values, techniques of social ordering, and social change will be valid not only in Mali but in Mississippi, not only in Lagos but in Harlem. If this hope and belief are warranted, the age-old aspiration of the philosopher for the universal may yet in our own efforts be to some extent fulfilled.

The Development of Law and Human Rights in West Africa

[The following talk was made on June 11, 1968 at the University of Iowa to the Midwest Conference of Fulbright Professors.]

The subject assigned to me this morning is broad and complex, and I despair of saying anything profound about it. Since I shall remain well within my forty-minute allocation, however, I can assure you that what I say will not be prolonged.

The suggested limitation of our discussion to West Africa is helpful. Beyond that, I shall limit the principal focus of my remarks to English-speaking West Africa, since that is the area I know best. Among the Anglophonic states, my own experience has been mainly in Ghana. The statement of these limitations suggests, I think, a necessary general caveat. All generalizations about "Africa" are suspect. As analyses become more modest in scope, focusing on regional, or national, or sub-national-ethnic phenomena, they have progressively better chances of being sustainable. Consequently, I am strongly attracted to a relatively narrow base for my comments. Perhaps I may be permitted the hunch, however, that the difficulties, disappointments, and longer-range hopes that one experiences in looking at law and human rights in Anglophonic West Africa would be quite similar to reactions induced by developments in many other parts of a vast, complex, and fascinating continent.
May I say a brief word to elucidate somewhat the rather large term -- human rights. Since the post-World War II years have seen the development of a number of international conventions dealing with various "human rights," one might conclude that the term now embraces a fairly firm body of well-recognized claims of the individual, which have as their corollaries equally well-defined duties in other individuals, social groups, or governments. I am doubtful of the extent of shared agreement on these matters, however. For our purposes today, we need not pursue very far the search for certainty in the concept of "human rights." I shall take that term to include broadly two fundamental components: first, the right to political participation, to a significant involvement in determining the structure and composition of that government under which one is to live; and second, the right to reasonable freedom in order to engage in certain types of activity without which the right to political participation cannot flourish and without which the individual human personality cannot develop and express itself creatively. Among these activities are speech in all its forms, assembly, and association. My concern today is with the relationship between law and these fundamental "human rights."

Before turning to an analysis of the role legal institutions can play in furthering human rights, as thus defined, it will be helpful to survey very briefly the relevant African experience. We need pause only briefly over the colonial period when the African peoples had their initial contacts with modern legal norms. It will suffice to observe that very little in the colonial experience could have suggested to the Africans that democratic participation or individual freedoms had much to do with law. Quite the contrary. Colonial power was essentially autocratic. Whatever altruistic motivations might have been claimed for it and however consistently it may have sought to work through and utilize traditional governmental functionaries who often had indigenous democratic roots, the law of the colonizers was imposed law, making no serious claim to democratic validation. It was law imposed for an exceedingly limited range of purposes -- preservation of peace and order, collection of taxes, and facilitation of such exploitative enterprises as might have been introduced to support the metropolitan economy. It is not surprising, therefore, that the Africans came to view law and legal institutions as the tools of a dominant power elite, used to serve the purposes and interests of that elite.

There were, of course, certain countervailing influences in the colonial experience. Mission teaching spoke to some extent about individual values; African pupils and university students studied the British constitution and laws with their supporting
conventions of governmental restraint and responsibility; and on the eve of independence the colonial power undertook to implant formally democratic governmental institutions and safeguards for individual rights. These manifestations of colonialism's death-bed repentance cannot blur the image or soften the impact of its life in Africa, however. I would suggest, therefore, that African perceptions of the relationship between law and human rights, as these perceptions were shaped by colonialism, provide little basis for early optimism that developing African law will accord a high priority to the protection of human rights.

As I have suggested, the colonial powers, on the eve of their withdrawal from Africa, became far more concerned with a democratic underpinning for the independent African governments and with legal protection of human rights. All of the independence constitutions, to some extent negotiated but largely "granted" by the metropolitan powers, provided for democratically based governments and for some assurances of individual rights and liberties. Constitutional bills of rights sometimes appeared; minority interests were often protected by federal or regional structures; and efforts were made to balance and thereby restrain governmental power centers. Whether these seeds, planted so late in unprepared soil, could have germinated and grown is questionable. That question has been rendered moot, however, by events.

The ink was hardly dry on many of the independence constitutions before efforts were begun to change them. Being imposed arrangements, the constitutional orders could claim little, if any, of the emotive support that gives great stability to the American and British constitutions. The new African constitutions were alien, and they attempted restraints under which the new African leaders chaffed. Restraints, therefore, were soon removed by constitutional or legal processes, or simply ignored. The various governments of the new African states were characterized by rapidly increasing authoritarianism, corruption, and ineffectiveness. This sums up what we may call Phase I of post-independence West Africa.

In many of the states of West Africa, Phase I has now been ended by military coups, which were accompanied often by public rejoicing. Phase II is the current period of military government. In important respects, particularly with respect to economic rationality and the reduction of corruption, Phase II appears to be substantially better than the past. Some of the military governments, especially that in Ghana, also have shown themselves to be far less inclined to political repression than their civil predecessors. They are, however, governments imposed by force of arms, without democratic legitimization, and it may
be quite unrealistic to expect of them major innovations in the legal protection of human rights.

Out of these governments must come Phase III, the return of government to civilian hands under constitutional arrangements which, one hopes, will carry assurances of stable, decent, and effective government. To the potential role of legal institutions in furthering respect for human rights during the next phase of governmental development in West Africa, I will turn now. In the few moments remaining to me, I will seek to make three points: first, that the African context is and will continue to be relatively unpropitious for the development of assured human rights to either effective political participation or individual liberties; second, that the affirmative or creative role of law in furthering the development of human rights will be and can be relatively modest; and third, that despite the foregoing fairly pessimistic assessments, human experience in many countries has suggested certain techniques for use in the constitutional and legal order which can be helpful in the furtherance of human rights in societies committed to their preservation.

First, let us consider the West African cultural matrix and its relationship to a modern state and a legally assured regime of individual human rights. In the West African societies, I have not discovered that strong and consistent strain of individualism which most obviously would foster effective demands for security of personal freedoms. Traditional African societies appear to be largely group-oriented -- to the family, the clan, or the tribe. Within these groups there are, to be sure, many manifestations of humane values, including in many instances democratic underpinnings of traditional institutions of government. But the individual as the locus of protected rights and freedoms does not emerge as he has in the developed societies of Western Europe and America. For this reason, the societal pressures for individual rights of political participation and personal freedom are far less in the countries of West Africa than we would assume them to be in our own culture.

Another factor which is far more prejudicial to the development of security for human rights than is the lack of individualism in indigenous societies is the absence in the new nation-states of unifying values and coherence at the national level. Colonialism in its classic form has almost ceased in Africa, but it has left its firm imprint on the face of the continent. The current nation-states are the pieces tumbled out of the colonial grab-bag. The lines that defined the various areas of metropolitan control were drawn without reference to topography, natural boundaries, or ethnic realities. Tribal
groups were split by colonial boundaries and their fragments covered by the veneer of various metropolitan cultures, languages, and legal systems. As a consequence, each colony was a miscellany of indigenous ethnic groups with numerous traditional differences and even hostilities.

During the colonial period, these diverse elements were held together by the firm hand of the metropolitan power. Little or no effort was made by the colonizers, however, to nurture among the African peoples perceptions of other unifying values that transcended their traditional cultural groups. When the unifying colonial power was withdrawn and national sovereignty was granted, the result was a collection of nation-states replete with strong, centrifugal forces related in one way or another to sub-national centers of allegiance and power. The classic example of the ultimate predominance of those forces is, of course, Nigeria. Even now, after a period of bloody civil war, it remains doubtful whether reunification of Nigeria in its immediate post-independence form can be achieved.

To complete the picture, we must set off against the centrifugal forces of traditional loyalties and hostilities, the drives of national leaders to whom the fragile reins of power were handed by the departing colonialists. However the motivations of these leaders may have been diluted later by the personal gratification of power, I think we may assume that they were initially motivated, in part at least, by the perceived need to modernize their societies and economies. For this reason, I think we may refer to most of this first generation of African leaders as part of a modernizing elite who saw governmental and legal power as the crucial tools in the painful, arduous tasks of modernization and development. A modernizing elite with a shaky hand on the controls of national government and a society torn by centrifugal sub-national forces do not create a felicitous matrix for the development of expanding political participation, for counterbalancing power centers, or for security in the exercise of individual freedoms of speech, association, or assembly. Increasingly political opposition has been equated with treason. Opponents were bought off, forced into exile, or jailed. Constitutions were amended to unify power at the center; laws were enacted to control association and the expression of ideas. Paralyzed by growing fears of their internal opponents and their external enemies, the African governments have failed to meet effectively the demands of their people for some relief from the grinding pressure of poverty and disease. The disappointed expectations of the people have been matched only by the conspicuous and wasteful indulgence of the leaders. It was into this unhappy situation that the armies and police forces have moved in recent years in most of the West African states.
As I have suggested earlier, the military-police coups, however odious they may be to most of us, have effected certain improvements. Particularly has this been true in Ghana where the National Liberation Council has governed, as best one can tell, honestly and humanely and already has produced a draft constitution for a return to civilian government. But the Phase II governments in West Africa have not been able, and will not be able, to resolve over a short period all of the obstacles to stable and decent government. Sub-national loyalties and traditional hostilities still exist; political leaders and civil servants of ability and integrity are still in short supply; the cultural set that equates institutionalized opposition or even criticism to disloyalty is still present; and the hard economic facts make significantly greater satisfaction of the needs and desires of the people seem remote indeed. For these reasons, I continue to regard West African circumstances, in general, as relatively unfavorable for the development of a regime of human rights firmly secured by the laws of stable governments.

My second proposition, applicable generally and not merely in West Africa, is that the initiating or creative role of law in developing human rights is modest indeed. In my view there is a tendency in many societies to expect more of law and legal institutions than they can be expected realistically to produce. We see this in the inclination of many legislative bodies in this country to respond to a wide variety of difficult social problems by enacting laws, often penal in character. We see it also in the recurrent inclination to rely somewhat naively on constitutional arrangements, such as bills of human rights, for assurance that decent relations between officialdom and the citizen will be maintained. I do not want to sound too pessimistic, nor do I want to ascribe to law an unduly passive role. Law is an important, perhaps the most important, technique of social ordering available. Into that technique can be built different value acceptances. In looking at law -- whether at the fundamental constitutional level, at the level of statutory enactment, of executive regulation, or of the day-to-day conduct of officials -- it is always appropriate and often enlightening to inquire: what values have been accepted for implementation by the law in question.

It is obviously important from our perspective that the value of the individual human personality and the value of individual self-expression through speech, assembly, and association, as essential instruments in shaping the government under which a people lives, be reflected in the legal order. While recognizing that importance, however, we should impose certain
restraints on our expectations from the legal order. Legal institutions are in a sense empty vessels into which various kinds of value acceptances can be poured. If humane values are poured in, whether by an elite which has monopolized control of the legal order or by a broad democratic consensus, this is a step in the right direction. It is only a step, however, for there can be and often is a wide gap between the values formally stated in constitution, statute, or regulation and the values actually implemented at the innumerable points of contact between official actors and the citizen. Being essentially a pragmatist, I am far more concerned with this operational level than with the pious posturing of formal enactment. Some of man's grossest inhumanity to man has occurred through official action in societies whose constitutions solemnly affirmed the fundamental rights of man, as has the Soviet Union's constitution for many years.

We must recognize, therefore, that the achievement of law does not necessitate any assured protection of human rights. Similarly, law which formally incorporates humane values still may be totally ineffective, for law is not self-executing. Its execution, its effectiveness, depends on the attitudes of official actors and on the attitudes, expectations, indeed the demands, of the citizens. The view I am suggesting was clearly stated last year by the editors of West Africa, commenting on a proposed new constitution for Sierra Leone. They said: "There is a tendency to assume that constitutional provisions in themselves can safeguard liberty, whatever the intention of powerful politicians. Experience elsewhere suggests that in the end politicians will have their way unless people at large are vigilant." (West Africa, January 28, 1967, p. 124).

One addition must be made to this observation. The vigilance of the people will help to control the politicians, but thought must also be given to the leaders of the armed forces and police. These agencies often retain a discipline and coherence greater than most other power centers in the society, as has been the case in West Africa, and, most importantly, they monopolize the instruments of violence that can, for a time at least, intimidate and control even a vigilant population. Therefore, we need to recognize that the effectiveness of any legal order and of the values built into it, depends ultimately on the power ratios within the society. If the pattern of military-police coups which has recently characterized West Africa continues, if the return of the soldiers and police to their barracks is regarded as temporary -- until civil government again displeases -- the significance of the established legal order and of its implicit values is seriously compromised.
I can end my comments on my second proposition on a happier note, however. While generalization is hazardous, most of the West African coups have overthrown governments whose abandonment of humane values and basic human rights was reasonably clear. That abandonment has been in some significant measure an inducing cause of the military-police intervention. Thus, one might conclude that the military-police regimes have been thus far firmer supporters of humane values and human rights than their civil predecessors. If the military-police regimes retain power or periodically reassert it, however, and, in doing so, if they deny basic human rights, I am persuaded that even such regimes of overt force ultimately can and will be subverted and replaced by any society whose commitment to human dignity and freedom is clear and consistent. Thus, I conclude this strand of my argument: the affirmative, creative role with respect to human rights is not for the law itself but for the people. If the people play that role and present their demands with firmness, clarity, and vigilance, they will be able to incorporate the appropriate values into the legal order and assure that those values are realized as the legal order makes contact with the citizens.

I turn now to my third proposition which I may dispose of with a brief summary. The proposition is that experience in many societies has identified a number of constitutional and legal techniques which can be functional to the end of assuring that governmental power does not deny unduly the claims of citizens for effective political participation and individual rights. I will offer examples, not an exhaustive catalog. Prominent among these techniques is a constitutional bill of rights with juridical status. The effectiveness of this device depends in turn upon the existence of an independent, competent and courageous judiciary through whose decisions, on the complaints of aggrieved citizens, the powers and actions of legislative bodies and executive officers can be restrained properly.

This role for the judiciary can be generalized, of course, into a broad principle of checks and balances. In the circumstances of most, if not all, of the West African countries, the application of this principle is difficult and indeed may appear hazardous. Checks and balances may seem to compromise the ability of government to act decisively and with dispatch to meet needs of the greatest urgency. Significant balancing power centers may represent strong centrifugal tendencies that could threaten the very existence of a national polity. These dangers are real, and the devising of checks and balances, which go far enough but not too far, will require great wisdom and probably much trial and error.
The Austrian economist and political theorist, Friedrich Hayek, identified the Rule of Law with reliance on hard, specific rules and the total absence of discretionary powers in official hands. I think that view in its generality is unsound, but I shall not pause for a detailed refutation. In fact, Hayek offered a half-truth, and I will try to suggest the valid half. The enemy of the Rule of Law is not the existence of discretionary powers, but the allocation of uncontrolled discretion to officials, usually executive officers. This thought suggests two specific legal techniques for helping to assure that official action stays within appropriate bounds. The first is the insistence, firmly backed by controls which can be invoked by the citizen, that every official be required to establish in a clear enactment of law his authority to act. The second is the insistence, where an official has been authorized by law to act in his discretion, that the discretion be circumscribed by an official statement of the standards which are to govern its exercise. These techniques do not unduly restrict the delegation of authority, even discretionary authority, to officials. They do provide, however, some assurance against action without any authority in law and some basis for the review of actions claimed to be taken within the scope of official discretion.

Perhaps the most important prerequisite to the establishment in West Africa of stable governments under which a regime of human rights assured by law can be developed is discernible progress of the governments in meeting the urgent and legitimate demands of their people for improved conditions in health, education and economic opportunity. Whatever their own merits, the African governments on their own cannot achieve that progress in sufficient measure. They need the moral and material support of the developed, affluent nations of both West and East.

The record of the developed world thus far in responding to the needs of Africa is disquieting, but that is a subject for another day.

FREEDOM, UNIVERSITY AND LAW

THE LEGAL STATUS OF ACADEMIC FREEDOM IN THE UNIVERSITIES OF BLACK AFRICA

[In 1975, I was invited by the Faculty of Law of the University of Lagos to deliver a series of lectures on an endowment honoring the late J.I.C. Taylor, Justice of the Supreme Court of Nigeria and later Chief Justice of Lagos State. There being no transmitted tradition of academic freedom in the new...]
universities of formerly British Africa, I decided to explore that subject, beginning with some rudimentary analysis of the concept that would have been unnecessary in speaking to an American audience. The lectures were presented on November 15, 16 and 17, 1976.]

THE UNIVERSITY'S MISSION AND ITS CLAIM TO FREEDOM

The lingering twilight of the colonial era and the hopeful dawn of freedom from alien rule saw the birth of a number of universities in sub-Saharan Africa. These infant institutions, and frequently political and governmental leaders as well, accorded a high priority to the development of law faculties to educate professionals for both governmental service and private practice. This primacy was dramatically illustrated in 1961 when President Julius Nyerere assigned to the new University College in Dar es Salaam the building just completed as headquarters for TANU, the President's political party, so as to permit the Faculty of Law to begin its work without delay and thereby to become the first division of the University of East Africa established in Tanganyika. These events in recent memory, and their significant continuing implications, suggest the dominant themes in these lectures: freedom, universities and law. We will explore the nature and mission of a university, particularly in the context of the new sovereignties of Anglophone Africa; the dimensions of that special freedom without which the university's nature cannot be realized or its mission accomplished; and the role of legal institutions in securing that critical range of liberty.

Our discussion will address a question far more modest than the legitimate entitlement to freedom of each individual, grounded on his humanity. Indeed, it will analyze and assess a unique claim advanced by a limited group of persons on the basis of their function in a specialized institution -- a university. Therefore, it seems essential at the beginning of the analysis to inquire into the purpose of that institution. If the relevant claim to freedom is properly limited to a subset of human beings, its ultimate validation must rest on the peculiar needs presented by the claimants' institutional setting in order for them and the institution to function effectively to the achievement of their own purposes or mission.

An extensive international literature on the mission of a university reveals a broad spectrum of agreement on two basic functions: to transmit the accumulated body of knowledge and, through continuing enquiry, to refine and extend it. We would, I suspect, agree on the primacy of these functions while recogniz-
ing that their postulation implicitly raises but does not resolve a number of recurrent, complex, and important questions which we cannot hope to explore fully here. We may not, however, pass them entirely unnoticed.

When we speak easily of the university’s function of transmitting knowledge, of its teaching role, what distinctions, if any, are we prepared to accept between university teaching and that which properly characterizes the lower schools and other institutions? Is it the function of a university to orient its teaching program to shaping the character of its students and to instilling in them a commitment to the dominant current values of the society, or is such teaching responsibility properly remitted to the home, church, school, or sectarian association, rather than to a university? Where is the proper balance in university teaching between fact transmission (at progressively more advanced levels) and development of skills and insights into modes of enquiry and into the processes of critical judgment? Does a university distort its mission or imperil its basic identity if it develops teaching programs to prepare its students for particular professional or vocational roles?

These are important and sometimes difficult questions, and one’s response to them influences significantly his attitude toward our central concern -- the appropriate freedom of teachers and scholars in a university. To avoid trying your patience unduly, however, I will suggest only briefly, and largely without supporting analysis, the views which shape my own answers to these questions and, consequently, my attitudes on certain of the basic themes of these lectures.

Despite prestigious countervailing examples -- particularly Oxford and Cambridge Universities until a relatively few years ago -- molding the character of its students to socially approved patterns and inculcating accepted values are not a university’s primary tasks. Indeed, aside from certain values that are truly central to the pursuit and dissemination of knowledge, I would suggest that they are not properly included in the institution’s role-definition. Character formation and basic socialization involve the postulation of values -- and therefore of faith, belief, indeed, of preference -- and not of knowledge. Even if a social, economic, and political consensus could be found, a university’s acceptance of the role of propagator would smack of indoctrination, not that of objective pursuit of knowledge and constant challenge to and re-testing of accepted truths which seem to me the central mission of a university.
Rejection of an essentially parietal role can be supported by the university on further pragmatic grounds. I retain the gravest doubts that much in the way of character formation or socialization remains to be done, or can be done effectively, at the ages when students typically begin university. Modern psychiatry has suggested that a child’s character is basically set in infancy, and by the time a person enters the doors of a university his basic view of himself, his world, and the relation between them is fixed. One would not deny, of course, that some shaping influences may be exerted within the university environment. Many university teachers, by their examples of honesty, diligence, and human sympathy, have left deep imprints on their students. In the main, however, I suspect that such influences, when effective, serve to reinforce existing commitments. Furthermore, influencing character and value attitudes through the examples of individual teachers differs radically from an effort to exert a similar influence undertaken by the institution itself.

It would be fatuous to insist on a sharp, absolute cleavage between the responsibilities of the schools and the university for learning in the sense of fact acquisition. The student who assumes that he brings with him from the schools all the facts he needs for his university career will doubtless find that career quite brief. While recognizing, therefore, that fact acquisition -- at progressively higher and more complex levels -- remains an important emphasis in the university, we may still insist on profoundly important differences between the schools and a university in responsibility for dealing with the corpus of factual knowledge. The university’s institutional responsibility for extending that corpus -- the research role to which we will turn shortly -- inevitably sharpens an awareness of the ever-shifting content of the body of reliable knowledge and reflects itself in the teaching program in greater emphasis on modes of inquiry, the ways in which knowledge is sought and validated, and on the processes of critical judgment. Just as the student entering from his school must recognize that he will continue to learn facts, so the university graduate must recognize that much he has learned will be superseded by new knowledge, perhaps within a relatively brief time. While few graduates will function at the true research level and through their own efforts open wider the curtains of ignorance or misconception, all should be aware of and sympathetic to this process. Also, at a mundane but important level, the university’s teaching program should have prepared each graduate to seek out, marshal and use the factual knowledge -- new and old -- that he needs in his own life and work.

Finally, at this summary level, may I comment briefly on a matter made relevant largely by the great influence of English
universities on those in Africa -- the university's role in teaching for career or vocational preparation. I take it that those who have abjured job- or vocation-oriented teaching at the university level are not denying the utility of knowledge, the processes of its acquisition, or critical judgment in the practical work of the world. Rather, they are insisting that the university should occupy the high plane of general knowledge and should leave to lesser institutions the preparation of young people for particular vocations. Such specialization of mission, leading inevitably to the proliferation of teaching institutions, does not seem to me dictated by the non-negotiable nature of a university. Prudent utilization of scarce resources and the desire for high quality in professional and vocational education argue for the university's participation in it.

Perhaps I may illustrate my view by a few comments on education for the profession of law. Non-university institutions in England assumed responsibility for the education and training of lawyers at an early stage of history. Even when the older English universities began instruction in law, it was conceptualized as general, non-professional education for undergraduates who might or might not go on to the Inns of Court (or to a solicitor's office) for professional qualification. Even on this restricted basis, however, law teaching in a university did not seem to many academics entirely respectable. The effort to achieve a "proper" university status for law study had a marked influence on curriculum. Subjects readily related to traditional, respected parts of the university curriculum -- for example, Roman Law and jurisprudence -- were welcomed. But Taxation, Company Law or Civil Procedure were banned in earlier times from the university, since these involved only "practical" training.

Instruction in law and the attitudes of law teachers in Oxford and Cambridge have changed substantially since the earlier period, but acceptance of responsibility for truly professional education still has not reached the point that would seem desirable. Why is instruction in the subject matter of a particular profession appropriate for a university and how does its university home influence such instruction?

The argument might be pursued at many levels, but I will abbreviate it by continuing to focus on education in law. First, may I emphasize my profound agreement with one premise of the earlier Oxbridge position. Instruction related to the origin, development, and current functioning of law and legal institutions should not be the monopoly of a professional school or a group of pre-professional students. One of the most challenging
and illuminating studies for any educated person deals with the basic structure of public order and the pattern of restraints through which social energies are channeled and directed. The sociologist, political scientist, economist or philosopher can learn much that is germane to his own discipline by studying the institutions of the law.

I am entirely willing, however, to argue the case for a university home for law, even if we think only of the education of professionals. At its best, legal education is not mere learning of legal rules and craft skills. It is an intellectually challenging exploration of the genesis and growth of basic social institutions. It can and should bring to bear in a focused context the substantive insights and some of the methodologies of the social sciences and humanistic disciplines. Good legal education develops intellectual rigor, analytical power, and the habit of objective, critical judgment. By accommodating it in the university, institutional standards need not be lowered nor its mission distorted. The study of law can be enriched and deepened by the influences of the social sciences and humanities in a university environment. At the same time, the general intellectual life of the university can be strengthened through the contributions of teachers and students of law.

Lest these claims for the rightful place of law in the university’s program of teaching and scholarship be discounted as mere expressions of guild pride, let me concede readily that legal education can forfeit its entitlement to university status. If its teaching becomes mere rote-learning of rules and doctrine or drills in craft skills, if its study is abstracted from the cultural, economic and political life of the society, if it contents itself with mapping the flat plane of positive law without subjecting that law to critical judgement on the standards of internal coherence, social utility, or the elusive but eternal quest for justice, it has no proper place in an institution entitled to be called a university.

The claim of law, properly studied and taught, to a respected place in the life and work of a university can with proper adaptation of the argument be sustained for other fields with a professional or vocational orientation. Medicine, nursing, agriculture, the organization and management of economic enterprise and governmental institutions enjoy a similar entitlement if their intellectual content is explored and their students are encouraged to bring to their study enquiring minds and critical judgments. Especially is this true, I believe, in the new nations of Africa where the content of curricula has been shaped unduly by uncritical acceptance of foreign models. Even
if concern for quality and relevance to local circumstances did not press so urgently for university responsibility in education for various professions, economic factors would do so. Proliferation of narrowly specialized teaching institutions exacts costs that should be avoided if critical educational needs can be met in other ways.

Let us turn now to the second function of a university reflected in the broad consensus mentioned earlier. Despite the easy lip service paid to the research function, it too raises some difficult questions. What is research? Do all members of the university’s academic staff share some responsibility for pursuing it in support of the institutional mission? And, crucially, what is the proper balance between the research and teaching components of the university’s responsibilities? Even in the older universities, these questions recurrently pose difficulties; they have a special cogency, however, in the new universities of Africa.

In its purest and most advanced form, research is the pursuit of truly new knowledge through hypothesis, testing, and validation to that level of strong probability which seems to be the practical limit of the human mind. So conceived, research will make effective claims on the time and energies of relatively few of the members of a university faculty, for only a few possess the quality of mind, commitment, and, in many institutions, the practical facilities required for pure research. Possibly this is as it should be, for pursuit of pure research exacts high costs. Work at the real frontiers of knowledge demands an extreme specialization, a narrowing of focus to sharpen the probe into the unknown, and a singleness of purpose that may preclude other work, reasonable leisure, and a social or family life. Ortega y Gasset, the Spanish social critic, conceiving research (in his terms "science") in this pure form, regarded it as an activity that surrounds, sustains, and illuminates the central mission of the university (transmission of culture and training for the professions). He argued, however, that society needs few pure researchers, so that few need be trained for research; he thought that few people have a real aptitude for it; and he proposed the somewhat acerbic but probably not unrealistic premise that most true researchers are poor teachers, that combining the roles of teacher and researcher is unwise.

Whether such views as these can be sustained in all times for all universities, it is more clearly arguable that at this time in the relatively young African universities, pure research is not a responsibility comparable to the teaching function. Research is costly, particularly in the physical sciences, but also in the social sciences if many of the modern techniques of investigation are used. Further, a research orientation nurtures
specialization, not simply to a single discipline but often to a narrow set of problems within a discipline. Therefore, a strong university orientation to pure research may be reflected in a curriculum unduly characterized by one-subject honors degrees. Further, stress on the development in students of sophisticated research competences may leave them on graduation fitted actually or in their self-conceptions only for careers in which no relevant opportunities exist in their own societies. Considering this range of problems, Lord Ashby has suggested that now and for the foreseeable future the prime need that Africa addressed to its universities is for the broadly-educated graduate capable of manning the civil service, the schools, and the professions, rather than research scientists. In broad measure, I would share this view and would regret an uncritical emulation of English, American or European universities in their research commitments.

In one respect, however, the desirability of a major research role for the African universities seems entirely clear. In the pursuit of knowledge of the history and cultures of the African people and of the physical and biological environment of Africa, scholars in the new universities there have special responsibilities and opportunities. Recognizing these and with prudent management of their own resources, the African universities can play their proper role in adding to the stock of world knowledge.

Thus far I have spoken of pure research whose success adds some new datum, great or small, to mankind’s knowledge. If we abjure puristic limitations, however, and include within research continuous inquiry that serves to master existing and ever-growing knowledge, that attempts new assimilations in order to produce clearer insights into critical relationships or new applications for the improvement of man’s lot, we have defined a research role in which a larger segment of a university faculty can participate. Such research is not only an indispensable support for a vital teaching program. It also lessens the risk of unduly narrow specialized courses and degree syllabuses and it more readily facilitates the university’s response to the current pressing problems and needs of its surrounding society. In the house of the university there are many mansions, and I am not prepared to assign to this one less dignity, worth, or entitlement to recognition among the major institutional roles than to pure research.

With this brief survey we have treated the roles or missions of a university that are reflected in the broadest consensus. Though perhaps more usually ascribed, at least in the United States, to the individual faculty member than to the university itself, another frequently mentioned function is
"service." The ambiguity of this ascription is not significantly reduced by the usual gloss specifying service to the "nation, region, or local community" or, with emphasis on the role of the individual faculty member, service to the university itself.

For its well-being, growth, and development, the university as an institution needs many services. Among the most significant are the services of its non-academic staff, but our concern with the expectation of service focuses on the members of the faculty. What obligation to serve the university is a non-negotiable part of the obligation of each faculty member? The answer I find most readily acceptable is that the fundamental service responsibility of a member of the academic staff is met by teaching and research activities and by participation in those deliberative processes of the institution through which the teaching and research programs are defined, refined, and improved. If the university is entitled to expect from each faculty member some further range of service to the institution, the resulting diversion of time and effort from the basic faculty roles can be extremely costly in terms of quality, may demand talents which the committed teacher-scholar does not possess, and may succeed in making faculty status less attractive than it should be.

May I offer a single example? In every university in which I have served, there have been indications from time to time, fortunately always within manageable proportions, that some members of the university community viewed the law faculty as a pool of legal talent upon which other members of the faculty, perhaps students as well, and certainly the university itself should be able to call as problems requiring the services of an attorney arose. On occasion I have responded to such requests for legal services, as I know many faculty members have, and I would be distressed by an assertion that my individual decision to render such service was incompatible with my responsibility as a faculty member. I would be even more distressed, however, by an assertion that by virtue of my status as a faculty member, I had an institutional responsibility to render this service. In my view, the faculty member fully discharges his institutional service obligation by rendering a high-quality performance in teaching and research and in participating in the work of the various university agencies through which deliberations and decisions concerning research and teaching take place. Fortunately, many faculty members, presumably voluntarily and reflecting their own interests and perceptions of competence, do go further and help to meet a wide variety of service needs that arise in the institution.

If one shifts attention from the individual faculty member to the university itself and asks what the service function of
the university is, I find myself again most comfortable with the view that the university's service to its society is simply the sum or product of its teaching and research missions. I doubt the wisdom of regarding a university as a general purpose social welfare agency, available on call to meet an infinite variety of social, governmental or business needs to which trained manpower must be deployed. As the university permits its role to expand beyond teaching and research to activist roles in addressing specific problems, devising programs, and implementing them, it runs an undue risk, in my judgment, of diverting its best energies from its fundamental roles and, through activist commitment, of compromising that detachment from the marketplace, the legislative halls, and the executive offices which nurtures objectivity.

Clark Kerr's generally approving analysis of the modern American "multiversity" reveals clearly how far many institutions in the United States have moved from the views I have expressed on the proper service function of a university. As organizer of cultural events and athletic spectacles, as a custodial "foster home" for many young people who have little interest in education but are not needed in the labor market, as a source of researchers, advisers, planners and executives available on call from government and the great corporations, many American universities have grown in size, complexity, and in the scope of the financial resources they marshal and expend to the point where many have lost any integrating sense of community, requiring for their efficient functioning a massive bureaucracy far removed from teaching or scholarship. I would not deny the reality of certain practical benefits from this proliferation of university functions. It would be prudent, however, to keep in mind the indictment presented by many of the student protesters of the 1960s that the universities had become simply uncritical servants or partners of government and business in preserving the status quo. Those protests asserted that the universities owed something more and different to society—particularly an on-going, penetrating critique of the social order, illuminated by advancing knowledge and humanistic values—and I agree.

Do the circumstances of the recently independent countries of Africa and their universities warrant assigning to them a broader service function than that I have suggested? The argument for doing so would stress the urgent need for rapid progress in attacking poverty, disease, and ignorance and in developing governmental and private institutional structures that are functional to these tasks, and would point cogently to the widespread shortage of educated manpower and the general ab-
sense of institutions, other than the universities, that can respond to these pervasive social problems. The views developed during the years I have lived and worked in Africa and African universities avoid, I hope, the absolutist fallacy of insisting that the university and its faculty should reject all tasks that cannot be justified strictly in terms of their traditional functions of teaching and scholarship. They are characterized less by rigid lines between the proper and improper than by certain cautions to guide particular decisions.

African governmental and political leaders have consistently expressed an expectation that the universities, supported by scarce public resources, will join actively in the effort to improve the quality of life of the people. The statement by President Nyerere of Tanzania at the inauguration of the University of East Africa is typical:

The University Colleges which comprise this University cannot be islands, filled with people who live in a world of their own, looking on with academic objectivity or indifference at the activities of those outside. East Africa cannot spend millions of pounds, cannot beg and borrow for the University, unless it plays a full and active part in the urgent tasks of East Africa. Even if it were desirable, we are too poor in money and educated manpower to support an ivory tower existence for an intellectual elite.

Our problems will not wait. We must, and do, demand that this University take an active part in the social revolution we are engineering.

In similar vein, President Houphouet-Boigny of the Ivory Coast:

But our tasks are too pressing and our time too limited for us to rely on the slow process of the creation of an elite through universal and largely disinterested methods of instruction. Problems of political, economic, and cultural development of our societies, and the raising of the standard of living constitute immediate objectives which require us to enlist the help of all the institutions of our states and, more particularly, those whose mission it is to prepare the finest elements of the young for the immense tasks expected of them.

Our university must, then, in addition to its traditional role, put at the disposal of the nation men
and women who possess the technical knowledge that will permit them to participate fully and usefully in the economic and social development of the country.

There is no doubt that in speaking thus to the universities, these political leaders are voicing views widely held in their societies.

While one might respond forcefully and truthfully that a university and its faculty contribute to the solution of society's problems and can further a social revolution while remaining within the parameters of their basic functions of teaching and scholarship, it is clear that more is being asked and, within limits difficult to define and sometimes hazardous to defend, more must be given. I will not argue, therefore, that the African universities should respond to the imperatives of development only through their basic roles in teaching and research, but I would suggest certain lines for use in defining the university's role that are crossed only at great cost to the university and to the society.

First, even those who demand most eloquently that the university participate actively in programs of social, economic and political development probably recognize certain priorities in allocating the university's resources. First and foremost are those functions uniquely assigned to the university -- teaching and research. If these are imperiled in their appropriate quantity or quality by the diversion of faculty time and effort to other activities, however worthwhile, the society suffers. Sound, longer-range development is sacrificed for limited immediate gains. When considering the wisdom of responding to requests for service activities beyond the basic functions, therefore, the prudent university administration or faculty member will weigh carefully the impact of an affirmative response on the institution's ability to perform creditably the tasks it was established primarily to perform.

Second, there are, I believe, certain constraints on external activism that are imposed by the basic mission of a university, if its integrity is to be maintained. Implicit in a university's search for knowledge and in its effort to develop in students a capacity for objective enquiry, analysis, and judgment is an inevitable tension with the surrounding society. The established mores, the conventional wisdom, the current political programs and their ideologies, all must be within the range of the university's on-going critique. This view of the university's role underlies the cryptic observation of David Star Jordan many years ago that society has the right to expect the scholar to serve as the antidote to the demagogue.
Fortunately, a similar attitude has found expression in the African context. In the address quoted earlier, President Nyerere observed:

"In all its research and teaching the University of East Africa must be as objective and scientific as is humanly possible. It must work against prejudice of all kinds, searching always for that elusive thing -- truth. It is in this manner that the University will contribute to our development, because the fight against prejudice is vital for progress in any field. In this fight the University must take an active part, outside as well as inside the walls. And this may mean standing out against the expressed beliefs of the majority, for prejudices are the point to which men retreat when the real problems are tough and when they are not prepared to face the implications of their personal or community difficulties."

The path of the university and its faculty in Africa, and indeed in most parts of the world, in pursuing the course pointed out by President Nyerere will be a thorny one. But it must not be abandoned.

Calls upon the universities to assume activist roles in furthering programs of social change frequency imply, and sometimes explicitly demand, commitment to a particular ideology, political faith, or economic order. An Asian Prime Minister declared in the University of Lagos some years ago that "the intellectual elite must march in step with the political elite, otherwise momentum will be lost." To the same effect, Ghana's Minister of Education in 1965 assured the University of "generous and unstinted support" if it fulfilled its obligations "with scrupulous loyalty and devotion to the cause of our Party and Country." Whatever the personal political views of individual faculty members may be -- and no one can rightfully expect that the university teacher-scholar will be a political eunuch -- I would suggest that neither a university nor its faculty members can unquestioningly "march in step" with a political elite or demonstrate "scrupulous loyalty and devotion" to the cause of a political party and still perform with integrity their basic functions.

At a less focused and more subtle level, however, even when institutional loyalty to an ideology is not at issue, active participation in devising and implementing programs can imperil objectivity and the development of critical judgment. The faculty member who serves as a political adviser to a governmental agency or private corporation or who assumes operational
responsibility for a particular program has in some measure put at hazard his ability to treat that policy or program and its underlying assumptions with full objectivity. Whether the possible loss reflects a calculated, prudential protection of his own investment or merely the intrinsic limits of the human mind, the university teacher-scholar should recognize the risk that the commitments of his extra-curricular activism may affect, possibly prejudice, his university role and obligation. Not all external undertakings are fungible, of course, and vitally important discriminations can be made on the basis of the extent to which an external role can be expected to impose constraints on continuing analysis and criticism. In some instances the probable constraints may counsel rejection of the role; in all, they warrant careful assessment before the role is assumed.

One cannot overestimate the difficulty -- often the hazard -- for the African university and its faculty in defining and defending their position on service beyond the traditional functions of internal teaching and research. Failure to respond to pressing needs and demands may invite condemnation of academic elitism and ivory tower detachment. Response may imperil the quality of the university's performance of its unique missions. And if that mission, including its expression in a penetrating critique of dominant values and programs, is well performed, the risks of hostility to and sanctions against the university and its faculty are ever present. Even President Nyerere, in the thoughtful address to which I have referred, after asserting the university's responsibility to press its search for truth into a critique of dominant attitudes, recognized great hazards:

I know I am asking a great deal of the University of East Africa. I am asking its members to be both objective and active -- which is a difficult combination. What is more, I am asking this under circumstances in which I know that both are liable to give rise to some misunderstanding with the government and people. This will be reduced if there is complete honesty, but courage and self-sacrifice may be demanded from all of us, including the university members. Because I cannot claim that I, any more than my colleagues, will never mistake honest criticism for unconstitutional opposition. Nor can I honestly promise that our need for national unity in the struggles ahead will never lead us into the error of abusing the nonconformist. I hope we shall not make these mistakes, but of only one thing I am quite certain. The basis of human progress throughout history has been the existence of people, who regardless of the consequences to themselves, stood
up when they believed it necessary, and said "That, is wrong; this is what we should do... ." If we know that the world is round we must say so, even if the majority of our people may still think that it is flat.

Any invitation to soar to the sky involves the hazard of plummeting painfully to the earth. Great honesty demands great courage, and even the courageous may suffer.

The outline I have sketched of a particular social institution contains little or nothing that is novel; it adheres closely to the basic concept of a university as this has developed through nearly a millennium in the Western tradition. Within that concept there is ample room for institutional diversity. A university in one of the new countries of Africa, as in every other society, will and should respond to the particular needs, values, aspirations, and opportunities of its own social setting. It does so, however, within the constraints set by its basic mission if, in the words of Lord Ashby, it is to "belong to the commonwealth of universities--remain loyal to the idea which brought the studium generale into being seven centuries ago."

The question remains, of course, whether the peoples of Africa want such institutions. Whatever the short-term travails of particular universities in various countries have been -- and I do not discount their seriousness -- I remain hopeful that the African societies do want and will develop universities of growing strength whose membership in that "commonwealth" will be beyond doubt.

Should one be confident in such a prognosis? It is, I believe, only a partial answer to point out that only from their universities can the African societies expect a growing stream of educated men and women who can deal creatively and competently with the urgent problems of hunger and disease. One must also add that only in their universities can the African people satisfy that universal urge that has lighted man's slow emergence from the primeval darkness -- the compulsion to push back the barriers of the unknown, to learn his origins and to know his heritage, to assay and refine the fundamental values of his culture.

If a society wants to establish and nurture a true university, what are the essential conditions for its development? If an institution aspires to university status, what claims or demands must it address to its surrounding society and polity? Our inquiry here, prompted by such questions, cannot be exhaus-
tive. Rather, we will consider a single supportive condition to which the institution must lay claim -- an environment of freedom in which the educational and scholarly activities of faculty and students can occur.

Human history is replete with the struggles of men to define the legitimate parameters of freedom and to defend those bounds once set. Obviously these efforts are neither limited to nor defined by the particular needs or claims of educational institutions. Through much of Africa, the past two decades have seen the successful assertion by the people of the claim for freedom from an alien political control; in some parts of the continent that struggle continues today. Throughout the continent also the struggle continues for freedom from a powerful alien economic and cultural hegemony. Within the new countries the appropriate entitlement of the citizen to political and civil liberty has not been adequately clarified or secured. Vitality important though the issues and problems at this general social and political level are, they are beyond the scope of my present concern. My comments relate to a special form of freedom, usually called academic freedom. It may not exist even in a society where the usual range of civil liberties and political freedoms enjoy adequate protection. We should note, however, that in an authoritarian polity, where no individual enjoys such freedoms, it would be futile to search for an acceptable measure of academic freedom. At a certain level of repression, all freedoms are unified in their rejection.

Much of the discussion of academic freedom is expressed in both individual and institutional terms: the freedom of the individual teacher-scholar to inquire, speak, write and publish without fear of sanction, and the freedom or autonomy of the institution to make its own decisions on a broad complex of issues without interference from external, non-university agencies. I find the joinder of these two strands of discussion frequently productive of confusion and error. We will separate them, therefore, considering first the claim of the individual faculty member.

"Academic freedom, in its primary sense," runs one definition, "is the freedom claimed by a college or university professor to write or speak the truth as he sees it, without fear of dismissal by his academic superiors or by authorities outside his college or university." Even as a starting concept, I believe this definition needs amendment in one important respect: dismissal of a faculty member is not the only sanction whose imposition, because of the expression of the teacher's perception of truth, would violate academic freedom. Demotion, the withholding of merited promotion, adverse salary adjustment,
Censure, or any one of a wide variety of sanctions could also, in view of the cause of the sanction, warrant the conclusion that a faculty member had been deprived of his academic freedom. Academic freedom, in this primary sense, therefore, does not exist where the actuality or the reasonable prospect of the imposition of any disadvantage or the withholding of any benefit serves to limit the teacher-scholar in the search for truth or in the transmission of the fruits of that search to students or to the scholarly world.

Freedom of such scope may seem excessive, and its claim by the university teacher may appear to be simply another manifestation of frequently-attacked academic elitism. It may, indeed, smack of irresponsibility, nurtured by an immunity from the natural consequences of offending those among whom he lives and works. Clearly the freedom claimed by the university teacher to do his work and speak his mind exceeds the realistic expectations in many professions or vocations where the prospect of loss of clientele, patronage, or job provides strong incentives to avoid offense. Before turning to the defense of this broad claim to freedom for the academic—and I believe it can be defended—let us pursue somewhat further our analysis of the claim itself.

The effective protection of academic freedom does not mean that the teacher-scholar is free of all constraints, has no duties correlative to his right to freedom, or is totally free of the possibility of sanctions. In the United States, where an extensive literature has developed, the most influential statement on the scope of academic freedom, that formulated by the American Association of University Professors, makes clear that the asserted freedom is not license. Consider a few illustrations from that statement. While entitled to freedom in the classroom in dealing with his own subject, the teacher should not introduce controversial matter unrelated to his subject. Recognizing that the university faculty member is a citizen, a member of a learned profession, and an officer of an educational institution, the statement enjoins him to "remember that the public may judge his profession and his institution by his utterances. Hence he should at all times be accurate, should exercise appropriate restraint, should show respect for the opinions of others, and should make every effort to indicate that he is not an institutional spokesman."

The AAUP statement also makes clear that the protection of academic freedom does not make absolutely inviolate a person's status as a member of a faculty. That status can be terminated for "adequate cause," a concept not fully explicated but some of whose content is suggested. Adequate cause clearly includes in-
competence in the faculty member's field as judged by his professional and collegial peers. Arguably it also includes moral delinquencies of a sort sufficiently grave to imperil viable relations with colleagues and students. And rationally it could not exclude clear and substantial failures to perform teaching and research functions implicit in the status to which the faculty member was appointed. Further, it should be emphasized that the immunity from university or external sanction based on his teaching and research does not immunize those activities from scrutiny, criticism and evaluation.

Perhaps a brief illustration, based on an episode in an American university, will serve to make the scope of the claimed freedom clearer.

A research-oriented sociologist began an empirical study of sexual practices among the male population. He and his staff used interview techniques and relied heavily on volunteer participants who were willing to respond, truthfully and accurately it was hoped, to questions concerning their sexual histories and current practices. Individuals did not, of course, remain identifiable. In the course of time, the research resulted in a book projecting a statistical profile of the sexual characteristics of the American male. Perhaps not surprisingly, in view of the historic Puritan strain in the American experience and the currently expressed, though infrequently practiced, morality, the research and its published results aroused a storm of protest. Many patrons of the university where the sociologist held a professorship and where the research project had its base and (the university being state supported) many citizens who objected to the assumed use of tax dollars to support such investigations, demanded that the research be terminated and that those responsible for it be dismissed. Had their demands been met, the clearest violation of the academic freedom of those conducting the research would have occurred. Fortunately, the administration and faculty of the university asserted vigorously and courageously the claim to academic freedom and, not unimportantly, displayed considerable political skill. The professor and his associates retained their posts, and the research continued.

Were these faculty members who offended the moral sensibilities of many members of the general community and perhaps of some members of the university itself totally immune from scrutiny, evaluation, criticism and sanction? I suggest that not even the staunchest defender of their academic freedom would contend that they were or should be. In delimiting the acceptable, or at least accepted, negative responses to the research from those which would have violated academic freedom, some clearly recognizable and defensible lines emerge.
First, neither the university nor its members were claiming for their activities any immunity from the general law of the land. The research in fact violated no criminal statute, nor, insofar as I am aware, did it transgress any duties imposed by the general law of tort. Had it done so, the university and its faculty would not have been entitled, at least not exclusively in the name of academic freedom, to have maintained any objection to a criminal prosecution or to a civil action against the researchers. This is not to say, of course, that the relevant law of crime or tort, if it could have provided the basis for such action, would have been unobjectionable. It might have been legitimately attacked as unduly repressive, as violative of desirable civil liberty, and probably, in the American context, as invalid under generally applicable constitutional guarantees. The fact that the general law would unduly limit academic research and publication may support an additional pragmatic argument in defense of general liberty, but in an analysis of academic freedom it is beside the point. Insofar as the academy is unduly constrained by the proscriptions of general law, applicable to teachers, researchers, and all other citizens, the basic objection is not couched in terms of academic freedom, but rather in terms of the desirable freedom of all citizens. Academic freedom, as such, grounds no claim to immunity from generally applicable legal norms.

Next, let us recognize that research or teaching may elicit a range of responses, sanctions if you will, which have the potential for limiting academic activity, but which few, if any, would seriously contend involve violations of academic freedom. Those who believed, for example, that the sex research offended acceptable standards of decency might have said so, perhaps in terms little affected by the standards of civility, and might have shunned any further social intercourse with those involved in the research project. However regrettable we might find such attitudes and conduct, they fall, I believe, within the legitimate area of freedom of the critics. I know of no sanctions that could be effective against them, but even if sanctions could be found, I would find their use objectionable. The claim to academic freedom cannot and should not serve to silence the critics of the academy or its members, however unenlightened we might think the criticism on occasion to be.

At a more fundamental level, there is another type of criticism we should recognize as not only compatible with academic freedom, but as essential to its full realization and to furthering those ends which academic freedom itself serves. This is criticism involving the standards of the academic enter-
prise itself, those that find their warrant in the effectiveness of the search for truth and its transmission. Recall again our illustration of the sex research project. The publication of its first major study produced substantial criticism within the universities and outside. Much of this related to the validity of the statistical methods employed in the study, to the evident failure of the researchers to achieve a random sample of the relevant population because of their heavy reliance on voluntary interviewees, and, therefore, to the doubtfulness of certain of the conclusions reached. Insofar as such criticisms were advanced by other teacher-scholars, their expression may be regarded as the exercise of the academic freedom of the critics. More importantly, however, academic freedom establishes no immunity from scrutiny for error or incompetence in the search for or the transmission of truth. One may hope, of course, that criticism will be offered with civility and with a becoming modesty that rests on the recognition that the critic may be wrong. Since academic freedom itself finds its basic justification in the effective search for and transmission of truth, however, its claimant must not only tolerate but welcome the open scrutiny of his efforts and the criticism of them on criteria relevant to the enterprise.

The proper protection of academic freedom is concerned with the security of status of the teacher-scholar and with the significant terms and conditions of that status. Primarily, therefore, the sanction limited by academic freedom is dismissal or the adverse manipulation of status perquisites. It must be emphasized, however, that such sanctions are limited, not excluded. In defining the limits, two basic features of a dismissal that can be reconciled with academic freedom must be stressed. First, the application of the sanction must result from the internal decisional processes of the university itself. Second, it must be grounded on criteria or standards which are demonstrably functional to the integrity of the university’s basic mission—the effective search for and transmission of truth. These features of a defensible sanctioning procedure are best assured by two other characteristics of the process: participation in the disciplinary proceedings, as both witnesses and decision-makers, by members of the faculty, and procedural safeguards which assure to the affected faculty member a fair hearing. We will return to these vitally important aspects of the discipline of academic members of a university in later discussion.

Before turning to a consideration of the justification for the academy’s special claim to freedom, let us consider the second aspect usually subsumed by the claim, that is, the autonomy of the university as an institution. It is this assertion of in-
institutional autonomy, I believe, especially in the context of the new universities of Africa, that has been most productive of confusion and tension.

While Africans point with legitimate pride to ancient universities such as Al Azhar in Cairo and Sankore in Timbuctoo, it is clear that the modern universities of Africa that now concern us owe little or nothing of their structure or role-perceptions to these institutions of learning. Rather, they are in character and mission, if not always in time, part of the legacy of colonialism, finding their models in England, France, Belgium, and, in one or two instances, the United States. It is not unfair to observe, therefore, that the modern universities were and to some extent still are alien institutions in their African settings. That alien quality has been emphasized through most of their brief lives, though decreasingly to be sure, by heavy reliance on administrators and faculty recruited from Europe or America who brought with them, both as strengths and as limitations, conceptions of the university as an institution, its mission, mode of governance, and relation to the external society, that had been shaped in their own countries. In fairness, it should be added that if alien models have created problems for the African universities, responsibility must be shared fairly equally by expatriate staff and African faculty members. I recall vividly one colleague in the University of Ghana some years ago, a man quite vocal in his self-identification as an African socialist and "Nkrumahist," whose ultimate line of opposition, when almost any innovation in the educational program came to be considered, was the plaintive cry, "But this is an English university!" Thus, expatriate staff whose vision was unavoidably limited by their own social and university experience frequently abetted by African faculty members educated abroad and concerned that their new institutions be recognized and respected by universities in other parts of the world, have projected images of the new universities that are largely in but not of the societies that support them.

Expressing vigorous new African nationalisms and expecting from the universities practical support for their conceptions of nation-building and development, many of the political and governmental leaders of the new countries understandably have objected to the seemingly alien character of the new universities and have sought to influence their life-styles and functions. Often these efforts have been directed largely, as in Ghana in the late 1950s and early 1960s, toward the superficialities, indeed the trivia, of university life, such as students' academic gowns or the Oxbridge conventions of high and low tables in the dining halls. Even trivia can have symbolic value, however, and these imported trappings often have seemed
to assert not only an unwarranted elitism but a commitment to European, not African, values and purposes.

A more substantive expression of the educational objectives of the political leadership and its effort to remold the universities is illustrated by the University of Ghana Act of 1961 which listed among the principles to guide that university's development of its educational program the followings:

1. that in determining subjects to be taught emphasis should be placed on those "which are of special relevance to the needs and aspirations of Ghanaians, including the furtherance of African unity";

2. that students should be given "an understanding of world affairs, and in particular of the histories, institutions and cultures of African civilizations"; and

3. that research programs should reflect a "special attention to subjects which relate to the social, cultural, economic, scientific, technical and other problems which exist in Ghana or elsewhere in Africa."

To similar effect, President Houphouet-Boigny, on laying the cornerstone of Abidjan University in 1963, declared that:

"(The University) should...not be oriented too exclusively toward a culture inspired by that of European peoples, although the acquisition of that culture is, in fact, indispensable to the material progress and economic and social development of our states. It must exercise the functions of guardian and defender of the national patrimony of the African Community in the midst of which it is placed, both in the religious, philosophical, and linguistic spheres, as well as in the domain of the arts, literature, and music."

Clearly, if university autonomy as a component of academic freedom means that the members of the university community alone should enjoy the prerogative of defining the university's program and shaping its mission, that principle will be severely challenged in post-independence Africa.

Regrettably, members of the universities too frequently have responded to expressions of concern that the universities be African institutions by mounting the barricades and asserting in the most extreme form a claim to university autonomy. Consider the following statement which appeared in 1964 in an East African university journal. Regarding the true university as a community of scholars, of which the lay members of the
university's governing board or council were not truly a part, the author declared:

"... academic groups are the only groups competent to decide upon academic questions. In this connexion it has to be remembered that the Council of a University, although in varying degrees containing academic representation, is a non-academic body and it is made no more academic by being part of the university structure. For this reason Councils need to be regarded by the academic community with suspicion. It is often from within these bodies that the first inroads are made upon academic autonomy. This becomes especially true where the view is taken that a master-servant relation exists between the Council and the academics.

"The academic community must continually remind itself and its Council that the direction in which teaching and research moves within the community can properly only be determined by the interests of learning itself. And the only bodies competent to decide what are these interests are the academic bodies."

Lest there be any doubt about the extent of the claim to autonomy which he asserted, the author continued:

"If the Council is not competent to determine academic questions, then a fortiori neither is Parliament or any other non-academic group.

"If government wants a university then it is the academic community which determines its educational policy...; if it wants an institution which adjusts its work to the training of teachers, or agricultural officers, or social workers, then it does not want a university. There is no reason why a university should not train teachers or what have you, but, if it does so, it does so on its own terms, and the usefulness of its graduates for Ministries of Education and Agriculture is purely incidental.

Fortunately, such views have not been unanimous, either in substance or abrasiveness of language, among those concerned with universities in Africa. The countervailing view, to which I would subscribe, was succinctly stated by Ashby in his Godkin Lectures: ". . . African leaders have now come to realize that autonomy is not always exercised wisely, and in a new country, although a university must not become a pawn for politicians, academic policy must be responsive to legitimate demands from the State."
The problem remains of defining the "legitimate demands from the State," since these centrally delimit the proper sphere of university autonomy. If clarity and in time consensus on that sphere can be achieved, it should be possible to secure the essential values and purposes of a university, to avoid its becoming a mere pawn of the politicians, and, at the same time, to prevent its developing as a costly and irrelevant enclave within an underdeveloped society. Again we may be aided in our analysis by considering a concrete case in which violation of proper university autonomy was vigorously asserted.

In August, 1964, Dr. Conor Cruise O'Brien, then Vice-Chancellor of the University of Ghana, was recalled from leave to be presented with a "Presidential Command" for the transfer of the University's Institute of Education from Legon to the University College of Science Education at Cape Coast. Neither Dr. O'Brien nor any University body had been consulted in advance about the transfer decision. The Government seemingly regarded the transfer as effectuated by executive decisions of the Ministry of Education without reference to any views developed within or action taken by the governance mechanisms set up by the University of Ghana Act and the University's own statutes. Objecting to this summary action, Dr. O'Brien sought the views of the University Academic Board which, by a nearly unanimous decision, resolved to ask the governing body of the University, the Council, to recommend to Government a reconsideration of its decision. The Board set out fully its reasons for regarding the transfer of the Institute as unwise. The Council, however, did not forward this recommendation to Government, not because of substantive disagreement with the views of the Academic Board, but because it regarded the transfer as a fait accompli.

In the ensuing months, the work of the Institute of Education was brought to a standstill, since no faculty member on its staff was willing to accept transfer or secondment to the University College at Cape Coast. The University Council, being unsure whether it could pay compensation to members of staff who were rendered redundant by the transfer of the Institute, sought advice from the Attorney-General who, under Ghanaian law, was the legal adviser to all statutory bodies including the University. In a cryptic opinion, the Attorney-General responded that if the Institute had been effectively transferred by act of Government, there would be no contracts between members of the staff and the University under which compensation would be due, since these contracts would have been "frustrated." On the other hand, if the transfer ordered by Government remained to be effectuated by action of the University Council, the Council had the legal power to direct staff, and any staff members who were
not inclined to proceed to Cape Coast might be held in breach of their contracts and liable for damages. On this view the status of faculty members, defined in their contracts of appointment, was subject to unilateral abrogation by action of Government, without University participation or support, or, if the status was maintained, it imposed on the faculty members a contractual obligation to serve in an institution having no juridical connection whatever with the University in which they accepted appointment.

We need not pause over all the dreary details of this episode. The Vice Chancellor was denied an opportunity to discuss the issues raised by the transfer with the Chancellor of the University, Dr. Nkrumah. Disturbed by this apparent lack of confidence and, therefore, by the seeming disutility of his further service, and concerned over the grave implications of the Government’s action for the integrity of the University, Dr. O’Brien decided to tender his resignation. He was ultimately dissuaded from doing so only by a formal request from the Convocation of the University. The transfer of the Institute was effectuated without University action, but the Council voted ex gratia payments to its staff which, as distinct from the basic transfer decision, the Vice-Chancellor deemed reasonable and equitable.

Much of the disquiet engendered in the University of Ghana by this episode was articulated in terms of university autonomy. What insights into the legitimate scope of that concept can we derive from reflection on that experience?

First, I would make clear my own view that in an African university, drawing its support from public funds, it is the legitimate prerogative of Government to frame overall state policy on higher education and to seek to make that policy effective. That policy may appropriately subsume, for example, such matters as the assignment of various areas of study and research to different university institutions, the scaling of priorities in budgetary support, or the granting to students from areas of the country that have suffered an historic disadvantage in educational opportunity of a preferred position in university admissions. Indeed, in the controversy in the University of Ghana the Vice Chancellor explicitly recognized such a Governmental prerogative. Why, therefore, did he think, as I do, that the action of Government was an attack on the autonomy of the University that merited condemnation and opposition?

First, he was insistent that Government’s transfer of the Institute disregarded the legal status of the University and its
own governance mechanisms that were defined by parliamentary enactment, as well as by the University's own statutes. The University had been created by public Act, and powers over its operations had been vested in the Council which, in turn, by statute, had shared those powers with the Academic Board. No power beyond these to shape by direct action the internal structure of the University or its program was defined and allocated by law. The Government's independent actions, expressed in a "Presidential Command" and executive orders of the Minister of Education, therefore violated a basic premise of the Rule of Law—that public officials be able to justify their actions by reference to clear grants of power in the law. Concern over the abandonment of the Rule of Law in a polity is not a university monopoly, but when the specific abandonment disregards clear and exclusive grants of power to the governance bodies of the university, objections are appropriately framed in terms of the autonomy of the university as defined in the law of the land.

Second, though in a sense implicit in the first stated objection, was the view that in framing overall educational policy Government should seek and give due weight to the views developed through the legally ordained governance mechanisms of the University. There was no insistence that in a contest of conflicting views, those formulated in and expressed by the University should prevail. The University's claim was more modest. It rested on the belief that within the institution created by law to exercise a responsibility for higher education could be found a relevant expertise that should have been utilized by Government in its own policy formulations. Thus, the underlying rationale for considering carefully the views developed through autonomous university processes was utilitarian; it rested on the belief that better educational policy would result from the careful weighing of University views than from their being ignored. Similarly, if policies germane to higher education were formulated after the University's views had been taken into account, the University itself could expect to be more effective in implementing those policies as part of the specialized mission assigned to it. The University of Ghana experience provided dramatic testimony on these points. The unilateral action of Government, taken without consultation and implemented in total disregard of serious substantive reservations within the University, impeded important teaching and research in the vital field of education, and the confidence and morale of the faculty were gravely undermined.

A third feature of the conduct of the Ghana Government was perhaps the most disturbing. This was the view expressed by the Attorney General that Government enjoyed a power to alter the status of members of the faculty without in any way involving University processes or criteria.
You will recall that the Attorney General, in advising the University Council, suggested two possible interpretations of the then current position: either the Institute had been effectively transferred by Governmental action with the result that the faculty status of staff members had been abrogated and their contracts "frustrated," or else, that the University Council by its own decision to transfer the Institute could place the faculty members in the dilemma of accepting this posting or breaching their contracts with the University. It might be argued, of course, that if the second possibility suggested by the Attorney General were the actual situation, no violation of University autonomy would be involved since decisions of the Council would be internal and therefore "autonomous." Two responses should dispose of this argument: first, that if the Council had voted to transfer the Institute, its action clearly would have been based only upon Government fiat, not upon a deliberative decision reached through the University's internal processes; second, that the sanction proposed by the Attorney General to be applied to faculty members who rejected the posting and insisted on serving only the University in which they accepted appointment would not be University discipline, but rather liability for contract damages imposed by the courts under general law.

If a government, independently or through its dictation of action by a university's governing board, can thus terminate or reshape faculty status and critical terms of employment, where are the boundaries of this awesome power? What is to prevent its exercise to dismiss a teacher because he explores with his students the virtues and demerits of socialistic development in a polity committed to free market capitalism? Or what is to protect a legal scholar whose research leads him to the conclusion that the expulsion of Israel from the General Assembly would violate the Charter of the United Nations, if his Government is committed to that action? Certainly, an important protection of faculty members from dismissal or other penalty imposed because of their teaching and research comes from the secure commitment of the power to impose such sanctions to the autonomous decision-making bodies of the university.

I am not suggesting that a decision to dismiss a faculty member would be legitimate or exempt from scrutiny for impingements on his academic freedom merely because it was made strictly within a university and in a manner fully consonant with university autonomy. Regrettably, universities themselves can and sometimes do violate the academic freedom of their members without external compulsion. I am insisting, however, that
university autonomy can be an important shield for faculty members against repressive forces in the external political, governmental, and social milieux.

Summarizing briefly the views here expressed on university autonomy, I would reject the claim that the university community is entitled to shape the teaching and research programs in total independence of the policies of government. Autonomy in this sense is not a defensible component of academic freedom. Rather, the legitimate claim to university autonomy involves two principal elements. First, there is an insistence that decisions concerning who shall become and remain a member of its faculty, and on what terms, must emerge from the university's own deliberative processes and reflect its own criteria. Second, the claim subsumes an insistence that in the formulation of national educational policy to be executed by the university the views of that community be considered and that its legally established governance structure be fully respected within the range of powers and functions assigned to it. Probably these aspects do not exhaust the scope of legitimate autonomy, but in my judgment they are truly basic. A polity seeking sound educational policies and their implementation through vigorous, creative and effective universities will, I believe, perceive the justification for this claim to university autonomy and will respect it.

Against the background of our discussion of the mission of a university and our analysis of the concept of academic freedom and university autonomy, I think little more need be said in justification of the university's special claim to liberty. Though it draws sustenance from the historic drive of all mankind for greater freedom to think, speak, search, and challenge, the academy's unique claim rests ultimately on a simply practical ground. If the teacher-scholar is to preserve his special character and perform his function, thereby enabling the community of teacher-scholars to carry out its mission, he must be as free as human ingenuity in building institutions can make him from repressive political, economic or religious forces that would restrict his range of inquiry or censor his communication of the truth, as he sees it, to his students, other scholars, or the general public. The questions may always be raised, of course, whether a particular society values the mission of a university and why it should. At that level, I would simply concur with Glenn Morrow who has observed that

"...a society that believes its stability, prosperity and progress are dependent upon the advance of knowledge and establishes universities for this purpose is patently inconsistent if it denies to these universities the freedom that they must have if they are to fulfill their nature and function. Academic
freedom exists, then, not to serve the interests of the professor but for the benefit of the society in which he functions, ultimately the community of mankind."

On the assumption that such a perception is widely shared, that universities are needed to further human progress, but that at all times and in all places, forces of repression will seek to limit the essential freedom of teachers and scholars, we will turn in the next lecture to a consideration of the role of university governance arrangements in sustaining or subverting that freedom.

THE LEGAL STRUCTURE OF UNIVERSITY GOVERNANCE

In view of the special claim to liberty advanced by universities and their faculties, a claim indeed to be free from various constraints frequently imposed upon other institutions and individuals, it is not surprising, in Africa or elsewhere, that the claim should be recurrently contested. If, more often than not, a particular society honors the claim, it is useful to inquire into the causes and to explore the practical instrumentalities that have proved effective against the ever-present forces of repression. Among these, I select for attention the instrumentalities of the law.

In considering the contribution that law may be able to make towards the nurture and preservation of academic freedom in the African universities, or to its erosion, I will deal first with the law of the university itself--its constitution, statutes, and internal regulations. Thereafter, I will turn to the general law and legal institutions of the country. The Nigerian universities and their legal matrix will be our central focus, but for a broader perspective we will consider as well the universities of Ghana, Kenya, and Zambia.

The constitutions of these relatively new African universities uniformly appear as ordinary statutes enacted by the national or a regional parliament or, where elective government has been displaced, as decrees of the ruling council. The constitution grants juridical status to the university and establishes the general structure for its governance. If the view expressed earlier is valid, that substantial university autonomy can provide a major safeguard for academic freedom and in so providing justifies itself, then the constitutional order which allocates critical powers and decisional roles deserves careful examination and analysis.
While there was surely variation in detail, all of the university constitutions under consideration initially adhered closely to the model of the English civic universities. This model embraces a governing council, a senate or academic board, and various officers, among whom the Vice Chancellor, as the chief academic and administrative officer of the university, is the most important. We will examine in some detail the allocations of function and power to these bodies and officers as the English model has been adapted to its new African environment.

The governance powers typically assigned to a university council are extremely general and inclusive. For example, the Council of the University of Lagos is charged with the "general control and superintendence of the policy, finances and property of the University, including its public relations." Similarly, the University of Ghana Council is granted "power to do or provide for any act or thing in relation to the University which it considers necessary or expedient in its capacity as the governing body, and the conferring of particular powers on the Council by other provisions of this Act shall not be taken to limit the generality of this section." A facile conclusion that the governance powers of a council typically are plenary would be unwarranted, however. They are often hedged in by allocations to other functionaries or bodies. For example, the grant of powers to the Council of the University of Lagos, quoted above, is subject to the extremely important qualification "Subject to the provisions of this Decree relating to the visitor." To that functionary and his pervasive powers we must return later.

In the English civic universities the most important body sharing governance powers with the council is the senate or academic board. That feature of the English model was accepted in the constitution of the early African universities, and it survives today. The senate or academic board exclusively or predominantly comprises academic members of the institution. To it the council may delegate certain of its powers and functions, or may be required to consult the academic body before exercising them. In some instances the university constitutions grant important primary, not delegated, powers to the senate. The seemingly most inclusive illustration of the latter arrangement is in the University of Cape Coast. There the Council is made responsible explicitly for the management of the revenue and property of the University and, subject to the powers and functions of the Senate, for general control over the affairs of the University. The Senate, in turn, is designated "the academic authority of the University." Since the identification of an "academic" as distinguished from a "non-academic" matter is not always clear, the Cape Coast inversion of the usual power relationship between Council and Senate is not free from am-

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biguity. A possibly more important source of ambiguity in the authority of the Cape Coast Senate, however, is the existence of an Academic Advisory Committee, comprising three to five persons appointed by the President on the recommendation of the National Council for Higher Education, which is responsible for "advising and guiding the Council and the Senate on all academic matters." A brief flirtation with a similar body in the University of Benin ended in 1972.

In other universities where a sharp cleavage between academic and other matters has not structured the general assignment of roles and powers to senate and council, the senate is often granted narrower but important powers. Among the most important of these, as we will note later, are major roles in making appointments to the academic staff and in the discipline of academic members. In other instances, the assigned role of the senate is to advise or recommend on academic affairs, and one should not discount the significance of that power merely on the ground that it is not dispositive. While I cannot fully validate the conclusion by empirical evidence, it is my impression that the main stream of academic decision-making is effectively the domain of the academic bodies of the African universities, even though the formal power to decide may be lodged in the council. Such disquiet as I feel over the implications of governance powers for academic freedom, however, is not aroused by the main stream but by the occasional disruptive whirlpool, nor by the past or current actuality, but by the potential for power abuse, and not so much by council-senate conflict as by the pervasive and growing roles of individual functionaries. We can begin to appreciate the latter roles by examining the composition of university councils and the allocations of power to determine their membership.

While typically the senate or academic board of the university is entitled to designate from its membership a small number of members of the council, the dominant council majority in the African universities, as well as in the English civic universities, comprises lay persons. In England, they typically represent local civic, cultural or economic interests whose support is deemed important. In Africa, as well, a criterion of broad interest-representation is frequently articulated to guide the appointing powers and further representativeness is commonly sought by granting to various bodies within or outside the university power to appoint or nominate one or two members. Thus, members may come from the senate, convocation, congregation, and nonacademic staff association of the university, from an association of graduates, a specialized National Council for Higher Education and Research, or the armed forces. It is of in-
terest that only the University of Nairobi appears to have made provision for representation on the council of currently enrolled students.

While a council membership somewhat representative of the variety of interests within the university and the surrounding society is desirable and, in general, seems to have been sought, this feature cannot obscure the cardinal characteristic of the African university councils—a dominant majority owing their tenure to the central political and governmental authority of the country. Two illustrations of the assembling of this majority will be provided: the first might be described as the classic pattern. It has enjoyed a relatively long life under quite stable legislation in Ghana, as well as in Kenya and Zambia. The other illustration will be drawn from the Nigerian universities where university constitutions have shown an extraordinary transiency and fluidity.

The University of Ghana Council, with a total membership of fifteen, comprises the principal officers of the University, that is, the Chancellor, Chairman of the Council, and the Vice Chancellor, four persons appointed by the Chancellor, one civil servant, one person elected by a body who appears to the Chancellor to be representative of the heads of secondary schools, two persons elected by the Council itself from designated constituencies, and four persons elected by the staff of the University. The coherence of the majority is made clearer, however, when one notes that the President holds office as Chancellor; he, in turn, appoints the Chairman of the Council as well as four members. The Council appoints the Vice-Chancellor who must, however, be approved by the Chancellor, and it also elects two members, as mentioned. Only the four members elected by the staff, therefore, can claim tenure that is not basically dependent on the good will of the highest political and governmental authority of the polity. While no provision is made by the Act for the removal or dismissal of a member of the Council (other than because of absence from Ghana), the term of appointment or election is only two years.

The University of Ghana model is replicated in the University of Science and Technology in Kumasi, but there are potentially significant departures from it in the University of Cape Coast whose Council is to be constituted by the President acting in accordance with the advice of the Prime Minister from various named constituencies. Even there, however, out of a Council of fifteen to nineteen members, fifteen are selected directly by political and governmental authorities or coopted by the Council itself. Much the same arrangement exists in both Kenya and Zambia. The Kenya Act vests some of the critical ap-
pointive power in the President and some in the Chancellor; President Kenyatta holds both offices. Dr. Kaunda is also Chancellor of the University of Zambia, but he is given his appointive powers with respect to the Council of the University in his role as President.

The African universities did not invent the office of university Chancellor, nor did they pioneer in installing in that office an important public figure. The Chancellor of an English civic university is a prominent personage whose status symbolizes the public interest in and support for the institution. I take it, however, that long-standing and unquestioned conventions would accord to the English Chancellor no executive or directive control over the affairs of the university. That these conventions did not migrate to Africa with the formal governance model was well illustrated by Dr. Nkrumah's role in the University of Ghana.

That Dr. Nkrumah was entitled, as both President and Chancellor, to take a lively interest in the University of Ghana I would be the last person to dispute. We have noted earlier, however, one instance in which that interest was expressed with profoundly adverse effects on university autonomy. To that illustration could be added his demand that his approval be sought before senior academic appointments were made and on one occasion that named individuals be appointed to three professorial chairs, as well as the demands of lesser officials that the University dismiss or procure the resignations of senior members of the academic staff. There was no arguable warrant in any provisions of the University constitution or statutes for these interventions, and they were resisted with varying degrees of success by the Vice Chancellor. Dr. Nkrumah had expressed publicly his support for academic freedom and presumably for that reasonable measure of university autonomy which sustains it. Yet the gap between such assertions and the realities of the relationship between the University and the Government during the Nkrumah period was often wide. Dr. Nkrumah's only institutionalized role in the University was as Chancellor. It was apparent, however, that he drew no significant distinction between the scope of the power he could exercise in Government as President and that he was entitled to exercise in the University as Chancellor. Unfortunately, nothing in the constitution of the University would have served to impress upon him that such a distinction should be made. The Chancellorship as defined by law controlled the majority composition on the Council. Beyond that, it was essentially an empty vessel into which the realities of political power relations could be poured. Despite efforts by University officers and staff to sow the seeds of restraining conventions, it remains, I believe, no better than an open ques-
tion whether their efforts, and those of their successors, have succeeded.

My references to the earlier experiences in the University of Ghana are not merely a historical exercise. They provide, I believe, a reminder of the continuing hazards to academic freedom in the African universities when a foreign governance model is adopted without the sustaining and restraining conventions that permeated it in its homeland. August Chancellors and lay governing boards with sweeping governance powers have not imperiled academic freedom in the English universities. There, well-established conventions confine the governance powers of councils and officers, and accord to the academic agencies within the universities the substantive powers to determine the selection of faculty, the criteria for admission of students, and the shape of teaching and research programs. Thus is defined the reality of governance. The same has not been consistently true in the African universities that have followed the governance model of the English civic universities. One must, of course, avoid exaggerating the impingements of lay councils or the authorities that appoint them on the resolution of academic issues. If all the data were available, I suspect one would find that the senates or academic boards have in most instances shaped the academic programs, that their substantive determinations, though couched in the language of advice and recommendations, are routinely approved by councils. The exceptions, however, which have not been rare, serve to make the point that little in the legally articulated constitutional orders or accepted conventions deters the lay councils, whose membership directly reflect the current political and governmental orientation, or the political figure who serves as Chancellor, from regarding formal entitlement to direct and control the universities as sufficient also to permit the exercise of the power, or even to impose an obligation to do so.

Much of my comment thus far applies with equal cogency to the governance schemes that have come to characterize the Nigerian universities. The older universities in this country began, as did those in Ghana, Kenya, and Zambia, heavily influenced by the same English model. The evolution of their governance schemes must be traced through a rapid-fire series of constitutions and statutes in which a bewildering array of councils, senates, chancellors, pro-chancellors, and visitors grasp, lose, and regain their holds on the reins of university power. To trace with any significant detail this evolutionary process in the six Nigerian universities is unnecessary and would unduly try your patience. Therefore, I will rest content with a few summary observations and a somewhat more extended consideration of the unique Nigerian institution of the university Visitor.
In all of the Nigerian universities one finds the familiar functionaries, such as the chancellor, often more recently also a pro-chancellor, and the vice-chancellor, as well as bodies called the council and the senate. Often, however, their formal functions and powers differ significantly from those described earlier in the University of Ghana. In neither Ife nor Lagos did the university constitution initially make provision for a chancellor. Save in the University of Nigeria during the chancellorship of Dr. Azikiwe, and to a lesser extent in Ahmadu Bello University, the role of chancellor has been largely honorific and ceremonial in all of the Nigerian universities. More recently, the pro-chancellor, where he has appeared, may be functionally a more significant officer because of his role as chairman or presiding officer of the university council. At no stage of the development of the Nigerian universities has a chancellorship been associated with the degree of monopolized political and governmental power that characterizes Ghana, Kenya and Zambia. Therefore, the Nigerian chancellorship has not been a similarly significant channel through which general political forces could impinge on the universities to imperil institutional autonomy and academic freedom.

The feature of Nigerian university governance today which establishes its distinctive character is the emergence of the central, powerful role of the Visitor. Developed as a common law institution to provide oversight for ecclesiastical and eleemosynary corporations, the Visitor found his principal functions in assuring that the corporation adhered to its proper purposes and in settling internal disputes so as to avoid the delay, expense and unseemliness of litigation in the courts. Since a common law of Visitors was well developed long before any of the cut-off dates in the various African reception Acts, it presumably was available for application in all of the former British dependencies unless the judges deemed the relevant common law rules inappropriate for African circumstances and therefore subject to rejection or modification. Insofar as I am aware, however, no Visitor to a university or any other corporation had appeared in the African law reports until he made his dramatic appearance in Nigeria.

While the Visitor was a pioneer figure in Ibadan, the Governor General being named to that office in the University College by the Ordinance of 1954, and the basic legislation for Ahmadu Bello University and the University of Nigeria naming the Governors of the Northern and Eastern Regions respectively to Visitorships, the pattern has not been uniform. A Visitor did not appear in Lagos until 1967 and in Ife not until 1970. By the latter year, however, when provision also was made for a Visi-
torship in the University of Benin, the office had been established by the constitutional instruments of all six of Nigeria’s universities.

My description of the Nigerian Visitorship as unique is warranted, I believe, by the evolution of the powers of the office. In the earliest legislation I have examined, that for University College, Ibadan, the Visitor was already a major figure in the governance of the College. In addition to the general power to direct a visitation, at such time and in such manner as he deemed fit, in order to assure the College’s effective fulfillment of its objects, the Visitor was granted specific powers to appoint the Chairman of the Council and the Chancellor, to give or withhold his approval of the Council’s appointment and dismissal of the Principal, to make final and dispositive interpretations of the basic College constitution and statutes, and to appoint to the Council one member in addition to his other appointees who served on that body ex officio. While in some instances enjoined to consult the Council, the Senate, or both, the Visitor in the exercise of all of his powers was authorized to act in his sole and absolute discretion. These powers are hardly little acorns, and we should not find it surprising that from them great oaks have grown.

I need not trace in detail the evolution of visitatorial powers in the several institutions. There is certainly variation in the degree of detail with which such powers are articulated in the university constitutions, the relevant provisions in the University of Nigeria being the most skeletal and those in Ife probably the most extended. Where the powers are detailed they tend to follow the early Ibadan pattern: to conduct or authorize others to conduct visitations, to appoint and remove key university officers, ultimately to control the content of university statutes, to exercise important appellate powers over determinations of the council relating to staff grievances, and directly or indirectly to determine the majority composition of the council.

I do not elaborate this awesome array of powers in order to ground a contention that the Visitorship in the Nigerian universities has in fact deprived the institutions of their autonomy or the members of their faculties of academic freedom. My thesis is more modest but still disquieting: a constitutional arrangement has been created which would readily facilitate such deprivation, should political circumstances make that seem attractive. May I suggest briefly three features of the Visitorship which dramatically present that hazard.

First, the office of Visitor as now constituted brings into its domain a remarkably diverse collection of governance powers.
Among them one can readily identify legislative powers with respect to university statutes, executive powers over key appointments and dismissals, and judicial or quasi-judicial powers in interpreting the law of the university and resolving disputes. Further, the ill-defined power to visit and inquire at any time hovers, in Holmes' striking phrase, like a "brooding omnipresence in the sky" over the university and its members. No absolutist or inflexible doctrine of separation of powers need be invoked to ground a concern, in either the polity or the university, over the concentration in a single functionary of governance prerogatives as embracing as those of the Visitor.

Second, the allocations of power seem clearly intended to be coupled with a wide discretion in their exercise. The old University College, Ibadan Ordinance stipulated that the Visitor, though occasionally called upon to consult others, should finally exercise his powers "in his sole and absolute discretion." Recent legislation appears to favor the more subtle form of making the exercise of visitatorial powers dependent on strictly subjective criteria: for example, to remove an officer "if it appears to the Visitor" that he should be removed on certain grounds; or in exercising his appellate powers to "confirm, vary or quash...and remit...with such directions as (he) may think fit...." We must consider later whether visitatorial powers indeed are final -- subject to no review. It suffices at the moment to observe that the Nigerian legislation historically has made an effort in that direction.

Who is the authority in whom these extensive, largely discretionary powers have been reposed? The answer to that question defines the third disturbing feature of the Nigerian Visitorship. Since the first appearance of the office, visitatorial powers have been lodged with those who exercised general political and governmental powers as well. This pattern was established during the colonial period when the Governor General was designated as the Visitor in Ibadan. With the coming of independence, Visitorships shifted to the Governors of Western, Northern and Eastern Nigeria, and in Lagos to the Head of State of the Federation. With the recent federalization of all universities, the Head of the Federal Military Government now serves as the Visitor of every university in Nigeria.

May I conclude this general discussion of university governance arrangements, and specifically of the Nigerian Visitorship, by re-emphasizing an essential caution. I am not asserting that visitatorial powers have been used to corrode legitimate university autonomy or the academic freedom it should sustain. Nor am I asserting that the university community, in-
cluding its lay governing body, should be subject to no external oversight. It may be that many, perhaps most, of the members of staff are unaware of many important visitatorial powers and have not sought to invoke them when internal grievances have arisen. In fact, the existing visitatorial powers may thus far have been little used and, when used, may have been beneficent. One might, I believe, readily concede all of these possible facts in the context of this discussion and still not find his concern adequately allayed. My concern, which possibly many will share, relates to the creation of governance mechanisms allocating broad discretionary powers over the university to those who may be not only insensitive to its special ethos and needs, but also vulnerable to the temptation to deal with it as only one aspect of the general political and governmental matrix. If my earlier suggestion with respect to the chancellorships in Ghana, Kenya and Zambia is valid—that the importation into Africa of formal university offices and powers stripped of the conventions that guide and restrain them in England poses a grave risk to university autonomy and academic freedom—my submission is simply that the same is true of the Visitorship in Nigeria. To the possibilities of reducing and controlling that risk we will return later.

While brief references may be found in some of the university constitutions, it is the statutes of the African universities that provide most of the regulation governing the appointment of faculty members, their conditions of service, and the imposition of discipline on them. These show great variety: in some instances, very detailed regulation, in others summary grants of seemingly plenary, discretionary powers; and often curious lacunae. For our purposes, minute description of various statutory schemes is not required; we will seek a broader perspective.

In most of the universities, the power to appoint faculty members is vested in the council, a majority of whose members are, as we have noted, themselves laymen owing their status to external, usually political, appointing authorities. In Lagos, Ibadan, Ife and Benin, however, the statutes grant to the Senates the power to make the actual selection of appointees. While I do not have the data on actual practices followed in some of the universities where the power to appoint has been granted by the university constitution to the council, I strongly suspect that in most instances the councils have exercised their powers in response to recommendations of the academic bodies. One might be tempted to conclude, therefore, that it makes little difference how the formal appointive power is allocated. I am inclined to a different view, believing that the statutory specifications in Lagos, Ibadan, Ife and Benin are highly desirable.
Again, consider an illustration from history. Exercising his assumed powers as Chancellor and Head of the University of Ghana, Dr. Nkrumah demanded that all professorial appointments be cleared with him and on one occasion demanded that three named individuals be named to chairs at Legon. While an explicit constitutional or statutory allocation to the Academic Board of the power to select academic appointees would not necessarily have assured the University’s success in resisting these demands, I believe it would have provided useful leverage. If it is believed that academic criteria applied knowledgeably by academic members of the university should control the selection of faculty appointees, it seems to me far wiser to allocate appointive power accordingly, rather than to rely on conventions to restrain the seemingly large powers of the council, the chancellor, or other functionary.

In most instances African university statutes do not state the criteria for faculty appointment. Probably it would be unwise to attempt to do so. If affirmative criteria were stated, they probably would appear in the form of certain minimum standards to be met. There is often, in many contexts, a regrettable tendency for stated minima to condition expectations and, in operation, to approximate the norms. It may be better, therefore, if criteria are to be dealt with by statute, to specify only proscribed criteria. The constitution or statutes of most universities, including all Nigerian institutions, have adopted this approach. For example, the University of Cape Coast Act provides that "no discrimination on account of religion, political opinion, tribe or sex shall be shown against any person in determining whether he or she is to be appointed to the academic or other staff of the University, to be rejected as a student..., to graduate..., or to hold any advantage or privilege...." The university legislation in neither Kenya nor Zambia contains similar proscriptions, but under the guarantees of fundamental rights in the constitution of each country similar safeguards surely could be developed. Even if the impossibility of dealing adequately with affirmative criteria for appointment is recognized, enforceable proscriptions of irrelevant and impermissible ones may serve a useful purpose in pointing those with the power to select faculty members toward factors that are truly germane to the quality of the university’s performance.

I cannot speak knowledgeably about the detailed terms and conditions of appointment and service in the various universities. While the power to determine these is frequently granted explicitly to council, the exercise of that power usually is not
reflected in the statutes. Nor would I suggest that it should be. In general, it would seem more appropriate to incorporate most terms of service in the faculty member's individual contract or in stated university personnel policies, some of which might become contract terms through incorporation by reference or reasonable implication in the individual agreement made when a member of the academic staff is appointed.

In this connection, reference should be made to a disturbingly ambiguous provision of the statutes of the University of Ife. This provides that a member of the academic staff shall serve on such terms and conditions as may be set out in his contract with the University, but that every such contract "shall contain or be deemed to contain a provision that the terms and conditions of service therein specified are subject to the provisions of the Edict, the Statutes, Ordinances and Regulations of the University." Is this an all-encompassing inclusion by reference, which makes the various legal provisions in force when the appointment is made contractually binding on the University? If so, I would suggest that it deprives the institution of a legitimate flexibility in modifying certain of its internal policies and regulations in the light of developing experience. Another possible and perhaps more probable interpretation is more disturbing: that under the quoted language the faculty member's contract gives him no protection, all of its terms being subject to amendment or abrogation by the governmental authorities or by the internal agencies having the power to make and amend statutes and regulations. Surely the latter meaning, if adopted, would be pregnant with danger to the academic freedom of the staff and sufficiently corrosive of faculty morale to endanger the University's ability to recruit and retain faculty of acceptable quality. You will recall the espousal in 1964-65 by the Attorney General of Ghana of a view of the law which would have made the contracts of University faculty members nullities in the face of governmental action. Aware of the hazards to the University implicit in that view, the Vice Chancellor resisted it vigorously and, in some measure successfully. It should, I believe, be resisted in all institutions. Fortunately, the quoted statute of the University of Ife has not apparently been replicated in the other Nigerian universities.

In my judgment, actions by university authorities that infringe academic freedom will be far less frequent in making initial appointments than in determining whether term appointments will be renewed and in dismissing faculty members during their terms. We will deal with dismissals or other overt disciplinary actions later, at the moment concentrating on the renewal-of-appointment problem.
It is my impression that the African universities typically make an initial appointment for a stated term of years, perhaps three. Either express or implicit in the use of a limited term is the premise that the appointee is in effect a probationer, that the quality of his scholarship and teaching will be carefully assessed, and that acceptable standards must be achieved before any further or more durable relation with the university is formed. This is entirely appropriate. However careful the original vetting may be, it will not always identify the effective teacher and productive scholar or, indeed, the inclination and energy to become such. It is reasonable, therefore, that the university should have an opportunity to improve its staff strength by not renewing probationers and making replacement appointments. Not every romance becomes or should become a marriage.

A faculty member whose teaching and research may have been admirable may, nevertheless, have offended powerful interests. The results of his research or the critical scrutiny manifested in his teaching may have challenged the dominant ideology or the views of influential political or economic groups. If these circumstances do arise, a quiet non-renewal of appointment at the end of a probationary term may appear to be an attractive technique for excising the disruptive faculty member. If safeguards of academic freedom are to be made adequate, however, some means must be found for preventing the use of this technique for violating it, without at the same time unduly imperiling the university's opportunity to make the assessments of the probationary period truly discriminating on legitimate grounds. None of the university statutes I have examined attempts to deal with this problem. Before suggesting a possible solution, may I deal briefly with the present legal provisions pertaining to avowed faculty discipline.

The ultimate sanction against a faculty member is dismissal since it imperils both his livelihood and his further opportunity to pursue his scholarly vocation. Nevertheless, just as the university must retain an option not to renew a term appointment on its expiration, so it must not be deprived totally of the power on legitimate grounds to dismiss a faculty member during his tenure. Faculty status cannot be permitted to become a mere sinecure for the slothful or the incompetent. At the same time, the university should neither claim nor be accorded the power and right to dismiss a faculty member on grounds that involve impingements on the legitimate exercise of his academic freedom.

In view of the importance to both the faculty and the institution of disciplinary proceedings, it might have been ex-
pected that the treatment of this matter in university constitutions and statutes would have reflected great thought, careful discriminations, and precise draftsmanship. Such is not always the case, however. The statutes I have examined warrant the following general observations.

First, the power to dismiss or discipline faculty members, like the power of appointment, is vested in the lay council. Indeed, even in those Nigerian universities where the substantive power over appointments is allocated to the Senate, the power of removal or dismissal is vested in the Council.

Second, the specification of acceptable grounds for dismissal is either in very general terms or is totally absent. For example, in the University of Lagos, the stated grounds are "misconduct" or "inability to perform the functions" of employment. Only a perhaps questionable negative implication supports the view that these are the only permissible grounds, for the only relevant provision of the Decree is so drafted that a close reader might argue that the stated grounds are simply the only ones that activate a requirement of certain procedural safeguards. Furthermore, "misconduct" is not defined. The statutes of the University of Cape Coast authorize dismissal "for good cause," which includes conviction by a court of any offense which the Council considers sufficient to render the faculty member concerned unfit to perform his functions, conduct of a scandalous or other disgraceful nature, or conduct which the Council considers to be such as to constitute failure or inability of the faculty member to discharge his functions or to comply with the conditions of his service. In the University of Science and Technology in Kumasi, on the other hand, the statutes detail broadly-embracing grounds for discipline: failure to perform properly any duty imposed by regulation or instruction, any act prejudicial to the efficient functioning of the University or tending to bring the University into disrepute, absence without leave or reasonable excuse, insubordination, improper use of university property, and engaging without permission in gainful occupation outside the University. Contrasted to such an inclusive but indeterminate catalog of offenses, the position of the University of Nairobi appears almost attractive: while the University constitution authorizes the Council to make statutes setting the bases for dismissal, the statutes are entirely silent on the subject of discipline unless an earlier disciplinary scheme was preserved by a final saving clause covering certain earlier rules.

Third, the statutes do not uniformly require that in the imposition of discipline the faculty member be accorded the essentials of a fair hearing. As we have noted, the Nairobi
statutes are silent on discipline. While the University of Zambia Act authorizes the Council to provide for "disciplinary control", no statutes for the University have been adopted. No provision for a hearing as a pre-condition to discipline of a faculty member appears in the statutes of the University of Nigeria. On the other hand, there is a hearing requirement, including a number of safeguards articulated with various degrees of specificity, in the three Ghanaian universities and in all of the Nigerian institutions, except the University of Nigeria.

I would suggest that the provisions concerning faculty discipline in most of the university constitutions and statutes we have examined fall short of according the measure of protection for academic freedom that desirably might be built into the legal framework. In some universities, of course, regulations below the level of the statutes, or current practices which possibly enjoy the dignity of tentative or incipient conventions, may fill certain of the gaps I have noted. If so, their importance should not be discounted unduly. At the same time, one should recognize their limited significance when the legal protections of academic freedom are being assessed.

Against this background of general discussion of university governance arrangements as now defined by law and the hazards implicit in them, may I turn now to more important questions: what might be done within the universities or outside to strengthen university autonomy, the better to secure academic freedom, and what contributions to this process might be made by the law? I will not presume to outline a general model. Rather, I will offer some limited suggestions, largely concentrated on those aspects of university governance considered earlier.

My first suggestion may appear to be relatively elementary, perhaps even trivial: to say clearly and at an authoritative level that academic freedom is the life blood of the university and shall be preserved. It may appear anomalous that none of the constitutions of the African universities attempts a clear articulation and acceptance of the principle of academic freedom. The closest approach I have found appeared in the now-defunct constitution of the University of East Africa which stated that one of the objects of the institution should be "to preserve academic freedom and, in particular, the right of a university, or a university college, to determine who may teach, what may be taught, how it shall be taught, and who may be admitted to study therein." The absence of references to academic freedom in the constitutions of the other African universities is not surprising, however. None appeared in the relevant English models, again for the obvious reason that societal values and well-established conventions limiting the exercise of
formal powers provided and continue to provide adequate safeguards. Fairness requires the recognition, however, that in many universities uninfluenced by English models explicit commitment to the principle of academic freedom is rare. A 1967 survey of university legislation in the various less developed countries found only two references to academic freedom: in the Peru National Universities Act and in the statutes of the University of the Philippines.

One may argue that even in the absence of explicit reference, academic freedom is implied by some of the African university Acts. For example, the University of Ghana Act lists among the principles to guide the University in pursuing its aims that "students should be taught methods of critical and independent thought," and that "the fruits of research, and knowledge generally, should be spread abroad by the publication of books and papers and by other suitable means." I am fully persuaded that such a principle cannot be viable except in the context of freedom, where members of the University can feel secure in their positions while they seek and communicate knowledge with vigor, total objectivity, and candor. Yet reliance on implication rather than clear affirmation reduces the significance of the university's own constitutional order in nurturing and sustaining academic freedom.

The law relating to a university should contain, I believe, an explicit commitment to the principle of academic freedom. I propose no particular verbal formula. A possible model can be found in the superseded constitution of the University of East Africa which was mentioned earlier, though I would think it desirable that the legal provision stress not only the autonomy of the university in determining who may teach and what may be taught but also the freedom of the individual teacher to seek truth without fear of reprisal, to teach the truth as he sees it, and to communicate the fruits of his scholarship. Helpful guidance in the framing of appropriate language might be found in the statutes of the University of the Philippines which contain a broad guarantee of teacher freedom in the exposition of his subject in the classroom or in addresses or publications, coupled with appropriate prohibitions against inculcating sectarian tenets, discussing in the classroom controversial topics not pertinent to the course of study being pursued, and conduct which would reasonably create doubt concerning the teacher's fitness for his position.

It should be made clear that the constitutional or statutory commitment to academic freedom is not merely hortatory. Means must be found for converting the commitment into a true legal obligation binding on the council, the senate,
other university bodies, and individual members of the university. Further, since we have stressed the functional relation of university autonomy to academic freedom, means must be provided whereby the institution can assert effectively its own decision-making power as granted by law against external pressures. To be effective in these various contexts the guarantee of or stated commitment to academic freedom should not be articulated only in the university's own internal statutes, though it would be desirable there. It should be introduced at a level of the legal order that clearly embraces power constellations both within and outside the university, that is, in the national constitution or in the public legislative Act that structures and safeguards the university.

Elevating protection of academic freedom to the constitutional level has at least arguable advantages. The public Acts, Decrees, and Edicts that have provided the constitutional structures of the African universities are the ordinary grist of the legislative mill. The general dominance by the executive establishments over the legislative process in the African countries, the relative rarity of substantive deliberation within parliamentary bodies where they still exist, and the absence of institutionalized channels for consultation with affected groups in the shaping of legislation combine to make the constitutional arrangements of the universities fully vulnerable to change without any cautionary influence from the academic community itself. What the state gives by legislative fiat, the State can remove with equal ease. It is difficult, however, in my judgment, to develop any great confidence that the basic governance systems and sustaining principles of the universities would have been better protected if embodied in the various national constitutions, rather than in ordinary statutes. Any empirically validated distinction between the stability of constitutional and statutory arrangements in the African context surely would be difficult to sustain. Most constitutions have been fleeting actors on the national stage. Nevertheless, there may be some more august symbolism, some higher ordering of importance, and some greater immunity from the daily ebb and flow of political forces in constitutional as against statutory provisions. If so, it is perhaps significant that no African university thus far has reached the constitutional level.

The internal university community may be able to exert little influence on either the national constitution or the legislation that shapes its general governance system. Ordinarily, however, it can participate in the development and amendment of the university's own statutes. These normally contain the detailed provisions concerning two matters vitally related to academic freedom: the appointment of faculty members, including
their terms and conditions of service, and the criteria and procedures for their discipline. Insofar as there are internal legal safeguards for faculty status and academic freedom, we may begin our search for them in the statutory provisions related to these matters.

A preliminary observation should be kept in mind however: as was true also of university constitutions, no set of statutes I have examined contains any explicit reference to the academy’s own commitment to freedom of inquiry, teaching, and publication. The absence of such a provision in any university constitution, emerging as an ordinary public Act or Decree from the national legislative process, may be understood, though regretted. One cannot avoid a sense of anomaly, however, in considering the failure of the university community itself to articulate in its own statutes its guiding and sustaining values. The probable explanation again lies in the influence of English models and the reliance in the English universities on convention rather than legislation to safeguard the academic enterprise. Anyone tempted by another explanation -- that safeguards of academic freedom are unnecessary in regulations that can control at most only the university community -- should remember that some of the most egregious violations of that freedom have been committed by the authorities of the academy itself.

While large governance powers in lay councils, constituted as they now are, coupled with the almost total dependence of the African universities on government financing can present grave risks to institutional autonomy and individual academic freedom, significant change in either of these features does not appear to be a reasonable prospect. Potentially a lay council comprising men and women who are respected in the society and who understand and value the mission of a university can offer substantial benefits: they can usefully interpret social needs to the academic community and serve as a protective barrier between that community and various political and economic forces that may endanger it. Realization of these benefits depends primarily on the quality of the persons selected for council membership and on the attitudes that guide their deliberations and actions. Do they have a sensitive understanding, not only of the external society, but of the special needs of a university as well? Is political loyalty to the appointing authority their decisional compass or are they capable of exercising independent judgment in the interest of the university and the integrity of its mission? Assuring satisfactory answers to these questions can be furthered very little, I believe, by the blunt instruments of law. What counts is the orientation of the appointing authority and the quality of the appointments made.
I would suggest, however, the desirability of one change in the law on council membership. The dominant majorities on many councils owing their tenure directly or indirectly to a single, political appointing authority should be eliminated or at least significantly reduced. The power to nominate, appoint or elect should be dispersed among various constituencies: the academic members of the university, the association of graduates if one exists, representatives of the secondary schools, regional organs, professional associations, National Academies of the Arts and Sciences, universities or university associations in other countries, and the National Universities Commission if one has been established. The propriety of vesting a certain appointive capacity in the person or group that for the time being exercises paramount political and governmental power need not be totally rejected. If that capacity remains at currently typical levels, however, efforts to distinguish the university from any other government department or to immunize it from the tensions and abrasions of politics can have only limited prospects of success. Finally, greater security of tenure for council members and longer terms would seem desirable. If council members are to make their best contributions to the development of the institution, they should serve long enough to understand its complexities, and their independence of judgment should be buttressed by immunity from summary removal from office.

In assessing the implications for academic freedom of the governance powers of lay councils, it is obviously useful to discriminate between different categories or ranges of power. Despite the ultimate ambiguity of the classification, the effort in the constitution of the University of Cape Coast to draw a sharp, general distinction between academic matters, with respect to which the Senate is the authority, and the management and administration of University's revenue and property which most clearly fall into the jurisdiction of the Council, has much to recommend it. A similar, though narrower approach is illustrated by the assignment to the Senate of substantive control over specific academic matters, such as the selection of persons for appointment to the faculty. In the present African university context, I think it unwise and hazardous to rely on convention to assure desirable council deference to the academic membership of the institution in dealing with essentially academic matters. If that deference is deemed desirable, as I hope it would be, it should be nurtured by authoritative allocations of powers in the university constitution and statutes.

While I would not favor detailed statements of criteria for appointment to a university faculty, particularly if these succumb to the current fashion of quantification (years of post-terminal degree experience, publications, etc.), I do think it
useful to set out in the statutes in categorical terms the kinds of factors that may appropriately be considered in determining qualification for appointment, as well as those that may not be. Qualification for effective teaching and creative scholarship and demonstrated ability to use that qualification can be readily expressed as affirmative criteria. Equally readily, prohibitions against discrimination based on religion, sex, ethnic identification, or political persuasion can be framed. The specification of legitimate and proscribed criteria should be related to both the acquisition and retention of faculty status, so as to make clear their relevance not only to appointment and reappointment but to disciplinary proceedings as well.

As I have suggested earlier, the vulnerability of faculty to status termination through the non-renewal of term appointments can present subtle threats and actual dangers to academic freedom. While a university must remain free to utilize probationary status for a reasonable period, I believe it should respect the natural human urge for greater security of status. I am not now urging upon the African universities the adoption of something like the American concept of professorial tenure, though indeterminate or lifetime tenure of faculty is not unknown in the African universities. An arrangement under which all faculty appointments involve successive term contracts can be reconciled with the suggestion I would make. This is simply that the statutes of the university provide that the university may, if it chooses, make appointments probationary for a reasonable period, but a faculty member may challenge any refusal to renew the appointment. The challenge would impose on the institution itself a burden of justification under the legitimate criteria for faculty status specified in the statutes. That justification should be required before a university tribunal and under hearing procedures the same as or closely similar to those established to consider disciplinary actions. Later, we will consider the desirable composition and procedures of such a tribunal.

The agreement between a university and a faculty member, formed when appointment is offered and accepted, is a contract under which important legal rights can arise. If the African universities should follow the practices common in most American universities, however, skilled lawyers or judges would encounter great difficulty in ascertaining the scope and content of the contract terms. The standard forms in common use there are of the most abbreviated kind, usually being limited to a designation of title or rank, a salary term, and, if the appointment is for a fixed term, the duration of that term. In general, I would favor more fully elaborated standard-form contracts for faculty members. I believe it would be wise for the councils of the
African universities, after taking fully into account the views of the academic membership, to develop contracts of appointment and service setting out in clear language all of the critical terms of the relationship. The contract need not restate all of the provisions of the university statutes that affect faculty perquisites. Indeed, it would be unwise to do so, since with respect to some of these it may be prudent for the council to avoid contractual commitment, reserving to itself the prerogative to amend the statutes through normal processes. It may be, however, that certain faculty rights and protections created by statute, as well as certain benefits provided under general personnel policies of the institution, should be incorporated by specific reference into the contracts made with individual faculty members. Otherwise, reasonable expectations may be defeated, with a consequent erosion of faculty morale and a loss of effectiveness in the teaching and research programs of the university. The standard contract should make clear which of the personnel policies have become contractually obligatory on the university.

As I have suggested in various contexts earlier, the university community is entitled to expect of faculty members certain standards of performance and responsibility, while they, in turn, should be able to expect security of status except as they are judged critically deficient under those standards. Accommodation of the ends of academic freedom and security to academic responsibility and high-quality service necessitates, as we have noted, careful statement in statutes and perhaps in contracts of both the relevant criteria for faculty evaluation and the methods for applying them. It is to the latter, that is, the structure and process of faculty discipline, that I now turn.

The dismissal of a faculty member or often even the imposition of a less drastic sanction affects vitally important individual and institutional interests. Punitive action should not be taken except after the most careful hearing by an appropriately constituted tribunal operating under procedures that assure as fully as possible a fair hearing.

What is the appropriate composition of the tribunal to conduct such a hearing? Because the criteria of assessment which determine the appropriateness of the penalty are those inherent in the academic enterprise itself, it is critical, I believe, that the membership of the tribunal comprise exclusively or predominantly members of the teaching and research staff. Certainly it should not include any persons who have been involved in precipitating the disciplinary action and, in my judgment, would most desirably not include the Vice-Chancellor or a
member of his staff, even if he holds an academic appointment. Since I share fully the sensitivity of most lawyers to special courts or ad hoc tribunals, I believe that the disciplinary board should be set up on a permanent basis in advance of any particular need for its functioning. It should enjoy the respect and confidence of the faculty and not be subject to challenge as a mere tool of the administration or any external authority. Therefore, I would think it best that its members be elected, perhaps for three-year terms, by the senate or academic board.

While I do not believe that the Vice Chancellor should sit on the disciplinary board or appoint its members, he does have important roles to play in the disciplinary system. He should assure that the prescribed procedures for initiating and carrying out disciplinary actions have been followed meticulously and that any opportunities for solving the problem without formal proceedings, in the best interests of both the university and the affected faculty member, have been sensitively explored. Whether the Vice Chancellor can serve appropriately as a first level of appeal by a faculty member affected by an adverse decision of the disciplinary board is a complex and difficult question. That role would seem properly excluded if the Vice Chancellor has acquired an accusatorial or prosecutorial character earlier in the proceeding or even has performed in a substantial way a screening function in determining what cases should go through formal disciplinary proceedings. Since these roles are often desirable or at least unavoidable by the Vice Chancellor, it seems wisest not to ascribe to him also an appellate function.

If a faculty-selected disciplinary board is to continue to enjoy faculty confidence and to play its fullest possible role in protecting the academic freedom of members of the staff, its own procedures should be carefully designed to accord to an affected faculty member the opportunity for a full and fair hearing. We need to note the desirable procedural features only briefly: a reasonably explicit statement to the faculty member of the grounds asserted for disciplinary action; adequate time for him to prepare his defense; the assistance of the university authorities in securing the testimony of any witnesses or other evidence which the faculty member deems important; assured rights of the faculty member to be assisted by counsel, to attend the hearing, to be present when all adverse evidence is received, and to present to the board evidence and arguments in oral or written form; and finally the preparation of a written record sufficient to show the findings of the board on each ground for discipline presented I and to serve as the basis for a review by higher authority. These are familiar procedural safeguards of fairness, some of which are usually subsumed in
the Anglo-African legal tradition by the principles of natural justice and in the American system by the concept of procedural due process of law.

The usual arguments for at least one level of appellate review, as well as the ultimate legal responsibility of the council for the governance of the university, support the submission of the findings and recommendations of the disciplinary board to the council for final decision. A council whose members are sufficiently sensitive to the basic values of the academic community will normally confirm the report of the faculty tribunal. If full substantive review of the disciplinary board's actions is sought by either the affected faculty member or the administrative authorities of the university, that review should be based on the written record developed from the board's hearing. If the council is not satisfied with that record and therefore declines to confirm the decision below, the council should specify the nature of its objections and return the matter to the disciplinary board for further consideration. If the board has heard and considered all of the relevant evidence and has conducted its proceedings with full attention to all procedural requirements, only the most extraordinary circumstances, closely approaching a breakdown in the university's internal governance system and the trust on which it rests, should be expected to lead the council to a substantive rejection of the faculty disciplinary board's view of appropriate action and a substitution of its own final disposition.

Some may find this disciplinary arrangement, confined by firm procedural requirements and showing strong analogies to the system of criminal justice, incongruous in a university community. Particularly might this reaction be aroused, if, as I will propose later, these internal processes are made subject to some degree of scrutiny in the ordinary courts. I must confess that I too have regarded the recent development of "legalism" in American universities and more frequent litigation of university affairs in the courts with misgiving and regret. An ideal university in a better world perhaps would be able to solve all of its problems internally in a true spirit of community and with appropriate deference to its own essential values and to its responsibilities to society. Since that kind of world and university seems to elude us, however, I think we must consider utilizing those safeguards of order, decency, and responsible decision-making which have been found useful in the general society. A complex, often large, modern university, especially if supported by the state and therefore more vulnerable to the full range of social, economic, and political pressures, has the power to allocate perquisites too substantial, and to impose penalties too severe, to claim immunity from
traditional requirements of procedural fairness or to be entitled to immunity from the ultimate scrutiny of the law. Primarily, however, the relevant legal regime should be that of the university itself as defined in its constitution and statutes.

If the suggestions just made should guide a critique of university disciplinary systems, all of those we have considered would be subject, in varying degrees, to criticism. In all of the universities, the grounds for disciplinary action against faculty members, if stated at all, are expressed in very general terms. In all of them, except the Universities of Nigeria, Nairobi, and Zambia, the statutes involve academic members on disciplinary tribunals, though not always to the extent I have suggested. All of the universities, with the same three exceptions, provide some guarantee of a hearing to the affected faculty member, but many of the procedural safeguards I have suggested are not assured. In all institutions, the final disciplinary authority is vested in the lay council, but nothing in the constitutions or statutes seems designed to elicit a desirable deference by the council to the determinations of the tribunal that has substantial academic membership. In the critical area of faculty discipline, therefore, I conclude that the law of the universities has stopped far short of the contribution it could make to protecting academic freedom.

Ideally, full justice to members of the faculty and full protection of the institution’s interests would be provided within the legal regime of the university. If that is not seen to be the outcome of internal processes, it is inevitable that access will be sought to other tribunals and other bodies of law. To that possibility we shall turn next

GENERAL LAW, THE COURTS AND ACADEMIC FREEDOM

Thus far we have considered the mission of a university with particular reference to the expectations to which it must respond in the new countries of Africa. We have analyzed the concept of academic freedom and its critical relation to the university’s mission, and have described the governance structures now provided by law for several institutions. In the latter connection, we noted certain hazards to both proper university autonomy and to the intellectual freedom of teacher-scholars. While a number of safeguards germane to academic freedom could be identified, my suggestion was that in all in-
stitutions these were in some measure inadequate and in certain universities radically so.

As we turn now to the development of or the discovery in the general law of the land of further legal protections for academic freedom, may I return briefly to a suggestion made earlier that a right to academic freedom be established by the general law. In his major work on British, African and Indian universities, Lord Ashby proposed that a "compact" between government and university be agreed upon, a "compact" recognizing both the state’s interest and the university’s prerogative of autonomous decisions and actions within the scope of its mission, and that this "compact" itself be safeguarded by inclusion in a somewhat inflexible national constitution. My earlier reference to the ephemeral quality of African constitutions does not deny the attractiveness of Ashby’s proposal, at least as a goal.

The Anglophone countries of Africa came into being under written constitutions which often provided extensive catalogues of fundamental rights protected in some measure from legislative or executive infringement. In this respect they resembled the United States with its written Constitution and Bill of Rights, more than Great Britain. For this reason, a very brief account of the developing American constitutional law concept of protected academic freedom may be useful.

Consider the following statement:

"The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."

These are not the words of a militant university faculty member or even of a university administrator. They were written by the late Chief Justice Earl Warren for the majority of the Supreme Court of the United States in a judgment striking down the action of a state in infringing academic freedom.
The Supreme Court’s derivation of the constitutional right to academic freedom stems from the Fourteenth Amendment’s proscription of deprivations of liberty or property without due process of law. Such a deprivation is deemed to exist if a sanction, dismissal for example, is imposed on a faculty member because of his exercise of one of the liberties protected by the Bill of Rights, such as freedom of speech, religion or association. Similarly, an unconstitutional deprivation occurs if he is dismissed without an adequate hearing when he enjoys either by contract or custom a reasonable expectation of continuing his faculty status. I have described these protections as part of a developing constitutional concept. Its parameters have not been fully defined in the relatively few decisions over approximately the past two decades. It is important to note, since the Fourteenth Amendment prohibits only certain forms of state action, that possible impairments of the academic freedom of faculty members in the private universities by their own administrations or governing boards would not attract constitutional scrutiny. Nevertheless, the recognition of academic freedom, even within limited and still unclear boundaries, is an important constitutional advance.

Might those African constitutions that contain declarations of fundamental rights ground analogous protections of academic freedom? Consider, as an example, the Constitution of Zambia which lists, among the fundamental rights and freedoms of individuals, personal liberty, protection from deprivation of property, freedom of conscience, of expression and of movement, and protection from discrimination on the grounds of race, tribe, political opinions or creed. These provisions are not merely general exhortations to virtue, for the courts are given jurisdiction on proper application to use their processes to protect the postulated rights and freedoms. Surely in such an embracing catalogue of fundamental rights and liberties some recognition might be accorded to the freedom of teaching and inquiry which is the life blood of the university.

Constitutional litigation in general has been very rare in the courts of Africa, and I know of no case in which academic freedom has been recognized, or even asserted, as a constitutional right. Nor, in the immediate future, would I expect such a development. Three deterrents are immediately evident. First, judicial creativity which can pour specific content into the relatively empty vessels of constitutional guarantees is stimulated and guided by value perceptions widely shared in the society. A distinguished former Vice-Chancellor of the University of Lagos has written that there was no indigenous concept of academic freedom in Nigeria and that it still has to make its case to Nigerian society. Much the same is true in
other African countries and, indeed, in many societies around the world, I believe. Second, the constitutional ascriptions of fundamental rights and freedoms to individuals are usually hedged by derogation clauses couched in language sufficiently general and vague to accommodate many of the factors that can corrode academic freedom. Again the Constitution of Zambia provides an adequate illustration. Under its terms, an action challenged as impairing such an asserted right as freedom of expression may still be sustained if found to be done under a law that is reasonably required in the interests of defense, public safety, public order, or public morality, or for the purpose of regulating educational institutions in the interests of persons receiving instruction therein. Third and finally, the African constitutions themselves have thus far proved fragile indeed, being subject to fairly easy and frequent amendment or total displacement.

For these reasons it does not appear to be reasonable for faculty members in most African universities to expect that in the near future their academic freedom will be able to claim constitutional protection. Yet this may not always be true. The governmental fluidity and instability that seem inevitable under the various pressures of recent independence need not be permanent features of national life. As more stable constitutional orders emerge, it may be wise to consider recognition and protection of the universities in the organic law. Toward this end, the administrative and academic staffs of the universities (especially the faculties of law), and the legal profession itself, can provide leadership. This is needed in a sustained effort, not merely in responses to recurrent crises.

The value of academic freedom, like other individual liberties, may not now have deep indigenous roots. There is reason to remember, however, that a constitution, as explicated and enforced by the courts, can have great educational impact. As the fundamental law and its judicial interpreters carry out their potentially great teaching mission, it is to be hoped that a sensitive awareness of the necessity to protect the freedom of the mind, particularly in teaching and scholarship, will be among the imprints they make on the national character.

Below the grand level of the constitution, the basic national law of obligations, administered in the ordinary courts, may be or become available to protect faculty rights, including within certain limits the right to academic freedom. This possibility becomes more realistic if clear and sufficiently comprehensive contracts are made between the university and members of its faculty. Thus far, however, it appears that the faculty members of African universities have made little resort to the
courts to vindicate their asserted rights. The only instances I have discovered are two Nigerian cases: *Imegwu v. Lagos University Provisional Council* and *Oyenuga et al. v. Ife University Provisional Council*. *Imegwu* dealt with certain contract aspects of the financial settlement between the university and a faculty member who had resigned; it need not detain us. *Oyenuga* is closer to our interest and merits fuller comment.

Dr. Oyenuga, Professor of Agriculture in the University of Ife, was dismissed for alleged insubordination in refusing to comply with a directive that he resign his appointment or apologize for a letter he had written to the Vice Chancellor. Subsequently, four other members of the faculty resigned in protest against the dismissal and their resignations were immediately accepted. The legal action, begun in the High Court of Western Nigeria, involved the consolidated claims of all five faculty members for salary and emoluments for a specific period in lieu of notice. The judgment of the court favored the plaintiffs who realized a substantial recovery.

Against these basic background facts the judgment of the court is extremely difficult to understand. It does not appear that the defendant Council sought to make much of the seemingly significant difference between the case of Professor Oyenuga, who was dismissed, and that of the other four plaintiffs, who resigned. Indeed, in all cases, the Council relied primarily on the written conditions of service for senior staff and insisted that each plaintiff had the period of notice to which these service conditions entitled him. If the four plaintiffs other than Professor Oyenuga had resigned, however, of what was the University obligated to give them notice? The court’s opinion, including its reflections of the arguments of the Council, provides no satisfactory answer. One possible, though speculative, answer is that the resignations had been tendered to become effective at a stated time in the future, in accordance with a notice requirement imposed on faculty members by the conditions of service, but that the University wrongfully had made the resignations effective immediately. If this had been the fact, and the University had refused to pay the salaries for the required notice period which the resigning faculty members had honored, then recovery of the unpaid salaries would have been clearly appropriate in the legal action. If, on the other hand, the conditions of service required no notice period or the period of notice of a resignation had not been respected by the resigning faculty members, the University’s regarding their resignations as immediately effective and as terminating the University’s financial obligation to them would have seemed quite appropriate. One commentator on the case has suggested that the decision of the Court "may have far-reaching con-
sequences in the future entrenchment of academic freedom in Nigerian universities." Since the commentator added, however, that the four faculty members "resigned voluntarily and their employment was not terminated," he may find the significance for academic freedom that he attributes to the decision in a belief that the Court recognized an infringement of the freedom of the resigning faculty members that even their resignations could not obscure. If any such view motivated the Court, however, it is carefully shrouded by the opinion.

The Court’s treatment of the case of Professor Oyenuga is in some respects clearer, and certainly it is much more disturbing in its implications for academic freedom. He did not resign; he was dismissed. His dismissal, furthermore, was grounded on factors having little or no perceptible relevance to his performance as a teacher, scholar, or administrator. Even if Professor Oyenuga’s letter to the Vice Chancellor had been couched in unduly blunt terms and might have been challenged as lacking civility -- a doubtful view in my judgment -- in isolation it hardly seems an adequate basis for terminating his professorial tenure.

What then was Professor Oyenuga’s protected tenure? The Court ascribed to the defendant Council the view that it had power under the written conditions of service for senior staff to terminate the Oyenuga appointment by giving him six months’ notice or paying his salary for that period in lieu of notice. Such a power seemingly did exist with respect to first term, probationary appointments. The Court concluded, however, that the provision that all appointments were to be in the first instance for probationary terms of three years and only after confirmation were to extend to retirement age did not apply to professors. On the basis of this conclusion, Professor Oyenuga’s status should have been protected to age sixty. The Court declared, therefore, that the University could not terminate his appointment by notice of any length. It stated that the defendant Council admitted the soundness of this view of the written conditions of service, and it rejected the Council’s contention that an unwritten but implied term permitting termination by giving reasonable notice should be found.

If the Court’s interpretation of the contract between Professor Oyenuga and the University was sound, then such a contract was, in my judgment, seriously deficient in protecting the legitimate needs and interests of the University. Insofar as the judgment reveals the Court’s view, it was that no circumstance would permit the University to terminate a professorial appointment. If this view embraced termination on legitimate disciplinary grounds, it surely saddled the University with a
regrettable disability. Successive generations of students, the
general academic community, and the surrounding society should
not be compelled to provide a sinecure protecting incompetence
or clear, recurrent defaults on professorial duties. Let me make
entirely clear that there is no suggestion of any of these in-
adequacies or delinquencies in the case of Professor Oyenuga. My
criticism is at the general level of the terms of faculty con-
tracts and university statutes, if these combine to make a
professor on lifetime tenure totally immune to rightful removal,
as a seemingly permissible interpretation of the judgment in the
Oyenuga case would suggest. The contract itself, the university
statutes, or both. should make as clear as possible the permis-
sible bases of termination of professorial and other academic
appointments, as well as the procedures to be followed in estab-
lishing these bases and effecting the termination. This is
ground we have already covered.

The Oyenuga judgment was also puzzling and disturbing from
the standpoint of the legitimate interests of the professor.
After asserting that Professor Oyenuga’s non-probationary ap-
pointment was not terminable by notice and that it gave him
security of tenure until retirement at age sixty, the Court, in
framing the appropriate remedy, awarded only salary for the re-
mainder of a three year term. What was the source of such a
limitation? Apparently the source relied upon by the Court was
the written condition of service which fixed an initial proba-
tionary appointment of a faculty member at three years certain
and provided for longer tenure only after "confirmation," that
is, after termination of the probation. But the Court itself had
already rejected the view that Oyenuga’s appointment was proba-
tionary; his initial appointment, as professor, ran until
retirement. Such a contractually-created status and its at-
tendant security become mere illusion, however, if, upon wrong-
ful dismissal, the professor’s remedy is limited to emoluments
for the remainder of a non-existent probationary term. This
limitation on the available remedy merely accords to the
University a relatively inexpensive hunting license to collect
professorial heads!

I have discussed the Oyenuga case at some length because it
provides useful insights into both the advantages and limita-
tions of contract actions by faculty members to vindicate their
rights. The law of contract as administered in the ordinary
courts can provide some protection for academic members, if
their contracts of appointment and service are adequately
developed and soundly interpreted. In a basic sense, however,
that protection can never be truly sufficient. Faculty status
does not provide merely a livelihood. Equally importantly, it
provides membership in an intellectual community in which one’s
profession of teaching and research can be carried on for a lifetime. A monetary award of contract damages, properly measured, may protect the faculty member's strictly economic interests. The historic and usually defensible unwillingness of courts in the tradition of English equity to decree specific performance of personal service contracts, whether at the suit of the employer or employee, means, however, that the courts cannot be relied upon to protect faculty status to the extent of assuring an on-going opportunity to teach and carry out research. Exclusive focus on the monetary remedy, therefore, makes especially critical the full measurement of a dismissed faculty member's economic loss, so as to provide the maximum deterrent to wrongful dismissal.

Remedial limitations are not, however, the most fundamental ground for discounting the law of contract administered by the ordinary courts as a source of protection for faculty status rights, including the right to academic freedom. To be sure, if the university, in patent violation of contract terms or obvious disregard of statutory requirements, dismisses a faculty member, a court in dealing with the problem should confront no novel problems. Interpreting contracts or statutes and finding objective facts are the ordinary grist of the judicial mill. That grist may in certain circumstances be sufficient to satisfy the faculty member's need for protection. In many instances, however, it cannot do so.

As I have suggested, the quality of performance of a faculty member in his central roles of teacher and scholar properly remains subject to scrutiny, even after his formal probationary period has ended. If that quality is found critically deficient, he should be subject to disciplinary action, including dismissal, in full accord with his contract rights. When internal university processes have produced a conclusion that such a sanction is warranted, the ability of any court in a contract action or otherwise to provide a substantive review of that conclusion must be doubted. The standards or norms germane to the sanction are those of the academy; the ultimate operative facts are subjective and judgmental. The central question is whether the performance of the faculty member has fallen critically short of the standards of teaching and scholarship which the university has set. That is a question which few judges, if any, would feel competent to consider and answer. My own view is that they should not be encouraged to do so.

The utility of the contract action, therefore, seems to me limited to instances in which the university authorities have imposed sanctions in disregard of internal procedures, as in denying a required hearing, or those in which it makes no effort
to legitimize the sanction by reference to accepted standards for faculty discipline. We must recognize, of course, that impecable procedures do not guarantee a fair and decent result. Natural justice or due process cannot eliminate the hazards in unduly vague grounds for discipline or in grounds not functionally relevant to the quality of teaching and scholarship. Nor does procedural nicety excise the risk that critical judgments will be distorted by political pressures, avarice, ideological inflexibility, or other bias. The remedies for those ills are not to be found in the courts. They must be developed within the university community itself.

Another body of general law might in certain instances be usefully invoked in aid of academic freedom: that is, the remedial writs and the doctrines determining their availability and effect that were developed at common law for controlling public officers and agencies. We have neither the time nor the need for an extensive discussion of the subtle mysteries of English administrative law and its African progeny. I shall not dwell on the technical distinctions among the so-called prerogative writs, though it is clear that these, reflecting their historical antecedents, still influence the circumstances of their availability. I shall seek a broader perspective which may enable us to assess the limited, but important, contribution that administrative law doctrines and remedies may make in preserving the integrity of the university’s mission and the academic freedom of its faculty.

The central function of administrative law is to permit a judicial determination whether rules promulgated by subordinate governmental agencies are congruent with the higher norms provided by a constitution or statute and, in turn, whether the actions of executive officers fall within the scope of the powers allocated to them by constitution, statute or subsidiary legislation. The essential test applied by the courts is whether the power exercised is ultra vires. In the simplest and probably most common case the court is called upon merely to interpret conventional legal sources that allocate powers and, against the resulting interpretation, to determine whether the challenged rule or action can stand. In some instances the standard of judicial judgment may be more amorphous, however. Arguably an administrative rule, act, or decision within the scope of apparent powers may in certain circumstances be so unreasonable as to be ultra vires. It has been asserted as well, by one eminent authority, that an administrative body to which a power of decision has been committed may be compelled by a court to give reasons or more nearly adequate reasons for its decision.

Here, however, I would direct your attention primarily to another requirement frequently imposed by the courts under the
broad ultra vires doctrine: that is, the procedural safeguard of a fair hearing for one whose interests would be seriously affected by an administrative action or decision.

I have suggested earlier the crucial importance of the procedures followed in imposing discipline on faculty members and, to a limited extent, in determining the legitimacy of a decision not to renew an appointment at the expiration of its term. I have urged, therefore, that the university statutes set out clearly the required procedures, including therein a fair hearing for the affected faculty member. If this is done and the procedures are not followed in the imposition of a sanction, such as dismissal, the ultra vires doctrine applied by the courts can provide the ground for invalidating the sanction. Even if the statutes are not sufficiently explicit on procedural safeguards, however, I would not regard the courts as disabled. Utilizing the ancient common law writ of certiorari, the courts often have insisted, even in the absence of a requirement expressed in statute or regulation, that administrative agencies exercising judicial or quasi-judicial powers adhere to what are thought to be the standards of natural justice. These standards include many of the safeguards of a fair hearing which I have enumerated.

I should take brief account of two possible objections to administrative law review of university disciplinary proceedings and specifically of the application to them of the standards of natural justice. The first of these can be disposed of summarily, I believe. It is that the prerogative writs like certiorari, which are most characteristic of administrative law review, properly issue only against agencies exercising statutory powers, that is, powers created and assigned by a statute in the sense of a parliamentary Act. This view with its sound historical roots has been reasserted fairly recently by Professor Wade as a basis for criticizing certain English decisions in which prerogative writs were sought against universities created by royal charter. Two responses, summarily stated, adequately meet this objection. The first is that the various African universities are, in fact, statutory bodies. They are in no sense private; they are created, empowered, and funded by the State. They exercise functions of an executive, legislative, and in some instances judicial character, allocating and withdrawing perquisites quite comparable to those dispensed by government in other contexts. In my judgment, therefore, the same body of norms and remedies invoked by the courts to channel and control the activities of other instrumentalities of the executive arm of government should be applicable to the African universities.
The second response to the objection abandons legal technicality and stresses the substance of fair play. It may make little difference whether the courts respond to complaints against procedural unfairness by issuing prerogative writs or by the use of declarations, injunctions, or damage actions. While criticizing what he regarded as over-extended use of the writs, Professor Wade has pointed out that the "twin pillars" of natural justice are statute and contract. If the absence of a statutory source of authority makes the use of certiorari or mandamus inappropriate, contract enforced through other remedial devices may impose an obligation to provide a fair hearing. Contract may not be the only legal basis for analyzing the relationship between a university and a member of its faculty; but it surely is an available one. If it is to be used as the ground for asserting a judicially enforceable claim to procedural safeguards, such as a fair hearing in disciplinary proceedings, my earlier suggestions concerning the desirability of fully developed university statutes and of fully articulated terms of appointment to faculty status take on added importance.

The second objection to the availability of administrative law writs for vindicating a faculty member’s claim to natural justice in disciplinary proceedings entangles us in one of the more impenetrable jungles of English and English-influenced law. Numerous English decisions have turned on whether the claimant to natural justice was a mere servant in a strict employment relationship or was the holder of a public office removable only for cause. Thus, in various cases a hospital doctor, a dock laborer, and university undergraduates have been classified as "office holders" who are entitled to be heard before discipline is imposed, while a specialist surgeon and a university professor have been labelled "mere servants" with no such entitlement. Professor de Smith's comment, after reviewing these cases, that "one could perhaps be forgiven for wondering whether the law was verging on the asinine" elicits a strongly sympathetic response. To what extent does such "asinity" characterize present English law and to what extent should it influence African judges in dealing with the claims of university faculty members to natural justice?

The only case of which I am aware which classified a university professor as a mere employee and, arguably at least in part on that ground, denied his claim to natural justice, was Vidyodaya University Council v. Silva, a 1965 decision of the Judicial Committee of the Privy Council. Interpreted most narrowly, that case did not concern itself with the propriety of the University's action or with the professor's entitlement, perhaps on the basis of contract, to a fair hearing before dismissal. Rather, it turned on the technical reach of certiorari
and did not find in the University a sufficiently public charac-
ter to warrant the writ. Even on that basis, however, its
reliability as an indicator of the current state of English
judicial attitudes is suspect. In the later case of Malloch v.
Aberdeen Corpn., which involved a teacher employed by a local
education authority, the House of Lords held that a dismissal
without hearing the teacher was a nullity. The speech of Lord
Wilberforce is especially note-worthy. He said, in par:

A comparative list of the situations in which persons
have been held entitled or not entitled to a hearing,
or to observation of rules of natural justice, accor-
ding to the master and servant test, looks illogical or
even bizarre. ... One may accept that if there are
relationships in which all requirements of the observ-
ance of rules of natural justice are excluded (and I
do not wish to assume that this is inevitably so),
these must be confined to what have been called "pure
master and servant cases," which I take to mean cases
in which there is no element of public employment or
service, no support by statute, nothing in the nature
of an office or a status which is capable of protec-
tion. If any of these elements exist, then, in my
opinion, whatever the terminology used, and even
though in some inter partes aspects the relation-
ship may be called that of master and servant, there
may be essential procedural requirements to be obser-
vied, and failure to observe them may result in a dis-
missal being declared to be void.

With specific reference to the Vidyodaya University case, Lord
Wilberforce continued:

... I must confess that I could not follow it in
this country in so far as it involves a denial of
any remedy of administrative law to analogous emplo-
yments. Statutory provisions similar to those on
which the employment rested [the University consti-
tution and statutes] would tend to show, to my mind,
in England or in Scotland, that it was of a suf-
ficiently public character, or one partaking suf-
ficiently of the nature of an office, to attract
appropriate remedies of administrative law.

The legal status of the various African universities is
analytically indistinguishable from that of Vidyodaya
University, and it is to be hoped that African judges, as
relevant cases may arise, will find persuasive these views of
Lord Wilberforce.
In summary, the courts have, I believe, a basis in the standards and remedies of administrative law for scrutinizing university affairs in important respects. They can inquire whether actions taken by external authorities and university officers and bodies fall within the powers allocated to them by law and can insist that basic procedural fairness be maintained in disciplinary proceedings. We must recognize, of course, that the ultra vires doctrine will not enable the courts to assure that university constitutions, statutes and regulations, or the actions of university authorities taken under them, are good or necessarily functional to the expected mission of the university. The courts at most can strike down as invalid the rule or action that exceeds the legal power of the promulgator or actor. If the power granted is too broad or is directed toward inappropriate ends, the remedy, if any, lies at the national political and legislative level or within the university's own legislative process. Thus, the administrative law enquiry permitted to the courts by the ultra vires doctrine is limited but, I believe, important. Preservation of the Rule of Law is as important in the university as in any other sphere of state power.

Nor should the safeguard of a fair hearing in disciplinary proceedings, which I have stressed, be discounted as mere procedure. All of us recognize, of course, that even the fairest hearing can result in an unjust decision, particularly if the substantive norms being applied are themselves unjust. Furthermore, even a hearing satisfying all of the effective demands of natural justice does not provide an absolute guarantee against the intervention of bias, or influence on the decision from inappropriate or irrelevant criteria. A fair hearing for the faculty member, whether voluntarily provided within the university or compelled by the courts, will not, therefore, fully safeguard his academic freedom from threatened sanctions. Much human experience throughout the ages, however, supports the observations of the late Justice Frankfurter that "the history of liberty has largely been the history of procedural safeguards," and of Professor A. L. Goodhart that "In... three words 'the fair trial' we can sum up the outstanding contribution that the common law has made to civilization." Fair procedure begets sound substantive norms; it nurtures rational decisions and decent, humane actions.

In Ghana, Kenya and Zambia, the foregoing analysis of the relevance of administrative law to university affairs has, I believe, current applicability. We must recognize, of course, that in each of these countries judicial review of administrative action can be excluded if the empowering legislation makes action
entirely discretionary, conditions it on purely subject criteria, or expressly bars access to the courts. This will be true unless the claim for judicial review is based on constitutional grounds, as is still theoretically possible in Kenya and Zambia where constitutional guarantees of fundamental rights remain theoretically operative. With respect to administrative law scrutiny of university actions, Nigeria, for two quite different reasons, again may be the deviant case.

The first of these reasons need be treated only briefly. Since all of the Nigerian universities are structured and function now in some measure under Decrees or Edicts, and since any action against a faculty member or university body which would be relevant to our present concerns presumably would be by an instrument made under such Decrees or Edicts, the courts at present are seemingly blocked from considering or ruling upon the validity of such action.

The second reason involves what may well be a permanent feature of the structures and governance of Nigerian universities, the special role of the Visitor. As we noted earlier, the Visitor has been given by express legislation, or derives from the common law functions of the office, an extensive power to hear complaints and grievances arising within the university community. Historically the English courts have deferred in substantial measure to visitatorial jurisdiction and have refused to intervene in what they classified as domestic disputes. These guiding attitudes were well-defined in the seventeenth century. They have been reasserted in relatively recent decisions of the English courts and approved by scholarly commentators. More importantly, they have been embedded in the law of Nigeria by the decision of the Supreme Court in University of Lagos et al. v. Dada.

We must, therefore, accept that as long as visitatorial jurisdiction exists, disputes and grievances within the Nigerian universities will make their way only with difficulty to the courts, whether judicial scrutiny is sought on the basis of the law of contract or administrative law. While the path to the court house is narrow and hazardous, it has not been closed completely, however. Numerous decisions of the English courts over many years establish certain avenues to judicial oversight even in the presence of visitatorial jurisdiction. Since that jurisdiction is limited to domestic disputes, that is, those between a member and other members or the institution itself, it seems quite arguable that if faculty discipline has resulted in dismissal and termination of membership, the dispute would be no longer strictly domestic and access to judicial review would be facilitated.
A number of other legal doctrines and rules define the potential for a continuing judicial role even though the dispute is deemed to be domestic. The courts may enquire and determine whether a matter properly falls within the Visitor’s jurisdiction and may issue a prohibition if that jurisdiction is exceeded. If the Visitor refuses to act at all or fails to perform any duty imposed by the law, he may be compelled by mandamus to do so. While not required to proceed in accordance with common law rules, the Visitor must comply with any procedures laid down by the charter or statutes of the corporation and he must provide a fair hearing to the parties concerned. Indeed, when violation of the principles of natural justice has been asserted, some recent English cases involving university members have shown less deference to visitatorial jurisdiction and have proceeded to a consideration of the dispute on its merits. In view of the substantial powers and functions of the Nigerian university Visitor beyond those of a quasi-judicial nature involved in hearing and deciding disputes, his own actions may be the basis of a grievance. If so, a potentially important role for the courts could rest on the proposition that the Visitor is subject to the second branch of the principle of natural justice, nemo judex in sua causa. The Visitor may not visit himself! It would seem that the proliferation of internal university functions of the Nigerian Visitor may actually imperil his role as a settler of domestic disputes. He has become in a sense less a "visitor" and more a "resident" of the university community. As such, the chances are increased that his own actions may be the subject of the dispute and he himself an interested party to it. If that is the case, the basis for judicial deference to visitatorial jurisdiction in resolving the conflict is substantially impugned. The historic principle that one may not be a judge in his own cause provides the courts a usable ground for their intervention.

We should not let our discussion of judicial oversight of university actions affecting the rights and freedoms of faculty members rest simply on the proposition that legal bases for it can be found. Two further questions merit brief attention and comment. Is judicial involvement in the affairs of the university community desirable? If it is desirable, how realistic is an expectation that the courts in the new African countries will exercise the jurisdiction I have suggested they have?

Candor requires the admission that I regard resort to the courts to settle intra-university disputes as a mixed blessing at best. Certainly any procedure that had the effect of transferring to the courts significant decisional powers in assessing
the quality of the teaching and scholarship of a faculty member, his honesty, objectivity, and competence—the only qualities I regard as germane to his faculty status—could be disastrous to both university quality and academic freedom. Only an academic tribunal holds promise of the necessary discriminating judgments, and that promise will be best realized through internal procedures to assure that all relevant factors are properly considered and weighed. If these processes leave some further need for review, I am quite clear that the courts, if involved at all, should restrict their roles to enquiries into powers and procedures. In my view, however, it would be preferable if the courts could be avoided entirely. Litigation corrodes the spirit of community, and any dispute within the university is best resolved by an individual or body that is specially sensitive to the values of a university. These considerations reflect some of the traditional justifications for an exclusive jurisdiction in a Visitor.

Can the Nigerian Visitorship, as now constituted, sustain that justification? Surely one must feel great doubt. The Head of the Federal Military Government is far-removed from the six universities he must visit. He is inevitably and appropriately sensitive to the interplay of political forces, distracted by the pressing affairs of state, and, insofar as I am aware, without the support of significant specialized staff to assist him in the performance of his visitatorial role. For these reasons, I would, with great respect, endorse the recent suggestion of Chief Rotimi Williams, a distinguished Nigerian lawyer, that the Head of State should delegate his visitatorial functions either to an independent Panel of Visitors or to the National Universities Commission. Such a body, staffed by outstanding persons with a keen interest in higher education, could make the Visitorship a strong buttress of university quality and academic freedom.

If the African universities and members of their faculties do look to the courts as the ultimate vindicators of their rights, what kinds of responses should we expect? As we move into the realm of prophesy, we must look to the past for guidance. Implicit in all that I have said is the proposition that the state has long since displaced the church as the principal source of hazard to academic and other freedoms. Consequently, the question I have raised about judicial protection of university and faculty rights readily can be converted into an enquiry concerning the vigor of judicial oversight of public administrative action in general. At this level, history is not reassuring.

The colonial legacy to contemporary African courts did not include a strongly perceived role of curbing executive excess.
As intimate parts of an essentially authoritarian administrative structure, the colonial courts largely saw their role in helping to preserve law and order and in servicing the needs of the commercial community. In general, I suspect that the practicing Bar shared this rather modest role-perception. This is not to say that the colonial courts made no use of administrative law in considering challenges to the actions of official agencies. The case reports would readily refute such an extravagant claim. The administrative law component of the received common law provided the seed and soil, but these were not cultivated by colonial judges and lawyers. One might have expected more vigorous cultivation by African courts after independence, when received administrative law was supplemented by the guarantees of fundamental rights included in many early constitutions. This has not been the case, however. Indeed, one careful analyst of legal developments in East Africa has suggested that since independence, though the number of administrative agencies has increased, the amount of judicial control of administrative action has decreased. Nor has the record of the courts in enforcing constitutional guarantees been more auspicious.

One should not too readily blame African judges for undue timidity. The colonial legacy of judicial attitudes, the increasing tendency of enabling legislation to vest in officials a broad, unreviewable discretion, the derogation clauses that characterize most constitutional guarantees, and the threat of constitutional or legislative override of unpalatable decisions, combine to keep the judiciary close to the core of its traditional labor. It is at least arguable that in the context of the new African countries various legitimate governmental concerns combine to counsel against authorizing the judiciary to beard the executive lion in his den. That, at least, was the conclusion of two scholarly advisers on the present constitution of Tanzania who preferred committing the oversight role to a Permanent Commission of Enquiry within the executive branch. In any event, I would not predict for the near future an active judicial role in protecting university interests against executive incursions, whether these occur directly or through the distortion of internal university processes.

It may seem appropriate to conclude this analysis of internal governance structures and certain aspects of the general law with an assessment of the current state of academic freedom in the African universities. I shall offer none, however. Lacking intimate familiarity with the present circumstances of several institutions, I think it preferable to await the assessments of African teacher-scholars. I shall say only that well publicized events arouse a sense of disquiet. To some of the older events
to which I have referred may be added the frequent closures of universities and the arrest, detention or deportation of faculty members. Aside from such specific occurrences, I would stress the potentialities implicit in the governance models I have outlined. In the final analysis it is for Africans inside the universities and outside to determine whether these events and potentialities are compatible with their own aspirations and with the mission they expect their universities to carry out.

I have spoken to you as one who has spent most of his life in universities and is deeply committed to their mission and to the freedom which makes that mission attainable. I believe that any realistic hope men can have for a better life is inseparably linked to the work of free, vital educational institutions. The development and preservation of such institutions, directing the vigor of their research, teaching, and critical analyses to the societies that support them, are especially needed in the new countries of Africa where recent political independence has still brought to most of the people painfully little respite from their three age-old enemies.

I have spoken also as a lawyer, though not, I hope, one unduly beguiled by guild loyalties. I do believe that the institutions of the law can help to shape and to secure the values we cherish, that they still justify the historic perception that wise restraints nurture ordered liberty. Therefore, I have suggested thoughtful exploration of the contributions which the developing law of the universities and the general law of the land can make toward securing that freedom of mind, expression, and action without which no true university can exist.

Realism requires a general cautionary conclusion to this discussion. The special freedom required for the fulfillment of a university’s mission is ultimately bound inextricably to the liberties of all. A university cannot long exist as an island of secure liberty in a sea of doctrinaire repression. If the bell tolls for the civil liberties of the ordinary citizen, it will toll ultimately also for those freedoms that sustain the mission of the university. If one surveys most of the world today, he can hardly escape the conclusion that in the eternal struggle to free men’s spirits, minds, and voices, the forces of fear and repression prevail with increasing frequency. Yet the struggle must and will continue. The university’s own commitment to an open society of the mind must join with, support, and nurture other libertarian tendencies in the society. I hope that from such a union of forces will emerge in all societies a broader and deeper understanding of the university’s mission and needs, and a firm dedication to its freedom as an inseparable part of the liberty of all. In few countries today, however, are the
universities warranted in assuming that their own internal values enjoy wide social understanding and support. Their efforts to develop these will succeed, if at all, only through sustained involvements in the society, not through responses to occasional crisis.

While I have stressed the possible contribution of law to the maintenance of the conditions of civilized life, including the basic condition of freedom, greater stress must be laid on a more fundamental truth: we deceive ourselves if we expect from legal institutions the protection of values that lack our own deep commitment, our willingness to assert and defend them. Legal norms and institutions are merely tools in human hands. The hands that shape and wield the tools determine the tasks to which they will be applied, the priorities among them, and the longer range objectives that the immediate tasks service. In any assessment, therefore, of the significance of law as a bulwark of freedom, we must determine who exercises the power to shape the law and the ends toward which it will be applied. Whether the value commitments of the people in general or of a select few guide the shaping and application of legal power, however, one inescapable conclusion emerges: it is a futile and naive hope to look only to legal institutions for protection against those who hold the power to make and administer the law. Those who may doubt that truth, and specifically its relevance to the university's claim to freedom, will find adequate demonstration of it in the dominant social attitudes, the values of the governing elite, and the legal institutions of the Republic of South Africa.

In warning the American people some years ago against undue reliance on judicial enforcement of constitutional guarantees to protect their fundamental liberties, a great judge observed that "a society so riven that the spirit of moderation is gone, no court can save;... a society where that spirit flourishes, no court need save; in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish." Whether Judge Hand unduly discounted the law of the Constitution and the role of American courts in preserving liberty and civilized decency, I do not know. But of this I am sure: whether we have in view the special community of the university or the general society, our ultimate hope for freedom, tolerance, and love of truth rests primarily on what lies in the hearts of men-- the governed and the governors-- and directs their daily lives. If those values are cherished, on them can be built legal institutions to curb caprice, control the truly deviant, and within narrow limits compel right conduct. Without the support and guidance of those values, the legal order with equal facility can snuff the flickering flame of freedom.
PART THREE

REFLECTIONS ON EDUCATION, UNIVERSITIES AND LAW

WHO WANTS A UNIVERSITY

[As student protests on university campuses during the late sixties became more numerous and in some instances more violent, alienation of the ambient communities, local and national, became more obvious. I decided to try to speak to this problem when I accepted an invitation to speak on February 20, 1970, to the Junior Chamber of Commerce Distinguished Awards Dinner in Terre Haute, Indiana. Perhaps because of the press of other matters, I did not prepare a full text version of what I planned to say but spoke extemporaneously from notes. Later, before memory faded, I dictated from my notes the following version of the talk.

While the audience in Terre Haute was entirely courteous and observed the usual amenities of such occasions, I sensed strongly a substratum of disagreement with, perhaps even resentment of, the views I expressed. A year later, on April 18, 1971, I spoke to the annual Phi Beta Kappa dinner in Marquette University, and on that occasion I developed much the same views I had expressed in Terre Haute. The University audience did not appear to find them any more congenial than they had been in Terre Haute.]

America believes in education -- or so the conventional wisdom holds. A survey of our relatively brief national history will readily confirm that this belief has been reflected strongly in national, state, and local policy. No country in the world has undertaken to provide opportunity over such a broad educational spectrum to such a large percentage of its population. From the early land grants to the contemporary GI Bill, an appreciation of education has been reflected in the national allocation of resources. The westward migration across this great continent brought public and private schools, colleges, and universities in its wake. To this early commitment, our own state university, which is now celebrating its 150th birthday, bears striking witness.

This belief in education and willingness to commit resources, public and private, to it is an integral part of that
buoyant optimism which has characterized the American dream. Our focus has been less on hazards than on opportunities. Problems were there to be solved. Sustained by the bounty of the continental expanse, we have usually assumed without serious question our ability to surmount all obstacles, to solve all problems in the course of developing a fuller and more satisfying life for virtually all. If it is fair to say that Progress, individual and social, has been the special American Deity, it is surely also fair to say that we have seen Education as her principal handmaiden.

In view of this historic connection between the American perception of problems to be solved and the contributions of education, one might suspect that on the threshold of the 70's the strengthening of our educational system would be near the top of our national priorities. For at few times, if any, in our history have our problems appeared so urgent and complex. The assumed verities and values that have channeled our national life and mobilized our energies are being called seriously into question. It may be, of course, that our current questions go not so much to our professed values as to the reality of our commitment to them. Even that form of question, however, probes the bedrock of our individual and national life. On a more particularized basis, the problems and issues of the 70's involve international peace, racial justice, and the quality of individual and community life in an increasingly crowded and polluted environment. Reflecting our historic experience and attitudes, I am sure most of us would agree readily that our success in meeting the problems and issues of the 70's will be intimately related to the vigor and imaginative responsiveness of our educational system.

In the few moments available this evening, I will not undertake to discuss broadly our educational system. Rather, I will look at that part of the system in which I have been involved through most of my adult life, that is, our universities. I would hope to avoid both the danger of calamity-howlng and the danger of complacency, in suggesting certain sources of concern as I look at our universities on the threshold of the 70's.

The conclusion is unavoidable, it seems to me, that public support for our system of higher education is in serious question today. If one considers the attitudes toward universities reflected in our national and local news media, the recurrent danger of state and federal legislation authorizing the intrusion of public power into the governance of our universities, and the increasingly attenuated financial support for many universities, it is difficult to maintain one's optimism. In the national budget for fiscal 1971, which the President recently submitted to the Congress, there is an effective decrease in the support for higher education. In our own state, the 1969 Legis-
lature appropriated for the Bloomington campus of Indiana University less for the academic year 1969-70 than was available for the preceding year. While state funds will be somewhat increased for 1970-71, the percentage increase is less than the percentage by which price levels have gone up in the inflationary spiral. The net result, therefore, is a continuing decrease in legislative support for the central campus of the University. One consequence of this limited support for Indiana University was a massive fee increase adopted by the Trustees of the University in May, 1969. This resulted, in turn, in shutting the doors of the University to many deserving students.

Diminished support for the University appears inside as well as outside the institution. One of the prominent features of internal university life in recent years has been student activity which reflects profound disaffection and alienation. Some suggestion of the scope of this problem is provided by a recent study prepared by the Urban Survey Corporation. This study reveals that between January and June, 1969, there were 292 protests at 232 colleges and universities. In the course of these protests 956 students were suspended or expelled, and 3652 were arrested. Even more revealing than the statistics, however, is the fact that most of these protests were focused on essentially campus issues, related to the structure, processes, and programs of the university or college itself. It also bears emphasis that most of these protests were not led by members of the so-called New Left.

The impact of these forces within the university and in its supporting community is well indicated in the latest report by President Nathan Pusey to the Board of Overseers of Harvard University. Dr. Pusey described the period on which he was reporting as "a dismal year." He spoke of "the erosion of confidence and trust and respect, the promotion of distrust and hostility, the injury done friendship, and the defeat of reason and love." Continuing, Dr. Pusey observed: "It is hard at the moment to see how a measure of retrenchment can be avoided. Costs continue to rise. Income will surely be harder to come by. Competition for federal funds will become more intense at a time when science and universities are both declining in public favor."

The uncertainties and relatively pessimistic attitude expressed by Dr. Pusey are surely not limited to Harvard University. It is against such a general background that I would raise with you this evening the question "Who wants a university?"

As I reflected on what I might say to you this evening and specifically on the question just raised, I was impressed strongly that the nuances of emphasis within the question can produce essentially different questions. One might ask WHO wants a university? Or who WANTS a university? Or again who
wants a UNIVERSITY? The first form of the question simply seeks the identity of the active agent. The second invites an exploration of what it means "to want", of that affective relation that can produce commitment and lead to an allocation of resources and moral and material support. The third emphasis involves the nature of the university as an institution and probes its differences from other models. This evening I would like to start with the third question and explore with you briefly the nature of the modern university. Thereafter, I will comment briefly on what it means to want a university and finally will seek to identify those who want.

The modern university is an extremely complex, multifaceted institution. Indeed, Dr. Clark Kerr, former President of the University of California, has suggested that the contemporary institution should not be called a university, but rather a multiversity. In seeking the essence of such a complex institution, one is reminded of the old story of the five blind men and the elephant. They were permitted to touch the animal and then asked to describe it. The first grasped the tail and declared that the elephant was very much like a rope. The second placed his hand against the great gray side and declared that the elephant was quite similar to a tree. And so on. With the university, as well, there is a grave risk of the partial view and consequent distortion.

Some people, contemplating the modern university, might find it simply a corporate impresario. They might say "A university is an agency for presenting to the public great sporting events, musical fetes, and other forms of public entertainment." If they adopted the style of genealogical identification characteristic of the horse-racing world they might say, "A university is by Burton Holmes out of the New York Philharmonic, delivered by the Chicago Bears." And certainly those who see the university from this perspective do not lack support for their view.

Others might say, however, that the university is predominantly a custodial institution, that its function is to keep young people off the labor market for a few years of advanced socialization. The university provides for them during this period a pleasant setting, a significant range of supporting amenities such as health care, and a vast array of essentially harmless activities. From this perspective the university might be seen as a cross between a medium security prison and a summer camp.

Still others might say, "No, a university is really like a license bureau. Its function is to train and certify people for many specific social roles, for example, doctors, lawyers, teachers, computer programmers, football coaches, army officers." If one with this view approached the problem of defini-
tion through illustration, he might find the analogue of the university in an amalgam of a school of driver education and the Bureau of Motor Vehicles.

As each description of the elephant provided by the blind men revealed a certain character or quality of the animal, so each of these views of the university rests on a number of its activities and its characteristics. In suggesting a somewhat different view of the essence of a university, I have no intention of rejecting or condemning as inappropriate any of the roles of a modern university, reflected in the partial views suggested. Many are highly useful to society. Nor have I any desire to argue that the university should be an introverted, socially irrelevant enclave. In stressing what seems to me the central role of the university, however, and in searching for a kind of ideal essence of the university, I seek to place any emphasis on a role or institutional purpose which seems to me to encounter the gravest risk of being lost or diluted in the complex modern institution. Therefore, in seeking this essence of the university, I would frame the question in this way: how many of its aspects and functions could be stripped away and still leave an institution deserving of the term "university"?

In responding to that question, I would offer a thesis for you to ponder. My thesis is this: in its essence a university is a community of scholars. Its members differ in age, experience, knowledge, insight, and wisdom. These variations in its membership make implicit in its function the teaching or transmission of a body of knowledge or insight. Nevertheless, all members of the university are bound together by and find their shared identity in a common commitment to truth, to probing the sources and limits of human knowledge, to testing continuously the body of assumed knowledge, and to developing new knowledge of man, of social groups, and of the physical world.

An institution so structured and committed can appropriately be called a university.

An institution of this character may undertake other socially useful functions and remain a university, if the other functions do not involve compromise or dilution of its basic character and commitment.

An institution which lacks this character and commitment is not a university, however useful a range of training or other functions it may perform.

May I suggest to you, very briefly, some of the implications I see in this thesis? First, I think it implies that, within the university, authority derives its legitimacy from its commitment to and its functional support of the process of expanding and transmitting the body of tested knowledge. There-
fore, the President, Chancellor, Dean, or Professor derives his legitimate authority not from his age, his status, or the eminence he enjoys throughout the world, but rather from the commitment on which he acts within the university -- the commitment to protect and support the processes of free inquiry and teaching. Second, all aspects of knowledge are within the purview of the university. No proposition, no received truth, no faith can claim immunity from the processes of test and challenge which are implicit in the essential function of the university. Third, the inevitable and indeed desirable consequence of the university’s success in performing this central function will be a continuing critique of individual attitudes and beliefs and social arrangements. Inevitably therefore, the relations between a university and its surrounding community will often be abrasive and tense, for the critique of truth is often disquieting. Fourth, this central function of a university can be performed only by voluntary participants in an atmosphere of freedom.

What does it mean to want a university of the kind I have suggested? It surely does not mean that an actual participation in the university is required. Many of our fellow citizens who have never attended a university and have no thought of doing so may nevertheless appreciate the role of a university in our society and want to preserve it. Nor does wanting a university in this central sense require that one reject all of the modern university’s practical, applied or operational activities. Many of the students on our university campuses who are there primarily or even exclusively for training toward some specific social role may nevertheless want a university of the basic kind I have described. Wanting a university rests on an appreciation of the unique contributions such an institution can make to the continuing improvement of the quality of individual and group life. And wanting such a university goes beyond merely a willingness to tolerate it, a mere disinclination to oppose or seek to weaken it. Wanting a university involves active support of it, support in both moral and material terms.

May I turn now to a third emphasis involved in our primary question: WHO wants a university?

The most obvious answer might appear to be the students, for they are appearing on our college and university campuses in ever increasing numbers. I strongly suspect, however, that these numbers are in many ways deceiving. A great many of our students today are not on university campuses because they want a university or want to participate in one. Rather, they are moved by an extremely powerful set of compulsions. Foremost among these, of course, is the Selective Service system which confronts our young men with the choice of continuing in school beyond secondary level or entering the military service and participating in a war which large numbers of them condemn as un-
just and contrary to our national ideals and interests. Even if draft pressures were removed, however, there would remain potent parental and social pressure for the student to move on to a college or university. The status value of a university diploma, the tendency to stigmatize the student who does not go on to a college or university as a "drop-out", and the tendency to downgrade employment which does not ordinarily contemplate a university background, are in my judgment some of the least defensible aspects of our strong social pressures toward "upward mobility". Finally, there are significant and, it seems to me, often functionally unjustifiable compulsions from the employment market which serve to force young people into colleges and universities. I think employers would be well advised to consider carefully the criteria used in selecting their employees and to try to determine whether the conventional inclusion of a university degree is in any significant sense justified by the contemplated tasks to be performed.

This set of compulsions has caused President Kingman Brewster of Yale University to speak recently of "the involuntary campus." President Brewster observed: "My elders and betters, my peers and contemporaries, are backed to the wall, then driven up the wall, eventually driven up and over it, by students who are often fundamentally anti-intellectual; who are impatient with learning and research; who think there are social ends other than the advancement of learning which a university should serve; and who see no reason why the majority vote of students should not dictate what those ends are and how they should be pursued." This alienation from the central role and function of a university, which President Brewster has observed in many students, becomes much more understandable if one recognizes, as he did, that they are in a university involuntarily, responding to external pressures and not to their own interests and motivations. If a significant segment of our student bodies is coerced into universities, it is not surprising that many students are prepared to commit their primary energies to disruption and efforts to change the university so as to make it resemble more closely the sort of institution which may claim their allegiance.

I surely would not want to leave the impression, as I am confident Dr. Brewster did not, that our student bodies are monolithic, that they reflect generally a rejection of the central role and purpose of a university. One may easily identify a number of components in any student population. To be sure, a number of students reject the modern university in virtually all of its aspects and seek actively to disrupt or even to destroy it. In my judgment, however, this group is relatively small. Other students, rejecting what they conceive to be the dominant commitments of the modern university, seek to change it but only by deflecting the university to their own ideology and program. They demand a socially active university but only if it
is active toward a particular ideologically defined goal. I suspect that this group is larger than the first mentioned but is still only a small minority. Other students want and indeed seek a university true to the essential purposes I have described. They see in our present universities, however, only uncritical support of and service to a society they find in many ways hypocritical, corrupt, and unjust. They demand that the university's commitment to truth, to expanding the body of reliable knowledge and transmitting it, be channeled into a continuing critique of society to the end of its improvement and enrichment for all segments. In my view, this group of students, relatively large but still a minority, is the group that needs to be encouraged and cultivated. Finally, a great many of our students accept the more peripheral training functions of the university and seek only its license or certification which for them is their ticket to the affluent society. I suspect that these students represent what President Nixon would call the "silent majority."

You may properly ask -- where stands the faculty? I think that in the faculty one may find an assured body of strong support for a real university. I would certainly not suggest, however, that such a commitment is unanimous. Many members of a university faculty see their role from the limited perspective of a job. Many faculty members in good universities have succumbed to the blandishments and pressures of government agencies, business concerns, and the general society which are able to accord to the faculty member economic and status perquisites that are most attractive. It is not surprising, therefore, that the dominant attitude among many faculty members is "Don't rock the boat; don't risk conflict with and criticism from the surrounding society by challenging, testing, refuting, and criticizing."

Finally, I would ask where stands the surrounding community. Does the general community want a university? I think it would be presumptuous for me to hazard an answer to that question, but I would suggest that you ask it and wait for the answer. Is the community willing to support an institution committed as a real university must be to a sustained search for truth? Does the community adhere to the faith that in the context of real freedom of inquiry truth will prevail? Can the community tolerate having its cherished assumptions, its assumed knowledge, and its traditional values challenged, tested, and perhaps refuted? Can the community respond creatively to the increased knowledge and insight a university can provide, so as to develop a society offering a better life for all citizens, a society less marred by the blight of racial prejudice, a society whose institutions do not serve to lock a segment of the people into the iron grip of poverty?

I do not know the answer to these questions, but this I do
know. If we are to build and preserve a free and decent society in this country, the central role I have ascribed to universities must be played. Our knowledge of ourselves, our group life, and our physical world must be refined and extended. I know of no institution other than our universities which offers hope of performing that role adequately. It is my hope that with the support of the general community we can develop increasingly voluntary campuses for universities committed to this central task, along with many other useful roles a university can perform. This is my hope and it rests on the faith which St. John tells us was stated so clearly by Jesus: "Ye shall know the truth and the truth shall make you free."

PHI BETA KAPPA ADDRESS--CLEVELAND OHIO

[The invitation to address the Annual Dinner given by the Cleveland, Ohio Chapter of Phi Beta Kappa to honor the outstanding graduates of Ohio high schools came at a critical time. The tragic killing by the Ohio National Guard of four unarmed students on the campus of Kent State University had just occurred. In my own University, the main campus in Bloomington faced closure by students who had presented to the University administration an extreme set of demands for political pronouncements and other actions. The speech I made on that occasion, on May 11, 1970, is set out below.

As I have reread this talk, even after the thirty-years interval since it was delivered, I feel acutely yet again the pain and anger the events surrounding it produced.]

I had intended to use this occasion as a focus for trying to analyze the alienation that we sense in our students on university campuses today. Why are they alienated? How do the students express their alienation? And how should we respond to it? I would have tried to analyze calmly our social and political malaise. I would have had something to say about the nature of universities as a limit to the response they can make to the problems of the day. I probably would have offered some conventional praise of the life of the mind. And, being conditioned by a lifetime in the law and in universities, I probably would have left with you not only praise of the satisfactions that the life of the mind can provide, but also of the order and tranquility in which that life flourishes.

As President Taft has suggested in his introduction, however, the times have passed me by. The events of the past two weeks particularly—the reckless expansion of the war in Indochina, the consequent agony of our young people, the tragic deaths of four students at Kent State University, and the developing crisis on my own campus, a campus that is tense, angry,
frustrated, but thus far non-violent--have deprived me, I regret to say, of that measure of repose and opportunity for reflection that might have produced a more calm and possibly a more penetrating presentation. I hope, however, that you will understand and indeed forgive my sense of inadequacy this evening in reflecting my own feelings while responding to the interests of Phi Beta Kappa. How does Phi Beta Kappa mourn? How does Phi Beta Kappa find tongue to express moral outrage?

I have known, like you, of death and mindless destruction in Southeast Asia, in Watts, Detroit, Newark, Cleveland, Chicago. And I have believed with Donne that indeed "no man is an island entire of itself," that "any man's death diminishes me," and that, therefore, I should not "send to know for whom the bell tolls." Yet confessing my own humanity, I recognize that events on our own campuses and particularly the events at Kent State University have brought home to me more sharply the tragedy of our time. For these are our own sons and daughters; these are the events that shroud our own hearths in mourning; these are the events that close our own classrooms. We are sustained, I am sure, by the hope that the deaths of these young people will help to redirect us, indeed to redeem us, and that they will not be in vain. My feeling is expressed well in a song of grief by Edna St. Vincent Millay which I would share with you:

I am not resigned to the shutting away of loving hearts in the hard ground.
So it is, and so it will be, for so it has been, time out of mind:
Into the darkness they go, the wise and the lovely.
Crowned
With lilies and with laurel they go; but I am not resigned.

Lovers and thinkers, into the earth with you.
Be one with the dull, the indiscriminate dust.
A fragment of what you felt, of what you knew,
A formula, a phrase remains, --but the best is lost.

The answers quick and keen, the honest look, the laugh, the love, --
They are gone, They are gone to feed the roses.
Elegant and curled
Is the blossom. Fragrant is the blossom. I know.
But I do not approve.
More precious was the light in your eyes than all
the roses in the world.

Down, down, down into the darkness of the grave
Gently they go, the beautiful, the tender, the kind;
Quietly they go, the intelligent, the witty, the brave.
I know. But I do not approve. And I am not resigned.
If they are to help in redeeming this society, the students at Kent State must be remembered, their names etched in our memories. Therefore, if I could, I would say to Allison Krause, Jeffrey Miller, Sandy Lee Scheuer, and William Schroeder: "Do not go gentle into that good night."

Yet we must not capitulate or abandon hope. In a time and in a society riven by violence and raw emotion, we must reassert the value and the power of the human mind guided by humane compassion. This is a difficult task today because of the profound alienation of many of our students, indeed many of our best students. On that phenomenon I would like to comment briefly this evening.

Two weeks ago, immediately after the extension of our Vietnam intervention into Cambodia, the students at Indiana University presented to the Administration a set of demands. May I read those demands to you?

1) That the University repudiate President Nixon's plans for Southeast Asia, and demand the immediate withdrawal of our troops from Southeast Asia;
2) That the University end its complicity in Southeast Asia and open the books of the Indiana University Foundation to supply information on government contracts;
3) That the University make a financial commitment to the Bobby Seale Legal Defense Fund; and
4) That the University bring the percentage of Black students at Indiana University into accordance with the percentage of Black people in the population of the State of Indiana.

It is easy to view these demands contemptuously, as reflecting an appalling naivete, perhaps peculiar to university students. One could point out, and with some justification, the extraordinary complexity of the university institution; the difficulty in finding one voice to speak for the university with authority and legitimacy on political issues; the fact that the university's funds are dedicated to educational purposes and cannot be allocated for other purposes, however worthy, in response to pressure tactics; the fact that the university is not able to correct instantly, even in its own educational programs, the historic injustices to Black people in this country; and the inappropriateness in the university community of the rhetoric of demand and pressure tactics. All of these responses would be, in large measure, legitimate, but these responses do not fully dispose. I would suggest that we look at these demands briefly as reflections of some of the sources and manifestations of the alienation of our students today.

What are these sources? First is a belief that our national policy is committed to an intervention in Southeast Asia that
can be justified neither by good conscience, prudent assessment of national interests, nor international law; that, consequent-
ly, our intervention there is evil, imprudent, and illegal, Sec-
ond is a belief that American universities have served frequent-
ly as willing partners in the implementation of that national policy. Third Is a belief that American justice, both distribu-
tive and corrective justice, has been and is being denied to Black Americans and other ethnic minorities, a view, I might point out, reflected recently—at least as a fear—by the Presi-
dent of one of our most distinguished universities. And fourth is a belief that the historic oppression of Black Americans is being perpetuated today by educational deprivation and con-
sequent political, economic, and social disadvantage.

I would ask those who quickly condemn the alienated, militant students, "Can you assert with honesty that these beliefs totally lack foundation; or that in fact we are doing what we should to erode whatever foundation they have?"

This partial listing of the sources of student aliena-
tion is disturbing enough within itself, but the grim catalog could be continued. Should we not add to it the progressive loss of individual identity in a mass, computerized, technological society? Should we not list the violence we have loosed, not only on disadvantaged people in this country and abroad, but on the environment in which we and our children must live? And should we not indict the lock-step educational system which suppresses creativity and too frequently commits intelligent and concerned young people to a dreary progression of courses, seemingly designed to assure only their uncritical admission into a fat and complacent society. I need not extend the catalog. It is as familiar to you as it is to me.

The burning issue today is not the source of the alienation of the young but the nature of the response we can and will make to it. In suggesting, very briefly, some directions for that response I speak not simply as a citizen, a political being, im-
portant though that status is. Rather, I speak especially as a man of the university who is deeply concerned with the nature of the response which will be made in the university context.

First, let me make a fundamental position quite clear. I do not support the politicization of the university, in some of the current uses of that term. Rarely, if ever, can the diverse and complex elements that comprise a university find a single voice on political issues. Even if that were feasible, however, I would deny its legitimacy. Neither university administrators nor faculties have a valid political mandate, and any effort on their part to commit the institution to an activist political position or program is an abdication of their responsibility to maintain an open context for inquiry, teaching, learning, and criticism of all positions and programs.
I state this fundamental position and conviction as the basis for rejecting the urging of many activist students and faculty that the universities issue political statements and commit themselves to specific political action programs. I state it also as the underlying premise of a criticism of what many, indeed perhaps most, of our universities are and are doing today. I do not believe we can with honesty reject the demands of the activists on the ground that we must not compromise the value-neutrality and objectivity of the universities, unless we can demonstrate our possession of those qualities. And I doubt our ability to do that. Too many colleges and universities are now too deeply committed to functioning as uncritical service agencies of a society that desperately needs penetrating study, criticism and change. Our first step, therefore, must be to reclaim for our colleges and universities their ancient and honorable role as seats of free inquiry, teaching, and learning. If we rededicate ourselves and our resources to the central non-negotiable function of a university—the unrelenting and uncompromising search for truth—we need have no fear that our roles as educators will be passive, complacent, or uncritical, in a time when our students expect us to respond relevantly and creatively to their efforts to achieve a peaceful and just society.

My central thesis tonight is that the legitimate demand of our alienated students is not an abandonment of our role as educators but a return to it. This return would, I believe, be characterized by a renewed interest in teaching—by teaching that is not limited to the efficient conveyance of information, but teaching that seeks to stimulate the student’s own creativity and to discipline his critical faculties. Such teaching would require more attention to and respect for the individuality of each student, the individuality of his interests and his needs. Such teaching would recognize that it need not take place always in a classroom. And such teaching would indeed address itself from a variety of disciplinary perspectives to the problems of today.

My stress on teaching is not intended to downgrade scholarship. I believe, however, that redefinition and reorientation of scholarship are called for. Too often our academic reward system provides incentives to the teacher to slight his students in order to produce publications in which not even the liveliest imagination could find a contribution of new knowledge and insight. True scholarship, which is the worthy companion of teaching in the catalog of functions of the academic, need not result in publication. It can serve an essential purpose if it keeps teaching vital and relevant and if it contributes to a constant retesting of the transmitted tradition in the light of advancing knowledge.
I have spoken primarily of responses to the student alienation by educational institutions and by individuals in their capacities as teachers. May I conclude with the suggestion that we should not find in our functions as teachers a release from our general responsibilities as citizens, as active participants in the political process. I do not argue for a merger of these roles; indeed they must be kept distinct. The faith, the convictions, on which I act as a political being have no entitlement to being taught as demonstrable truth in my classroom. As teachers, of course, we cannot exclude entirely our own value choices from our contacts with our students. But we are obligated to distinguish with honesty — to the very best of our ability — that which we offer to our students as knowledge from what we advance as our own belief, our own political faith. And both our knowledge and our faith must be subject constantly to the searching scrutiny of critical minds.

Student alienation presents a profound challenge, not only to our educational system, but to our polity. We will not meet effectively the alienation of our students merely by changes in the university, urgently needed though those changes are. Until our young people see a reordering of political values and priorities, that alienation will persist. The end of the war in Indochina, an unrelenting attack on racial injustice, the lifting of the heel of poverty from many of our fellow citizens, and the cleansing of our environment are essential goals. To these ends revitalized colleges and universities can contribute greatly. But the power of decision and action does not rest with them. For that reason I urge my faculty colleagues and my students to express their concerns and commitments directly in the political process.

This is a time of deep crisis for our universities, and for our society. The protest of our students is not the cause of that crisis. Indeed, their protest gives me my greatest hope that we can move through that crisis to a more humane society.

But, ladies and gentlemen, hope founders when anguished protest finds no response. The foundations of what we have claimed as the American dream, if uncovered and exposed to light, would support a response in affirmation of ordered liberty, humane concern for the dignity and well-being of all men, and decent peace. Will we respond? Or will we merely await the full rage of the gathering storm?

Tonight we honor young women and men who have maintained a commitment to academic excellence in difficult and dissatisfying times. That kind of commitment must be nurtured by hope: that the ugly blotches of racial and ethnic prejudice in our individual and communal life will be replaced by appreciation of the richness of diversity, that opportunity will always meet effort at least halfway, that even condign punishment will be
tempered by compassion for human frailties, and that the violence in our national and international life will be rejected in favor of reasoned accommodation of interests. Tonight we fear and grieve, but beyond the night must wait the dawn.

COMMENT: STUDENT PROTESTS AND THE UNIVERSITY IDEAL

Immediately after the Cleveland speech I returned to Bloomington, for I was deeply concerned over developments there. I cannot recall whether the students had already begun the tight blockade of University buildings they had threatened if their demands were not met or whether the threat to close the University was still pending, awaiting the response of the administration. Immediately after my return, about 10 p.m. one evening, I received at home a telephone call from Keith Parker, the President of the University student body, a young Black man who had declared himself to be a Black Panther. He asked if I would come to campus and talk with him and other student leaders in the Student Government offices. I agreed, of course, to do so.

I arrived at the meeting shortly after 10:00, and without much in the way of preliminaries discussion began. No other faculty or administration member was present. The conversation continued through the night. I did not need to tell the students my views on the Vietnam conflict, minority rights, etc., for they knew already that we shared many of the same views. My concern was to get them to understand my conception of a university, so that they might deal appropriately, as I saw the matter, with the core issue, Who can speak for a university and on what subjects. I emphasized the diversity that can and usually does characterize a university community, including both students and senior members. I suggested that the administrative officers and appropriate faculty organizations could speak legitimately and with full authority on some matters, but that on political issues like those on which the students were demanding statements of a "University position," there simply was no University position, and pronouncements by the President or others in the administration would appropriately be seen by most people, including myself, as lacking legitimacy, and therefore as simply a spineless capitulation which could add nothing useful to the resolution of the great issues facing the country. Around these core positions we talked through the night, and I slipped into bed shortly after dawn by no means certain whether I had had any effect. Sometime during the day, however, the students withdrew their demands and ended the threat to close the University.

In a sense this development was not surprising to me. In general, the student protesters at Indiana were not of the
"crazy" variety. I had seen with sadness many fine faculty members fall into line behind any position militant students took, not out of conviction, but out of a kind of fear that, if they rejected the student view, a rapport essential to effective teaching would be lost. That was not consonant with my view or my experience. Students surely wanted their views to be heard and addressed with the sort of respect one accords worthy adversaries who are entitled to serious consideration, perhaps agreement, or rebuttal on the merits, not contemptuous dismissal.

On more than one occasion, students in the Law School would come to see me, vehemently protesting some policy or position that I or the faculty on my recommendation had adopted. My standard approach was to sit down with them and explain, as best I could, the factors that had led to the decision and to discuss their views. Time after time, the conversation ended with students saying calmly something to this effect, "We don't like the decision any better now than we did when we came in, and we would prefer to have it changed or abandoned. But it helps to understand what brought you to the decision you've reached." We never had a disruptive protest by law students, and when student activists in the general student population decided to take their protests to the point of closing the University, they were careful to leave the Law School alone. Our classes continued without interruption for those who wanted to continue their studies. We on the Faculty made it clear, however, that, while no standards would be compromised or requirements relaxed, we would be as helpful as possible in assisting students, who as a matter of conscience put protest activity ahead of their studies, to catch up.

There was spinoff from my all-night session with the students that had a touch of black humor about it. I became aware that one member of the University Board of Trustees "ate me for lunch" at every meeting of the Board. I knew this member, a lawyer, and rather liked him. So I contacted him, indicated that I was aware of his criticisms of me, and asked if he would meet with me to inform me of the specifics of my actions that he thought inappropriate and deserving of the criticism he was offering. He was reluctant to meet but finally agreed to do so.

There were several counts in his bill of particulars, not all of which I can recall, but among them were the following which were typical. First, I had embarrassed him personally among his Southern friends by my public opposition to the confirmation of Judge Carswell whom President Nixon had nominated for a seat on the Supreme Court. I expressed my regret over any discomfiture I had caused, but pointed out that I had always tried to make clear in any statement I made that I was expressing a personal, not a University or a Law School, view. I recognized that we differed on the Carswell issue, but I pointed out that when I was offered my University position, no one had indi-
cated that my acceptance involved relinquishing any prerogatives of citizenship.

Another objection was that I had permitted Michael Tiger, a lawyer toward the Left of the political spectrum, to speak in the Law School. I pointed out that I had not selected Tiger, but that when the Law Review editors selected him as the speaker at their annual banquet and asked me to assist in extending the invitation and encouraging him to accept, I had agreed readily to do so. I then asked the Trustee if it was his view that I should impose and implement a "speaker ban" in the Law School, as some universities had attempted to do and, in the case of public institutions, had been overridden by the courts on constitutional grounds. I received an immediate and somewhat embarrassed denial that the Trustee was urging me to move in that direction.

Another criticism, which prompts my mentioning these discussions here, was "You talk with radical students." I had said nothing publicly about my all-night session, but I'm sure the Trustee knew of it and that it was an illustration of my objectionable conduct. I reacted to this criticism more in amusement than annoyance. I simply said that I could only plead guilty to the charge, adding that in my view the University would have had far fewer problems with student protests if other members of the administration also had been inclined to talk with radical students.

Against this background of my years at Indiana University and specifically of the student activism and protest there and at other universities, I want to conclude this comment with an attempt at perspective. Preliminarily though, I must recognize explicitly the hazards of generalization. Campuses differed, often radically, in the student leadership that had great influence in selecting focus issues, in determining what resort would be made to disruption and criminal activity, and in resisting, even rejecting, rational processes in promoting or responding to efforts to deal with protest activities. Only the deaf, the dumb and the blind could have failed to recognize that protest activity at Indiana University differed profoundly from what appeared from time to time at Columbia, Wisconsin or Yale. At the same time, my experience at Indiana left me with the conviction that some techniques of student protest were common, that some administrative and faculty failures in conflict management were recurrent from campus to campus, and that some attitudes and actions, if used by those in positions of institutional authority, never lost their utility.

In several of the talks included here I have tried to sketch the concerned students who resorted to protest activities; I need not repeat that. I would not want my earlier comments to indicate, however, that I had some idealized image of the student protesters. They were young, immature, often ex-
tremely naive, and a good number were delighted if their use of crude language, well laced with four-letter words, succeeded in shocking their elders. Nevertheless, most student protest didn’t fall into a "nursery-adolescent" mode. If the sketch of protesting students I have offered is generally near reality, it does provide a set of clues to forms of response by faculty and administration that could be helpful. I will try to be more specific in identifying those clues, as well as in describing some of the techniques for mobilizing protest sentiment often used by students.

12. For a while an activist group of Indiana students put up a protest broad sheet called the Spectator, which one of the editors, a graduate student in political science, brought to my office. It was for sale and I asked my splendid secretary, Hazel Pennington, to buy each issue for me. After firmly expressing her disapproval and scolding me for wasting my money, she complied. After a time, however, I told her that she could tell the student not to bother bringing the paper to me. When she rejected the next issue, I was engaged and could not see him. Later, he wrote to me. His delight was palpable. I had been found out, had relied on my secretary to do my "dirty work." He continued: "I assume you object to what you once termed 'gratuitous obscenity' and that you share the common hang-up of people in your age group about sex." I quote briefly from my long responsive letter.

"If I may borrow the now conventional demand of students for relevance, I would suggest that I have rarely seen a publication less relevant to the troublesome issues of our time and place than the Spectator. As a matter of taste, I might occasionally be aggrieved by the gratuitous vulgarity the Spectator has often shown. On that ground, however, I would not have considered terminating my modest support of the publication. I can accept the vulgarity in the sense that it does not really disturb me; what I find it more difficult to accept is the utter, indeed the cosmic, triviality of the publication. Increasingly over recent weeks the Spectator has reminded me of a small, soiled child having a tantrum on the floor. By stopping my purchase of the paper I simply wanted to reflect my view that the tough, agonizing problems of achieving a truly open, just, and decent society deserve more mature and relevant attention from a publication which pretends to be aimed at a University audience."

I expressed my regret that I had not been free to talk with him when he brought the paper but added, "In the near future when it is convenient for you, I would be pleased to have you drop by the office so that we can discuss the Spectator further, if you care to do so." I never saw the young man again!
Student leaders usually tried to engage the support of individuals and groups outside the university by tying their protest to concerns and grievances that might be national in scope, but often were quite local: an increasingly unpopular war in Vietnam, the ugly face of racism and poverty, or simply the impingement of the university's development of its physical plant on the surrounding community. While there seems to be little doubt that student protest fed the growing alienation of the American people from the fiasco in Vietnam, I lack any strong impression that it eroded significantly the general community's view that most student protest reflected only the Angst of the over-advantaged offspring of the middle class. In the universities' own search for moral support from the broader community, they probably had no greater success than the student protesters. I have noted in some of the talks included here the recurrent tensions between the surrounding communities and universities that were performing their critical, essential functions. I have no impression that any university's handling of its student protests eased those tensions.

Leaders of student protests not only tried to expand their "constituencies" outward; within the institution their usual objective was to graduate, as soon as possible, the focus of protest to the level of eyeball-to-eyeball confrontation with the highest level of university authority, sometimes the governing board but more frequently the President. If this effort succeeded, it lent a grander significance to the protest and personalized the "enemy" in a figure or group often remote and little known, and perhaps lacking any of the loyalty, warmth, even affection, with which many faculty members and lower level administrators might be regarded. I always thought the wise President resisted this effort, encouraged those lower in the administrative hierarchy and in the faculty to engage students in a constructive dialogue, but reserved direct Presidential involvement, if any, for a late stage when the President might intervene as a conciliator, a peace-maker.

Stated bluntly, my view was that students were given an unearned bonus if the President responded immediately to every challenge. As I once said, there was no reason to haul out the elephant rifle to shoot every mosquito. Less crudely put, my basic attitude rested on the simple insight that it made good sense to deal with problems at the lowest responsible level.

This insight has its roots in pragmatic calculations of the realities of the complex, contemporary world, but those roots reach back deeply into the natural law tradition of Europe, with its insistence on individual worth and responsibility, as well
as into the congenial soil of 19th century English Utilitarianism. An influential contemporary manifestation of the view has emerged in the current debate in Europe over the development of supra-national communities and, ultimately, one Community; there it is referred to as the principle of subsidiarity.

While its roots are ancient, the recent introduction of the principle of subsidiarity into contemporary European theorizing about governmental design is usually traced to Christian, specifically Catholic, social theory, particularly in the 1931 Papal Encyclical *Quadragesimo Anno* issued by Pope Pius XI, where the principle is expressed as follows:

...just as it is wrong to withdraw from the individual and commit to a group what private enterprise and industry can accomplish, so too is it an injustice, a grave evil and a disturbance of the right order, for a larger and a higher association to arrogate to itself functions which can be performed efficiently by smaller and lower societies. This is a fundamental principle of social philosophy, unshaken and unchangeable. Of its very nature the true aim of all social activity should be to help members of the social body, but never to destroy or absorb them. The basic premise is quite clear: what can be done by the individual or smaller associations should be done there; the creation of larger or "higher" associations should await the determination that they are needed for the accomplishment of social tasks beyond the capacity of those closer to the individual.

This version of the basic insight, stated as a principle of social philosophy, is the form most clearly relevant to the problems of university administration in dealing with student protest. It might be noted, however, that in the 1970s and thereafter the subsidiarity principle was elevated to the status of a juridical norm in the developing European Community, finding fullest expression in the Maastricht Treaty which has four explicit references to subsidiarity. The primary one, Article 3b, provides in part as follows:

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only

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if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.\textsuperscript{14}

As a guide to social organization and activity, whether in private associations or governments, the basic ideas underlying the principle of subsidiarity have obvious merit. They provide guidance in the creation of new structures or institutions, in their empowerment, and in the exercise of discretion relating to the exercise of power and authority actually possessed. A university is not and cannot be a democracy embracing all of its members, including students. But many of the values that characterize a political democracy such as participation in critical decision-making can, with reasonable adaptation, be made features of university life. The closer officials who make or implement university policy, whether teachers or administrators, are to those being governed or only affected by it, such as students, the more effective the intake mechanisms for achieving the contributions, understanding, and acceptance of all are likely to be. Supporting these values may also be considerations of efficiency or effectiveness. Official actors closest to the operating level may be not only better informed of the relevant facts of the problem or need; they may also have a greater interest in solving or meeting it.

I had the impression from a distance, during my years at Indiana, that one of the most skilled practitioners of subsidiarity in the context of university protests was Robin Fleming, President of the University of Michigan. I suspect, without knowing, that sometimes faculty, deans and other mid-level administrators at Michigan may have felt that President Fleming left them too long twisting alone in the wind of conflict. If my basic view is right though, that is where they should be in the initial phases of campus conflict.

One of the hardest decisions university authorities had to make was when, if at all, to bring in the police. I include in this issue the use of the university's own police force. While efforts have been made in some universities in recent years to move toward better educated police officers, more understanding of and sympathetic toward university values and processes, in many places the personnel of the university's force does not

\textsuperscript{14} Other references to the principle of subsidiarity appear in the Treaty in the Preamble, as well as in Title I, Articles A and B.
differ significantly from that of the surrounding community. Certainly, at Indiana University, I had no greater confidence in the attitudes and discretion of our own police officers than I had in the city police or the sheriff's deputies. 15

If serious criminal activity has occurred or is threatened, there is no question, in my view, of the necessity to resort to the criminal justice system. The fact that a mathematics building that is bombed is on the campus of the University of Wisconsin should give the perpetrators of this crime no claim to immunity from the criminal law on the ground that their act was a protest against an indefensible war. On the other hand, student protests often involved activities such as sit-ins, occupations of buildings, tight picketing, etc. which could be fitted into such violations of law as criminal trespass. In dealing with these, I always thought sound discretion favored, at least for a good while, the non-criminal option. This alternative was university discipline under a code that made reasonably clear the type of conduct the university community thought inappropriate. An excellent example of this approach occurred at the University of Chicago when students occupied and prevented normal use of a University administrative building. President Edward Levi didn't call the police to expel the students and arrest them. He waited until they left the building, identified them, and University disciplinary processes were then calmly and dispassionately used.

Although student protesters usually adopted a highly moralistic tone in their pronouncements, their morality and their commitment to essential university values, as I understood them, were in many instances selective. The same was often true of university officials. For example, many in both groups often saw the University as an open environment, only if those who wanted to speak on campus agreed with current views of their group. I mentioned earlier the criticism by a University Trustee of my limited involvement in the appearance of Michael Tiger as a Law Review speaker. Another relevant illustration involved criticism of my permitting the use of the Law School's auditorium by a student group that had invited Bill Kunstler to speak after the Cambodia-Kent State tragedies in 1970. 16

15. In Appendix II, I have included accounts of two occasions when police forces were called in, or their intervention threatened, during demonstrations in Indiana University. These occasions illustrated the sharp divergencies between my views and those of the central administration of the University.

16. I had not known Kunstler before his appearance on campus, but in my limited contacts with him I found him far more pleasant than his public image would have led me to expect. His talk was rather poor, I thought, far below the level I thought a
found the basis of such criticism offensive. I found equally of-

(footnote continued):
University audience needed and deserved. After the speech I
drafted a letter which I showed to my faculty colleagues and in-
vited those who shared my views to join me in signing it. Eight-
een of them, a majority of the Faculty, did so. I set out the
letter below:

"In his address on October 7, Mr. William Kunstler spoke
with passion and apparent conviction on many of the pressing
problems of our time: the brutal and corrosive war in Southeast
Asia and growing violence in this country, deep-rooted racism,
intractable poverty,, and stultifying materialism. We share but
need not stress our concerns over these ills of our society.
Rather, we wish to point out that Mr. Kunstler, by a grossly
oversimplified analysis, may have invited developments he ex-
pressly rejects at this time. Also we want to state our
fundamental disagreement with Mr. Kunstler in his assessment of
the current role of the legal order and its potential for ef-
fecting desired social change.

"We recognize fully that legal process does not neces-
sarily lead to the right or just solution. The legal order must
stand judgment before the moral conscience of the community. The
central deficiency in Mr. Kunstler's address is that he fails to
recognize or to communicate the complexity of that moral judg-
ment. Any individual who contemplates the violent interposition
of his judgments against the established law is morally bound to
seek first a profound comprehension of the objective conditions
and realities of his society and of the probable consequences of
an attack on the basis public order.

"In our judgment Mr. Kunstler did not meet his
responsibility as a moral teacher. By simplistic analogies to
other revolutions and facile sloganeering ('There can be a
morality in destroying a building.') he risks diverting the op-
erative idealism of students into tragic channels--tragic for
the individuals involved but tragic also for the harm to viable
prospects for social change. A close reading of Mr. Kunstler's
address reveals that he does not counsel resort to violence now.
But we fear that the impact of his remarks in the context of a
political rally could be quite different.

"We are in profound disagreement with Mr. Kunstler's
belief that the dominant forces in our society have conspired to
enforce on students and disadvantaged groups unquestioning com-
pliance with the legal standards of a corrupt order. It is true
that influential segments of our society oppose significant
change. Nevertheless, ours is a diverse society in which many
individuals and groups are moving effectively for reform in na-
fensive, however, the students' demand that University placement processes be closed to recruiters from the CIA, as well as the objection by others to an appearance on Indiana's campus of an official of the Ku Klux Klan who had been invited by a student group to participate in a debate with a Klan critic and opponent. I made known to students my own rejection of their attempt to close the campus to the CIA, and I sent to President Elvis Stahr a strong protest of his decision to block the appearance of the Klan debater on campus. In each instance, where the activity to be excluded was simply a form of speech, I believed strongly that the University's function as an open forum for advancing, criticizing, and debating ideas and viewpoints was non-negotiable. Although Elvis obviously did not act on my view, he took my criticism in good spirits. When I expressed my open-campus view at an anti-CIA protest, the graduate

(footnote continued):

tional priorities and policies. As lawyers and law teachers, we know that, despite their imperfections, law and the legal system are essential instruments for reform. Mr. Kunstler himself, in his long practice before the courts, has often made effective use of the means afforded by the legal system to bring about desirable changes and to combat injustice. Indeed, his present condemnation of the legal system is protected by a central premise of that system--the constitutional guarantee of freedom of speech.

"In some of his remarks on campus, Mr. Kunstler recognized that to achieve a more just society requires a revolution of consciousness. A revolution of consciousness is brought about by a change in awareness and understanding. It is the product, not of violence and destruction, but of the critical rationality whose cultivation is the distinctive task of universities. The revolution of consciousness is the truly moral precondition for the restructuring of our legal and political institutions. In this revolution, students can participate in good conscience, with passion, conviction, and the special flair of youth. In this revolution the young can affirm passionately and compassionately their humanity.

"We stand on our conviction that counsels of violence, however sincerely felt, only strengthen resistance to change and make successful reform more unlikely."

The letter was sent to several local and area papers which published it. Not surprisingly, it failed to elicit any of the critical comments which usually appeared when my colleagues and I spoke out publicly on political issues.
student to whom I was talking replied cheerfully, "Oh, that’s OK; we know you don’t agree on this."

Virtually all of the protest at Indiana, as I saw it, reflected in various ways quite legitimate concerns, some having to do with national policy, some grounded on the belief or assumption that the University in one way or another was complicit in the public policy or practice students rejected, and some concerned only with an action of some University functionary. Much that students said may have been factually suspect, naive, or (very often) simply crude and offensive. I have mentioned the fear of some members of the faculty that expressed disagreement would so pollute the teacher-student relationship, that effective teaching and counseling would be seriously imperiled or completely lost. My own experience, as I have said, did not in any way support that fear. I believed students wanted, and were entitled to, serious consideration of their views and concerns, a dialogue in which even sharply conflicting viewpoints could be expressed and debated. I was never able to understand why others, faculty and administrators, either rejected that view or simply lacked the confidence to act on it. I believe, however, that my view was substantially the same as that of some leaders in other institutions whose experience in dealing effectively with problems far more difficult than any we had to confront at Indiana was admirable. I’ve mentioned in this group Robin Fleming at Michigan and Ed Levi at Chicago; to the list I would add Kingman Brewster at Yale and Archie Cox who became on protest problems the locum tenens for President Pusey of Harvard.

I had always regarded my commitment to Indiana University as terminal well short of my retirement, though I had no inflexible notion of the appropriate duration of my deanal tenure. Certainly the then-traditional law school deanship that usually lasted from appointment to retirement seemed to me in most instances unwise. In 1960, when retirement opened the deanship at Michigan, I had urged on my colleagues and the President the adoption of a term-deanship, but only one of my colleagues, Hessel Yntema, openly supported the proposal. It took almost another ten years before the renewable term-deanship was adopted at Michigan.

As the academic year 1970-71 moved toward its end and my work as Dean advanced on its fifth birthday, I found myself considering more frequently an exit strategy. My appointment as

17. There were certainly exceptions to this general conclusion. For example, the twenty-years deanship of Page Keaton at Texas turned that School from a respectable regional institution into a significant national one.
Dean was not term-limited. I had no inflexible view of an appropriate duration, though I toyed with the notion of a seven-year limit. In general, it seemed to me such a period should be adequate to permit any incumbent to commit to the job such creativity as he or she had, so that departure in favor of a new infusion of creative leadership would be appropriate. Much of what I had hoped to accomplish at Indiana had been done, and what remained of my development vision seemed increasingly remote in the context of my relationship with the University administration.

In Appendix II, I have provided a somewhat detailed account of the final phase of my period at Indiana. At this point, I will limit myself to an attempt to analyze the factors that served to erode my working rapport with the University’s central administration.

Even now, with vision sharpened or dimmed by almost thirty years of hindsight, I feel no confidence that I fully understand all of the factors that produced growing alienation. With some confidence, however, I can suggest three broad categories. First, surely, was a profound difference of view on the appropriate form of response to such student protests as we had. Earlier, I have tried to suggest my view and the approach I favored. I can point to very few specific actions the University administration took in dealing with protest that I thought wrong. Theirs were not in the main sins of commission, but of omission. It was not that their policies were in error, but that they appeared to have no policies. They usually appeared to be paralyzed by the prospect or actuality of student protest, to adopt a kind of "bunker mentality" that created a void. No voice spoke out to reaffirm the nature of a university, the values it cherished, and the implications of that nature and those values for addressing with concerned students appropriate responses to the pressing issues of the time. I want to emphasize, of course, that I don't suggest by these criticisms that I believed the University had its own position on any political issue or that any University officer was entitled to speak for the institution on such an issue. I believed, however, that by their words and their actions the University officers could hold up the "university ideal" and that such would be useful. I am sure that much that I said and did in this context, although making no express reference to the University administration, was seen as implicitly critical of it.

Another category of factors included many statements I made publicly about political issues, expressions of views not shared by many in a conservative state, local community, or University. The most important of these, of course, were those vigorously
critical of our involvement in Vietnam. Others had a narrower scope, such as my opposition to the confirmation of Judge Carswell as a Justice of the Supreme Court. In putting any such statement of view in a letter, I always refrained from using University letterhead, and tried to make clear that I was expressing only a personal view. Whether these reservations were not understood or simply intentionally ignored I cannot know. Frequently, however, my critics said or implied that I tried to express "Law School views," or, if not, that I aroused hostility to the School or the University by taking unpopular positions.\footnote{A relevant illustration was provided in 1968, when several of my colleagues and I signed a brief letter of opposition to the policy of the United States in Vietnam. The letter had been drafted initially by a faculty group in the Harvard Law School and circulated for comment, but it retained the relatively bland tenor that seems essential to keep a potential group of signers, particularly lawyers, together. The letter was printed in several of the local and area papers, and it elicited from one of our alumni a typical comment. He indicated that he thought our views were wrong but added that this was "not material." He acknowledged that we had a right to our opinion and its expression but added; "Perhaps you also have a right to sign such an article as law teachers, but I resent your use of a designation which implies to the public that the view you espouse is that of the Indiana University School of Law." Finally, he expressly tied his view to his belief that such expressions as ours made raising money for the School more difficult.}

The third category of factors comprises a variety of actions or inactions I took within the Law School itself which

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\item \footnote{A relevant illustration was provided in 1968, when several of my colleagues and I signed a brief letter of opposition to the policy of the United States in Vietnam. The letter had been drafted initially by a faculty group in the Harvard Law School and circulated for comment, but it retained the relatively bland tenor that seems essential to keep a potential group of signers, particularly lawyers, together. The letter was printed in several of the local and area papers, and it elicited from one of our alumni a typical comment. He indicated that he thought our views were wrong but added that this was "not material." He acknowledged that we had a right to our opinion and its expression but added; "Perhaps you also have a right to sign such an article as law teachers, but I resent your use of a designation which implies to the public that the view you espouse is that of the Indiana University School of Law." Finally, he expressly tied his view to his belief that such expressions as ours made raising money for the School more difficult.}
\item In my response to this letter I said:
\begin{quote}
"We are entirely in agreement on the proposition that expressions of opinion like that in the recent letter on our tragic policy in Vietnam should be made strictly in a private capacity. To that end the letter to the newspapers was written on plain bond and the envelope did not carry the printed return address of the University. We tried to make it entirely clear that we spoke as individuals and not in any sense on behalf of the faculty. The Indianapolis Star gratuitously inserted the lines suggesting that in some way the letter was issued by the Law School. The risk of that kind of gratuitous addition by a newspaper is always present. If that risk were permitted to silence members of the faculty who want to speak on issues of overriding concern, our professional status would have made us political eunuchs. That is a status I am not prepared to accept.""
\end{quote}
\end{itemize}
conflicted with the interests and preferences of influential alumni or University officials. This category is so varied in its content that I can only provide an example, the most important being the policy I adopted on admission questions. The attractions of a legal education and the improved stature of the Law School confronted us with a pool of applicants far larger than we could accommodate within our physical plant and staff. In part because I believed the position was sound, but in large part because it was the position favored by the Faculty, I declined to "second-guess" the Admissions Committee. The result was that from time to time a relative of an important figure would be denied admission. I consistently rejected urging that I take a limited number of "wild cards" to be played advantageously in sensitive admission cases. It surely is an arguable position that the Law School would have benefited from some sacrifice of "purity" in such matters. In a Faculty that historically had been allowed little role in setting the policy of the School, however, I thought that supporting the Faculty and nurturing its confidence as the policy-making organ of the School the sounder approach. If I erred, the error was conscious. I recognized the choices as I ran the cost-gain analysis. Even today with perhaps a clearer image of the hazards of the choices I made, I'm not at all sure I would decide differently. But I might.

In the spring of 1971, the International Legal Center extended to me on behalf of the University of Nairobi an invitation to spend the 1971-72 academic year there as Fulbright Professor. Although attracted, I thought initially that accepting the invitation was not feasible, but on reflection I decided that an able Associate Dean, a strong faculty, and a program we believed in removed any serious obstacles to my being away for the year. An added element of self-interest supported this view: I thought a year away might enable me to see more clearly the point at which my utility to the University had been or would be exhausted and a move elsewhere would be desirable.

It was not surprising that shortly after I arrived in Nairobi, I had a letter from John Ryan, who had been appointed without any external search to succeed President Sutton, effectively ending my tenure as Dean. There was an interesting ambiguity about the President's letter; it wasn't at all clear whether my resignation as Dean was being requested (if it was, I would have submitted it immediately, of course), or whether I was simply fired. I was somewhat amused by the question, but I had no doubt about the substance of the University's action, nor had others. This was illustrated by a pleasant and amusing letter from an English friend who wrote: "While I can imagine that
the situation is not, for you at the moment, one which is pregnant with humor, it does seem to me that you are creating a splendid record of being thrown out of all the right places. If ever there gets to be an academic purple heart, you will presumably get one with a triple paper clip cluster."

I relished this humor, but not the implicit gibe at both Ghana and Indiana. In both places, I had had the opportunity to do work I regarded as important; this had brought great satisfactions. To be sure, the two places shared some characteristics. In each, the constructive work my colleagues and I had done had been placed seriously at risk by repressive political forces: in Ghana from the faux-revolutionary wing of the governing party; in Indiana from the conservative Right. My experience in each place illustrated the fact that a good, vigorous law faculty created much discomfort in a politically repressive climate, whether the wind blew from the Left or Right. How much of what we had built would survive in either place was an open question. But for each place, and its University, I retained a deep, enduring affection.

Remaining at Indiana as a member of the Faculty was not a seriously considered option. Soon after my "resignation" from the deanship was announced, I had a phone call in Nairobi inviting me to spend the academic year 1972-73 as Visiting Professor at Duke University. I accepted with pleasure. Duke's invitation to remain as a regular member of the Faculty, extended in the fall of 1972, required a difficult decision. Finally, however, I decided to accept the invitation of Boston University, where a new President, John R. Silber, offered an exciting prospect of institutional development in which I might find an interesting and satisfying role.
PART FOUR

MISCELLANEOUS MUSINGS

Introductory Note

A few items I would like to include do not fit into the three thematic groups above. They are included here because in different ways they reveal aspects of my life that added richness to the fabric. The first two are reminiscences of friends, the first given as a talk at a memorial service, the second published in a dedicatory issue of a law review.

For years I have toyed with the thought of a series of short essays about friends who in different ways have played significant roles in my life, e.g. Hubert M. Poteat, my Professor of Latin when I was an undergraduate; Edgar M. Durfee, one of my teachers in the Michigan Law School who became, after I joined that Faculty, my mentor and friend; Conor Cruise O’Brien with whom I worked in Ghana; The Honorable Frank M. Johnson, a fishing friend, who taught me much about what a judge could and sometimes should do; and John R. Silber with whom policy disagreements, which were not rare, never diluted friendship or disrupted a close working relationship in Boston University. To these I should add two others, not close friends in the conventional sense, but men who played pivotal roles in my professional life, providing intellectual stimulation and encouragement at critical times for which I will always be grateful.

Willard Hurst spent virtually his entire career at the University of Wisconsin; he was America’s most distinguished legal historian of the century. In some way which I never discovered, Willard became aware of me early in my time on the Michigan Faculty and showed a continuing interest. He invited me to come to Wisconsin for a year or two to carry out under his general oversight one of the studies in nineteenth century legal history that distinguished the Wisconsin program. I declined, largely because I felt I had little talent for history, but Willard still involved me from time to time in stimulating projects. When I began to think of the research that led me to Ghana, Willard was a reliable source of both personal encouragement and insights into significant interrelationships. When one of his long letters, typed personally on an ancient typewriter, single-spaced and almost margin-less, arrived in Ann Arbor, I knew I had plenty to ponder over. Once Willard was in Ann Arbor for a brief visit when I was feeling somewhat intimidated and a
bit discouraged about the Ghana project. During a long walk, I said, "I'm a fairly competent lawyer, and I'm not uncomfortable with political theory. But to do this job right, I should also be an historian, an anthropologist, sociologist, philosopher, and maybe more." Willard listened quietly (perhaps with a smile that I, in my self-absorption, didn't notice), then said, "You're probably right, Burnett, but until you know of someone who is all those things and is ready to do the job, why don't you just go ahead?" I did.

Karl Llewellyn, for many years a member of the Columbia faculty before moving, via Harvard, to the University of Chicago, was a prominent member of that amazingly diverse group of theorists, rebels against the earlier formalism, which came to be known as Legal Realists. His field was mainly commercial law, but he did distinguished work in legal anthropology and even in constitutional law. My closest contact with Karl came in his years at the University of Chicago. When I was there for various kinds of meetings, I frequently stayed with Karl and his wife, Soia Mentschikoff who also was a member of the Law Faculty, at their home in Hyde Park near the University. Karl swung easily from his dramatic impersonation of a chef as he prepared my breakfast, baking rolls and informing me with total conviction that civilized people ate only "buckwheat honey" on hot rolls, to a late night, excited commentator on my research plans, scattering provocative ideas like a flint meeting steel. When I returned to Ann Arbor after such a visit, I usually had the feeling that I must be audibly vibrating. When Ed Levi, then Dean of the Law Faculty, extended an invitation to move to Chicago, he produced one of the most difficult professional decisions I ever made. Our children's ages at the time made a move to Chicago seem unwise, but I've never lost a vague sense of regret.

Had we moved to Chicago, having Karl as a colleague would not have resulted. I was in Chicago for some meeting in the spring of 1962, and had lunch with Karl and Soia in the Faculty Commons. That evening Ed Levi had a group in his home for dinner, and I expected to see the Llewellyns there. Soia arrived late and alone, just before I had to leave for Ann Arbor. She said Karl had seemed a bit tired; so she gave him an early dinner and saw him settled comfortably in bed before joining the dinner party. When she returned home, she found that he had passed away. He had remained a vibrant presence to the end.

The essay project must await another day, but I trust the two brief tributes included will not seem misplaced.

HOBART COFFEY: A MEMORIAL ADDRESS

[Hobart Coffey was my teacher in one Law School course, but
we were not well acquainted. Friendship developed after I returned to Ann Arbor in 1951 to join the Faculty. I will say little about Hob’s professional achievements, though much could be said, particularly about his skill, insights and determination, through his role as Director of the Law Library, to build one of the truly great law collections in the world. When, in the fifties, I became interested in legal developments in Africa and other parts of the Third World, I was frequently amazed to discover that some obscure study published in a limited edition in the twenties or earlier was in our collection, not because some member of the Faculty had needed it immediately and urged that it be acquired, but because Hob appreciated its relevance to the needs of some scholar in the future.

Hob was a tall, lean man, with a craggy face, and a distinctive style of speaking, chin slightly raised, voice deep, and the flow of words slow and deliberate. I often thought that if I had to conjure up an image of an Old Testament prophet, that image would look a lot like Hob. But a somewhat austere appearance did not hide a relish for life, an ironic sense of humor, and a great capacity for friendship.

While our contacts within the Law School were many and invariably pleasant, perhaps most of my cherished recollections of him come from our summer and fall fishing ventures with a small group of friends, usually to northern Canada. These continued for many years. Hob was a most casual but usually quite productive fisherman. He always made his large car available for the drive over usually unfortunate roads to whatever remote place we had chosen for fishing or climbing aboard a bush plane for the final leg. When Hob’s health began to fail, he was usually "enthroned" alone in the back seat of the car, while another man and I sat in front and shared the driving. Hob’s conversational gambits from the back seat were always a delight. One reliable feature was his inquiring, about 5:00 p.m. each day, "Did you hear it?" Even after we came to recognize the drill, we would ask, "Hear what, Hob?" Then the reply, "The Angelus," the signal for Hob to bring out a fifth of bourbon to toast the day. Only Hob was permitted to respond to the Angelus until we were off the road for the day.

When our group left Ann Arbor, Hob took over all financial matters; we thought of him as Chancellor of the Exchequer. He paid all restaurant and hotel bills, and settled all accounts in the fishing camp. During the final night in camp, while others were engaged in the last poker game, Hob retired to his cabin to work out the accounts. Near 11:00 he would reappear and report to each of us what we owed. No questions or protests were countenanced; the bill was simply to be paid when convenience allowed. It was only in the first year Hob could not go with us because of his health, that someone else took over as Chancellor of the Exchequer, and we realized the extent to which Hob had
been subsidizing our fishing trips each year.

Hob had retired from the Law Faculty and returned to his original home in Ohio before his death. By that time, I too had left Ann Arbor for Indiana University. I was saddened by news of his death, but relieved that his agonized gasping for breath was past. Some time later, a call from Ann Arbor informed me of the date of a memorial service for Hob and asked if I would make the memorial talk at that service. I hastily declined, sensing that I would find it very difficult to speak about such a close friend; however, the caller’s insistence prevailed. Preparing for the talk was a strange experience. I would sit in my office, perhaps checking a file for some memo from Hob I thought I remembered or merely recalling him, and frequently discovered that I was quietly chuckling. I knew then that I did not want to mourn a death but to celebrate a long and good life. The minister of the Unitarian Church in Ann Arbor, where the memorial service was held, wrote later in his Newsletter: "It was a different kind of memorial service and that is why I want to comment on it. Professor Coffey was a very cordial, kind and witty person, and Dean Harvey was rich with examples of Coffey’s gentle wit and humor. There were times when the audience broke out in audible laughter and I thought to myself: isn’t this a delightful tribute to a man who relished life and who loved people? Why do funeral and memorial services need to be so solemn; why not use wit and humor as it is appropriate to the person?" I was pleased by this reaction, for Hob would not have relished solemnity.

Our friend Hob Coffey died on Sunday, September 14. On the death of a friend it is especially appropriate that we meet and share our cherished recollections of him. Together, we neither sit in mournful silence, nor mark his going with outpourings of grief. A gentle and compassionate man who touched our lives with kindness, understanding, and warm companionship, achieved the satisfactions of honorable work well done, of friendship and respect well earned, and, in the fullness of years, he died. Without exception, my recollections of Hob are happy ones; some of those recollections I want to share with you today.

I knew Hob for more than 20 years, first as my teacher, then as a professional colleague, but most deeply as a friend.

I had only the course on family law -- or Domestic Relations as it was then called -- with Hob. His administrative duties in the Law School left him little opportunity to teach. Yet I recall him as an excellent teacher--meticulous in his preparation, lucid in presentation, demanding of his students, and much inclined to enliven his classes with a salty wit.

During the celebration of the Centennial of the Law School,
some waggish committee decided to put out a booklet of photographs of the Faculty, most of them of the candid sort. Usually a member of the Faculty rated only one photograph, but Hob had two. One was taken while he was teaching, seated behind the desk in a classroom. The photographer caught him, happily, with a quite characteristic expression. His head was turned slightly to the side, the chin well raised, and he looked upward with a beatific smile on his face. The identifying caption, based, I assume, on a comment made in his Admiralty course, was "Some captains named their ships after their favorite women!" For Hob the law was not an arid, impersonal system. It was a fabric of intensely human material to whose infinite variety and richness he could respond with interest, insight, and often amusement. As many legal memoranda and opinions left in his files indicate, however, he was also a skilled, disciplined professional.

The gulf between teacher and student in a large law school is wide and deep. Through most of his career, Hob bridged that gulf more successfully than most teachers of his time, for he liked and respected young people. I came to know Hob well, however, only after I returned from practice and joined the Faculty of the Law School.

Hob's contribution to the Law School was unique, for it was his responsibility to develop and administer the library on which all of us -- students and Faculty alike -- depended. The magnificent collection in the Michigan Law Library today is a splendid memorial to the imagination and dedication he brought to the tasks. His achievement could be illustrated readily by accession rates, gross holdings, and other indices, but I put aside dry figures for a personal illustration. When I became interested during the late fifties in legal developments in Africa and other less developed areas, I frequently needed relatively obscure works on primitive law or colonial legal systems. In the early stages I usually assumed that my need could be met, if at all, only by a patient search of specialized libraries and by borrowing. Yet on innumerable occasions I found that Hob had bought the work for the Library many years before, out of typically small original printings or on the rare book market. Through his imagination, foresight, and diligence in urging and serving the needs of the Library, qualities grounded in his own love for books and appreciation for the scholarship his duties left him little time to pursue, the Law Library became what it is today.

I will not stress his professional achievements -- though they are great. My thoughts are more of the quality of the man. He recruited for the Library a dedicated and competent staff whom he treated with respect and consideration. He was interested in them as individuals; he shared their problems; and he viewed their foibles with gentle amusement. Once after he discovered that the stack marker in the canon law collection was
spelled "cannon," he nursed his secret for weeks in gleeful anticipation of the reaction of some of his associates when they discovered the error.

On another occasion when he encountered the annual difficulty in reserving a few offices in the Legal Research Building for emergency use later in the year, he decided that the task would be far easier if all offices appeared to be assigned. To the fictional occupants of the reserved offices he attached proper names, deciding after mature consideration to use for the purpose the names of the twelve Apostles. The scheme worked, and Hob had several opportunities during the year to agree with the observations of others that indeed Mr. Matthew or Mr. Bartholomew was rarely in his office and did not appear too diligent in his work.

Hob was a student of the Bible and his reading of the King James version and the ancient catechisms was reflected in his choice of words and the cadence of his speech. To indicate that he would be unavailable in his office for a few days, he once posted on his office door a Biblical citation. The diligent who checked the reference would have learned that, properly interpreted, it revealed that Hob had gone fishing. During another absence he simply posted a photographic blow-up of an announcement he had discovered in an 18th century journal which went something like this: "Being overwhelmed by the burden of my duties, I am constrained to repair to my dwelling and to remain there until I regain my customary composure."

These small episodes illustrate Hob’s most pronounced and endearing quality—a wry, detached, whimsical, but always gentle humor. It made conversation with him a delightful experience, it relieved the tedium and ponderousness of Faculty meetings; it warmed his relations with his colleagues in the Library and in the Faculty. His humor and wit were as readily directed toward himself as toward others, and they will forever brighten our recollections of Hob. As one friend has said, "Anyone who doesn’t have a Coffey remark to cherish is the poorer for it."

Many of my own fondest memories of Hob come from fishing trips a group of us regularly made to Canada. Hob was a relaxed, even casual fisherman, but he caught his share or more. In recent years when failing health made it impossible for him to be with us, Hob remained in a special sense in the group, for we frequently recalled that special mixture of wit and wisdom which filled his conversation.

With these outings too I associate other recollections of Hob which reveal qualities we took perhaps too much for granted in the special community of the Law School: a courtliness and grace, a warm interest in all kinds and conditions of people, and a considerateness that never suggested condescension. Those
qualities were also revealed in many acts of private charity and support, the extent of which not even his close friends knew.

Hob was a complex, many faceted man. My own recollections can suggest, at best, a partial view. Some of you would recall and stress his professional contributions during forty years of devoted service to a great University. Others would speak of the sympathy and support he gave his staff and his sensitivity in meeting institutional needs while providing opportunities to the young, the disadvantaged, and the oppressed. Out of our collective awareness we could compile a large but not exhaustive account of his generosity to the aged, the lonely, and the needy. But with all this, we would not have described the whole man. There was, in Hob, an ultimate sense of privacy, an inner reserve, that all of his friends recognized and respected.

Hob Coffey is dead. The iron will that sustained him without complaint through his final years of failing health has been discharged. Yet with those of us who knew him and for those who will continue to benefit from his labors, Hob still lives.

As long as students and teachers of the law work in this University, Hob will live;

As long as friends and acquaintances find joy in recalling his gentle, humorous, and wise words, Hob will live;

As long as men value human compassion and quiet, unpublicized acts of kindness toward others, Hob’s spirit will live.

It is for these reasons that today I cannot mourn, nor can I express the grief of loss. I was privileged to know, to love, and now to cherish the memory of a fine man. I would simply pray that the God of all-encompassing love will receive and sustain him.

JOHN PHILIP DAWSON: A MEMORIAL REMEMBRANCE

[In the fall of 1946, in my first year in Law School, I was a student in an Equity course taught by Jack Dawson. Shortly after the semester began, however, a health problem required me to leave school. By the time I returned a few months later, Jack was on leave to serve as the Administrator of International Trade in the government of Greece. In missing the Equity course and others with Jack, I have no doubt that I lost out on one of the great experiences a law student could have.

When I returned to Ann Arbor as a member of the Faculty in 1951, Jack was back from Greece. He took over that fall as the
senior member of the Faculty teaching Contracts and I, a raw rookie, was given a section as well. Thus began a professional association and friendship that lasted almost forty years. Until Jack left for Harvard in the mid-fifties, our contact was close indeed. It reveals much about Jack to mention, however, that when the Faculty decided to integrate coverage of remedies in the basic Contracts course and Jack and I decided to prepare a book to service this curricular innovation, the first version of the book resulted from each of us developing independently and with very little consultation the parts we agreed to take on. Later editions of the book changed this pattern, however, and brought a special kind of collaboration that resulted in a really "seamless" work. In this marvelous relationship, Jack was indeed my teacher, but he always spoke and acted as if we were simply colleagues.

After my resignation from the Indiana Faculty, I was invited to come to Boston University, and, at the same time, Jack who had just retired from Harvard came "across the river." The five years we taught side by side in Boston provided an experience of friendship and collegiality I will never forget and always cherish.

The death of Jack Dawson on October 19, 1985, provided, not an occasion for mourning but, rather, an opportunity to celebrate a long life, well-lived. Through a lifetime of study and scholarship he refined and expressed a deep and wide-ranging intellect; he loved, married, sustained and was sustained by a devoted family; he served with distinction his universities, his community, and his country; he relished his closeness to his friends; he lived richly and deeply, and—in the fullness of time—he died. So I sing, not a dirge, but a paean, knowing that my unwelcome tears are not for Jack, but for myself. I do not expect to meet his kind again. In sharing our cherished recollections of him, we assuage our sense of loss.

Although our professional work for almost thirty-five years was closely entwined, I will leave to other occasions most of my recollections and comments on Jack's teaching and scholarship. A single remembrance will suffice. Years ago, when interviewing a young lawyer for a faculty appointment, I inquired about his own teachers whom he respected most. Not surprisingly, Jack's name headed the list. In response to my probing for reasons, the young man said all the appropriate things about mastery of substance and teaching skill. A day later, however, he returned uninvited to the subject. His earlier answer, he said, while quite accurate, was inadequate. Struggling to articulate Jack's special quality as a teacher, he said, "He cared about and he built on what his students thought and said." To the qualities, thus sparsely suggested, I too can bear witness. Jack and I began teaching Contracts at the same time, I as a true rookie, he as a mature scholar. A year later, we began work on a book that we
took through several editions. I recall and will appreciate always being treated from the beginning as a full partner in that enterprise. While I never had the benefit of Jack’s formal courses, through most of my professional life he was my teacher. As such, he cared, he listened, and he shared with extraordinary generosity.

As a young man Jack was an athlete, powerful in body and seemingly boundless in energy. So he remained into the late middle years. When I was law student, I saw him one day with a plaster bandage across his nose, made necessary, I learned, by a high-sticking son in a family hockey game. In his later years he spent much time and energy in moving stones for various building projects in his beloved Vermont. Physical power was joined in him with a capacity for reacting with intense, emotional sensitivity to nobility and beauty. Several years ago, we planned to see together the segment of a televised biography of Queen Elizabeth I that covered the Armada period. Jack suggested that in preparation we should re-read the Queen’s address to her troops at Tilbury when they awaited the arrival of Parma’s forces. He began to read aloud but, when his eyes filled and his voice choked, he handed the book to Emma to finish the reading. This small incident illustrates well both Jack’s vibrant historical sense and, far more important, his dependence on the strong, beautiful, and loving woman who for almost sixty years was his wife.

Jack had an unusual capacity for friendship, and I think he would be pleased that his friends relish their recollections of him. His disbelief of praise, usually expressed with wry humor, should caution us, however, not to let our recollections project an image too good to be quite believed. So let us recall a man in the fullness of his personality, capable of passion, anger, and disdain. One small illustration comes to mind. We were arguing, as we often did, about issues and people of the law, in this case about the work of one Supreme Court Justice. I yielded briefly to the playfully malicious temptation to score debater’s points rather than to engage Jack on the issue he wanted to probe. So I disguised my agreement with the view he expressed and merely probed for any chinks in his armor. After a bit, he looked at me with an eye that could be fierce when his "Irish" was up and said, "I probably should point out that you’re making me very angry." Fortunately, I usually escaped his anger, but, extraordinarily kind and generous though he was, he was capable of reacting strongly, with anger and disdain, to departures from the standards of civility or integrity that he cherished.

Many years ago a play on Broadway used a stage-setting that indulged the fantasy of Heaven as an upper room visible above the stage. When the living -- the people in the lower room -- thought about or were influenced by those who had died, the lights in the upper room came on, and its occupants moved,
talked, lived. That charming idea suggests that the room where Jack is will be lively indeed. For where men, women, and children draw tight the bonds of loving support in family or friendship, Jack's spirit will be there. As long as teachers teach and students learn in mutual respect and shared commitment to the search for knowledge, a vital part of Jack's life will continue. While women and men of the law continue to prize insights deepened and sharpened by patient craftsmanship and scholarly objectivity, Jack will speak to us. And as long as we draw strength from the understanding, love, and loyalty that our friends so generously provide, we will have unfailing reminders of a gracious and good man. Jack Dawson's upper room will be full of light, love, and life.

NATIONAL GOALS AND INTERNATIONAL LAW

[The following lecture was a puzzle! When I encountered the manuscript in a file, I had a clear recollection of preparing it and of reflecting that probably some of the views expressed would not be congenial to many in the political climate of the time, but I had no recollection whatever of the date, place, occasion, or the audience. Some of the footnote references indicate that the lecture could not have been earlier than 1961, and my intense preoccupation with the work in Ghana which began in 1962 seemingly excluded most of that year and several thereafter. My brief clarifications of a few fundamental concepts or terms strongly suggest that I was not speaking to an audience of lawyers. A part of the mystery of the talk's provenance was resolved late in the work of putting together this collection, when I had occasion to read the file on me which the CIA had developed. I learned there that the talk was presented on my behalf by my Michigan Faculty colleague Roger Cunningham to the Michigan Pastors' Conference in 1962. I assume that the Conference occurred in the fall of that year and that my earlier departure for Africa made it necessary for me to have a colleague deliver the talk for me.

I resolved doubts about inclusion of the talk here on the basis of several factors. First, it casts some further light on my general theoretical position which was one of the principal themes in Part I. Second, the concerns that came into sharp focus in the tragic years of our Vietnam involvement found early expression here. Finally, while I may have been quite mistaken in many of the views I held, I can claim the virtue, or perhaps the vice, of consistency. In reviewing the National Goals talk, I have found no view expressed of which I now repent.]

The subject assigned to me is "National Goals and International Law." This juxtaposition suggests that there is some
meaningful relationship between the two, though its nature is
not clearly indicated. Conceivably it is one of mutual support,
our national goals furthering the development of and adherence
to international law which in turn stimulates progress toward
those goals. On the other hand, it is possible that the rela-
tionship is one of hostility and reciprocal impediment. A third
possibility is that national goals and international law lie in
entirely different and unrelated ranges of meaning and dis-
course. Before commenting further on the problem, however, it
seems essential to clarify the meaning for present purposes of
the two basic terms.

First, let us turn to the matter of national goals. In
establishing the relevant meaning of this term it seems clear
that two basically different approaches might be used. The
first would view national goals as facts and seek to identify
them by use of the investigative techniques of the social
sciences. Even within this approach sharp divergencies of
methods and results are possible. Are national goals determined
by ordinary citizens or by officials? If the former, is simple
majority determination sufficient or must some stronger voice of
the people speak out? If official views set national goals,
where should these be sought? In the Congress? In the manifold
offices of the executive establishment? Or in the hallowed
halls of the Supreme Court? Any resolution of these questions
would itself require of the investigator certain value postula-
tions to which many others might want to take exception. Since
I know of no relevant empirical investigations along any of
these lines, this approach to the fixing of national goals may
for present purposes be put aside.

The second approach to a formulation of national goals is
avowedly ideal. The question it raises is not what are our na-
tional goals but, rather, what should they be? It is worth ob-
serving that an answer to this question is not the conclusion of
a syllogism containing as one of its premises an "ought"
proposition of unquestioned and unquestionable validity. In
such circumstances, it would be highly presumptuous for me to
discuss national goals as I might formulate them in answer to
this normative question.

To avoid being stopped at the inception of our discussion
by an inability to delimit one critical term in our subject, I
have secured agreement that we may take as given the formula-
tions of the President’s Commission on National Goals.19/ This
group of distinguished Americans utilizes the second of the ap-

19. Goals for Americans, Comprising the Report of the Presi-
dent’s Commission on National Goals and Chapters Submitted for
the Consideration of the Commission, 1960.
proaches suggested above. In transmitting its report to the President it declared:

"[T]he Report expresses views that reflect solely our own judgment, sometimes in accord with and other times at variance from those of the several authors [of essays appended to the Report]. This judgment was arrived at during long hours at the conference table . . . .

" We do not expect our recommendations to command unanimous acceptance. Rather it is our hope that they will evoke active discussion. Under the democratic process this is the path to a national consensus."20/

To be sure, the Commission did not attempt to postulate a set of ideals or goals in a factual vacuum. The historic American experience, a developed sense of community, and the value judgments the Commission thought widely shared formed the underpinning for the Report. In the final analysis, however, the Commission Report purports to be not descriptive but normative.

We might fruitfully devote our entire discussion today to the Commission's formulation of goals for Americans during the sixties. Stimulation of such discussion was surely one of the primary aims of the Commission. We can only summarize the Report, however, to reveal the possible relationship of the goals suggested to the concerns of international law. The basic division of the Report is between goals at home and goals abroad. Among the former are enhancement of the dignity and development of the individual, elimination of discrimination based on religion, sex or race, the preservation and perfection of the democratic process, strengthening our system of education and advancing knowledge in the arts and sciences. The Commission recognized, as well, the importance of diffusing and balancing the centers of economic power, stimulating economic growth and technical change with a sensitive regard for any adverse impact upon individuals, development of an agricultural policy assuring a fair return to farmers through the mechanisms of the market, improvement of living conditions and health care for the people. Our goals abroad could be summarized under one heading -- the realization of an "open and peaceful world." To this end, the Committee urged free trade for general economic health, aid to less developed nations, defense of the free world, disarmament with adequate safeguards and the preservation and strengthening of the United Nations. The Commission suggested that an equitable tax structure providing adequately for public needs is instrumental to all these goals.

20. ibid., p. xi.
With this view of our national goals in mind, let us turn to the second branch of our subject -- international law. As a first step toward delimiting a very large subject, we will merely mention and put aside two bodies of law having certain international aspects but which do not concern us here. Not infrequently national courts are called upon in litigation between private individuals or companies to apply norms originating in treaties or merely in the customary practices of nations. Our own national Constitution lists treaties as part of the supreme law of the land. Norms so applied are viewed here as part of our national law, however, and not as international law even though their sources may lie in international relations.

Second, there is private international law. Today, vast amounts of trade and commerce are conducted across international boundaries. A single transaction may have incidents localized in several countries. For example, a lumber merchant in London may by correspondence with a broker in Hamburg agree to purchase a quantity of lumber to be delivered on designated ships berthed in ports of Finland and the Soviet Union, payment to be made by the transfer of dollar credits in New York. If rights and duties arising from this transaction should need to be litigated, what body of national law should govern? A national court considering this problem has available certain guiding rules to solve this choice of law problem. These are commonly referred to as private international law. They are immensely important but they lie beyond our present concern which is with public international law.

Only where the actor whose conduct is being examined is a national state is discussion in terms of public international law customary. Law deals however with relationships, and we must therefore press the inquiry: "Who can question the conduct of a national state so as to invoke the standards of international law according to customary usage?" The answer again seems quite clear -- only another national state or, in recent years, one of the international organizations. This delimitation of the circumstances in which evaluation of conduct in terms of international law accords with common usage is fundamental. We are now able to make the statement that international law for the purposes of this discussion is concerned solely with the relations between or among national states and certain international organizations. Figuratively, we may think of such states as the members of a society governed, to the extent it is "governed" at all, by a body of norms commonly referred to as international law.
What is the origin of these norms? Or, to state the question differently, if international law is to be invoked, to what sources does one refer to determine its substantive content. The Statute of the International Court of Justice (Art. 38) lists four primary sources (1) international conventions whether general or particular, (2) international custom accepted as law, (3) the general principles of law recognized by civilized nations, and (4) judicial decisions and the teachings of the most highly qualified publicists of the various nations. Little comment is needed on these several sources. Doubtless today the most important is the mass of treaties, both multilateral and bilateral, dealing with a vast number of subjects such as air transportation, postal service and trade relations. It should be noted that in order for custom to be regarded as a source of law it must not only be general but must be perceived by the nations as possessing a "legal" quality. Decisions not only of international tribunals but of national courts as well provide important insights into the substantive content of international law.

A rigid insistence on a conception of "law" as the command of a sovereign should not be permitted to obscure the fact that public international law derived from such sources provides the basis for ordering international relationships and getting the world's jobs done in many vital areas. On the other hand, the use of the term "law" for this body of international norms creates the risk that extremely significant differences between international and municipal "law" will be overlooked. If the present limitations of international law are to be understood and fruitful lines of development explored, these differences should be kept in mind. I would suggest three such differences.

1) In the international society, a monopoly of legitimate force has not been organized. That force, or the threat of force, plays a central role in the relations of nations is obvious. Twice in the first half of this century combinations of states have invoked this ultimate determinant when other devices and techniques failed to achieve acceptable adjustments in their relationships. Increasingly of late, this rule by force in international affairs has come to be contrasted with the "Rule of Law," the development of which is urged in order to end the reign of mutual terror created by the threat of modern weapons systems. As early as 1925, President Calvin Coolidge advocated "... establishment of a tribunal for the administration of even-handed justice between nation and nation .... The weight of our enormous influence must be cast upon the side of a reign not of force, but of law and trial, not by battle, but by reason."21/

In 1959, Vice President Nixon declared that "the time has now come to take the initiative in the direction of establishment of the rule of law to replace the rule of force."22/ Similar expressions could be multiplied. The suggestion seems to be that law and force are the polar extremes of techniques for ordering human affairs. This, I would submit, is palpable nonsense. Whether in the affairs of a small community of individuals, or in the world-wide community of nations, the essence of a legal order in the strict sense is the organization and monopolization of force, the incidence of which is threatened or actually used to channel and direct conduct. The existence of an international legal order or Rule of Law is not dependent on the absence of force; it is dependent on who possesses and can legitimately exercise it.

A simple illustration will clarify this point. Assume that Jones and Smith own adjoining tracts of land and that the boundary between them is in dispute. If Jones occupies and excludes Smith from land that Smith claims as his own, the legal machinery for settling the dispute is in general outline familiar to everyone; a trial will be held in which each disputant may submit evidence and the judge and jury will determine the rightful owner of the contested area. Perhaps appeal procedures will take the case to the highest court of the jurisdiction. It might appear superficially that this process for resolving conflict has no relation to force, that it is simply law in action or, as Aristotle might put it, the operation of "reason unaffected by desire."

Yet force or the implicit threat of force underlies and supports the entire process. In order to start his action against Jones, Smith has an officer of the court, a sheriff or marshal, serve on Jones a copy of the complaint and a summons to appear and defend. Aside from complying with the summons, does Jones have any recourse? To be sure, he can ignore it and make no appearance in court. He might even notify Smith and the court that he does not recognize Smith's asserted right or the competence of the court to inquire into the matter. In such a case, the court would respond to Jones' default, not by inaction, but by the entry of a judgment in Smith's favor. If the judgment authorizes specific relief, officers of the court are authorized and directed to go on the land, dispossess Jones and put Smith into possession. If the remedy sought by Smith is in the form of money compensation, he can have officers seize Jones' property and sell it to get funds for the satisfaction of

22. Ibid.
the judgment. But what if Jones decides to resist these steps, collects his weapons and ammunition and barricades himself to protect the land he claims as his own property. The answer is clear; legal force represented by sheriffs or marshals may seize him and, through the processes of the criminal law, the forceful sanctions appropriate to his conduct will be applied. These sanctions may include the deprivation of Jones' property, his liberty or his life. The fact that only rarely would such a boundary dispute actually call forth such forceful measures should not obscure the fact that the organized force of the community, overwhelming in relation to Jones and possessing a special quality of legitimacy, is always in reserve. It is the hallmark of 'law.'

Now let us transfer our simple boundary dispute to the international level. The parties now are national states and the ordering regime is that of international law. While by no means inevitable, it is entirely possible that substantive standards for determining the claims to the disputed area could be rationally fixed on the basis of treaties, customary practices, general principles extrapolated from the legal systems of the world, or prior judicial decisions. The existence of such standards provides no assurance of their implementation, however. The parties to the dispute are nations, viewed by traditional international law as equal and independent. They are sovereign, that is, there is no authority higher than themselves possessing legitimate power to order their conduct. No court exists which is competent to hear the case and apply the standards of international law, unless the defendant state voluntarily submits to the jurisdiction. If that submission is not made and the recalcitrant state mobilizes its forces to defend its asserted rights, the issue is left for settlement by arms.

When resort was made to war for pressing or defending an international claim, the traditional international law fell silent. All wars were regarded as equally lawful. Grotius, at an early date in his *De Jure Belli Ac Pacis*, did attempt to distinguish between lawful and unlawful wars, or between the just and the unjust. The effort failed, however. The position of the later international law was described by a leading English authority in these words:

"International law has no alternative but to accept war, independently of the justice of its origin, as a relation which the parties to it may set up if they choose, and to busy itself only in regulating the effects of the relation. Hence both parties to every war are regarded as being in an identical legal position, and consequently as being possessed of equal
In this century the effort to include resort to war within the proscriptions of international law has been renewed. The Covenant of the League of Nations, the Kellogg-Briand pact, and the Charter of the United Nations reflect this effort. By Article 2 of the Charter, member states undertake to "settle their international disputes by peaceful means in such a manner that international peace and security, and justice are not endangered" and to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state...." Yet despite these pledges, which may be said to have returned international law to the moral level Grotius tried to give it, the basic facts of the international community are unaltered. Submission by any state to the jurisdiction of an international tribunal is dependent on its voluntary consent. More importantly, the capacity for the exercise of force is still dispersed among the members of the community. Until that capacity is substantially monopolized and placed behind the norms of international law, the society of nations will be in a strict sense lawless.

2) The second difference between the international and municipal legal orders is in a sense a corollary of the first. Both have to do with the organization of the community concerned. The first distinction emphasized the centrality of force in the use of law as an ordering device. This emphasis tends to highlight executive functions, that is, the procedures for making law effective in actual or incipient conflict situations. It is apparent however, that within a modern state a viable legal order requires much more than an efficient and powerful executive to enforce the law. Agencies must exist for the authoritative articulation of norms and for relating those norms in their inevitably generalized form to specific problem cases. In short, both legislative and judicial organs are essential.

The legislative function is not, of course, exhausted by the initial formulation of a governing rule. Some of the most vexing problems of any legal order arise, not from the absence of an applicable rule, but from the belief of significant elements in the community that the available rule does not respond adequately to the demands of justice or social utility. Continuing adjustments must be made if the law is to be responsive to these demands in a changing society and the tension between officialdom and citizens is to be kept within tolerable limits. During the early centuries of development of the Anglo-American

23. Hall, INTERNATIONAL LAW, 8th ed., p. 82.
legal order the courts were the primary instruments not only for adjudication, that is the application of general norms to particular cases, but also for the development of legal rules and their adaptation to changing needs. The product of these centuries of labor is the Anglo-American common law. Today, the principal burden of norm creation and modification has been assumed by legislative bodies, but particularly in this country the part played by the courts in this work remains significant. Whether or not the creative, legislative function of the courts is emphasized, their role in the orderly and peaceful resolution of conflict is indispensable. When other processes of social adjustment break down, the doors of the courts are open and in general the parties pass through them in the confident expectation that evidence of the facts will be fully and fairly heard, and the facts as found will be rationally related to governing norms.

The common law has provided the aphorism that for every right there must be a remedy. In a sense this is a mere circularity, since it may be fairly urged that the only significant test of legal right is the existence of a remedy. In another sense, however, the aphorism reveals an important truth about our legal system. This is the basic assumption of completeness, that an appropriate judicial forum exists for every dispute. Even when a court dismisses the plaintiff's suit on the ground that he shows no legal right, the law, as viewed by the court, is being applied. This assumption of the completeness of the law and of the judicial machinery to handle every dispute that arises eliminates or greatly reduces the frustration and hostility that can arise when a party to a dispute has no recourse to an independent agency to hear his complaint and determine his rights.

Enough has already been said to indicate the limited governmental organization of the international community. There is, of course, no legislative agency to declare authoritatively new legal norms or to adapt older ones to changing needs. Norm creation depends on consent manifested in treaties, on the uncertainties of customary practice, and the often conflicting views of courts and publicists. These legislative inadequacies would be less significant if there existed international tribunals of general jurisdiction to which access was available in all conflict situations. As has been noted, however, the jurisdiction of such tribunals, like the International Court of Justice, depends on the voluntary submission of both parties. Furthermore, there is no executive establishment with an adequate reserve of force to assure compliance with the judgment, even where a competent court has determined the rights and duties of the litigating states.
It is of interest that the vital importance to an international Rule of Law of differentiated governmental organizations, administering a substantial monopoly of force, is sometimes recognized more clearly by a layman than it often is by lawyers. In 1932, Sigmund Freud wrote in a letter to Professor Einstein:

The union of the majority must be stable and enduring . . . must be permanent and well organized; it must enact rules to meet the risk of possible revolts . . . . Must set up machinery assuring that its rules (laws) are observed . . . . [T]here is but one sure way of ending war and that is the establishment, by common consent, of a central control which shall have the last word in every conflict of interest. For this two things are needed: first the creation of a supreme court of judication (World Court); second its investment with adequate force. Unless the second requirement is fulfilled the first is unavailing...

I wonder if we are not entitled to regard many of the current statements about the importance of an international Rule of Law as the merest cant, if the speakers do not appreciate the full implications of this concept, which necessarily include the organization of an international monopoly of legitimate force -- i.e. a world state. It seems to me at least doubtful that many of the speakers are prepared to accept this implication.

3) The third distinction between the international and municipal legal orders is perhaps the most basic of all. Every viable municipal legal order is underpinned and supported by a substantial range of agreement within the society on certain value judgments at both the ultimate and instrumental levels. A comparable range of agreement does not seem to exist today in the international community. It is conceivable in any society that an elite group may gain control of the instruments of legal power and attempt thereby to implement a set of value judgments entirely antithetical to those prevailing in the society. This may be done as part of a program of social change planned by the elite, or merely for the exploitation of the social group in the interest of some select few. As yet we know little of the limits of effectiveness of law for instilling and nurturing value perceptions different from those generally prevailing. It perhaps can be assumed that a certain tension between the values of the legal order and of the society may be tolerated and that over a longer period the latter will be slowly changed. Certain-

24. Quoted in the A.B.A. Special Committee on World Peace Through Law,Compilation of Quotations, 16-17 (Jan. 1960).
ly too, current experience would indicate that an elite entrenched within the power structure of the modern state with the full legal arsenal at its command may implement its values and pursue its ends in the face of widespread dissent within the social group. It seems clear, however, that the extent to which the ever present implicit threat of force behind the legal order must become actual will vary inversely with the extent of agreement between the values being implemented in the legal order and those of the people affected. One might suspect that any legal order supported only by its monopoly of force would not long endure.

In the international sphere the extent of agreement on basic values is of even more immediate importance than has been suggested in connection with municipal law. The reason is not hard to find. At the municipal level we assumed a developed legal and governmental order. In such circumstances, those who might object to the value judgments implemented by a particular law face the necessity of opposing an established monopoly of force buttressed by that residuum of respect and loyalty which the citizens have for their basic institutions. The situation among nations is quite different. There, such basic institutions do not yet exist; so no reservoir of respect and loyalty encourages compliance with a "law" whose implicit value premises have not been internalized by the members of the society. The problem is whether the group of nations can achieve sufficient agreement on a variety of ultimate and instrumental values to warrant their relinquishing sovereign and independent status, however hazardous that status may be, and creating a higher governing authority to which the functions of a legal order could be assigned.

The axiological roots of traditional international law lie deep in western European civilization. Aristotle distinguished between law laid down by a city state which was variable in time and place, and a body of norms oriented on the tendential nature of all being toward its highest and fullest development which would be the same everywhere. Belief in the existence of such universal and immutable norms, which came to be called the law of nature or natural law, was a central theme in the speculations of the Greek and Roman Stoics. In Roman legal evolution, this theory provided significant support for the development of the ius gentium, that body of law transcending the formalistic and provincial ius civile of the early Roman state, which permitted the orderly government of affairs in an empire embracing substantially the known world. In time, the ius gentium and the law of nature become virtually synonymous; they were the rules so eminently reasonable, so consistent with the rational and social nature of man that they were universally applicable.
A universal Church that could not fully abjure claims to temporal power lent its support to the belief in natural law, which Saint Thomas Aquinas conceived to be man’s rational participation in the divine universal ordering, the very mind of God. When the disintegration of the Empire and the division of the Church left a number of national states asserting their independence and contending for power, it was to the law of nature that writers like Francisco de Vitoria, Alberico Gentili and Grotius turned for standards of conduct governing even sovereign princes. On these foundations the body of non-conventional international law was built. The value assumptions underlying its rather modest restraints on national states were those widely held in European Christendom and to a considerable extent implemented in the developed Roman law.

Even in these relatively favorable circumstances, however, the society of nations did not find enough assurance of shared values or community of interest to organize themselves so as to develop an adequate body of generally applicable international law and make it truly effective in resolving international conflict. It would seem that the prospects for such development are even less favorable today. No longer is the world community limited to nations deeply imbued with the civilizing influences of Greece and Rome or affected by a unifying belief in the natural law of western Christendom. Aside from the great powers of the Communist block, at least some of the new nations of Asia and Africa tend to view the international scene from different perspectives. One hopes, of course, that further experience will reveal to them and to the older nations common values and ideals in their respective traditions upon which a stronger international order can be built. A more immediate and perhaps more realistic hope, however, is that motivation toward such an order among nations will be provided by the rudimentary value of survival.

Earlier, we left unanswered the question of the relationship between our national goals and international law. Since progress toward our goals would be impeded by international conflict, perhaps we can agree now that some sort of relationship exists, that the two do not lie in totally different ranges of meaning and discourse; but the nature of the relationship we have not determined. That indeterminateness exists whether we speak of international law in its present relatively primitive state or of the kind of international law that might be, if an effective system of international government were created. In the limited time available today, this relationship cannot be fully explored, but by offering for consideration a relatively recent problem case in our international relations, I hope to suggest certain lines of thought for further considera-
In April, 1960, the Government of Cuba announced that its territory was being invaded. In the preceding months, numerous assertions had been made by Cuban officials that an invasion was being planned or instigated by the United States for the purpose of overthrowing the Government of Dr. Castro, but these reports had been regularly denied by official and non-official American spokesmen. After the invasion of Cuban territory had been crushed, the following relevant facts seem to have been reasonably well established. Certain groups of Cuban refugees in the United States were brought together by officials of the United States government, were given military training and supplied with arms and were transported in vessels provided by our government to the Bay of Pigs for the invasion of Cuba. The hope that the invasion would spark widespread uprisings in Cuba was not realized and the invading forces were quickly defeated with unexpected strength and efficiency by loyal forces. The President of the United States publicly assumed full responsibility for the decision to support and implement the invasion plans.

How does the action of the United States in connection with the invasion of Cuba relate to our national goals? It might be suggested that, since the Castro government is Communist-oriented and tends to support the policies and objectives of the international Communist movement, its assumption of power in a country so near us constitutes a danger to the United States in terms of achieving not only our goals abroad but our goals at home as well. Viewing the Castro regime as anti-democratic, we might urge that our action is defensible, not only as a means of eliminating a subversive example to the dissatisfied peoples of Latin America, but also as a contribution to the self-determination of the Cuban people as well. We might even defend the propriety of our conduct by referring to the large amounts of property owned by American individuals and companies that had been taken by the Castro government without adequate compensation. If called to account for our actions, we might insist that no external body or organization can be permitted to determine the vital interests of the United States or the means appropriate for their advancement.

Is international law compatible with this view of our national goals and the means of achieving them? Does international law as it exists at this time approve our position or at least withhold judgment on our participation in the Cuban invasion? The subject of intervention in international law is too large and difficult to be dealt with here in its extended implications. We will, therefore, stay within the relatively clear
areas, if any can be found. Nor will we review the history of the United States' interventions in the affairs of its neighbors to the South, including Cuba. 25/ It suffices to say that the United States adhered without reservation to the Additional Protocol Relative to Non-Intervention produced by the Inter-American Conference for the Maintenance of Peace in Buenos Aires in 1936. The Protocol declared:

The High Contracting Parties declare inadmissible the intervention of any one of them, directly or indirectly, and for whatever reason, in the internal or external affairs of any other of the Parties. 26/

This proscription in the international law of the Americas was broadly restated at the Ninth International Conference of American States at Bogota in 1948. As a matter of fact, the Charter of Bogota seems broad enough to proscribe even our economic sanctions against the Castro regime, such as the sugar boycott.

We will not stop to inquire into the legality of the United States' support of and participation in the Cuban invasion under general customary international law or under the conventional law adopted through ratification of the United Nations Charter. By reference specifically to the international law of the community of American states, it appears beyond question that the action of our government was illegal. For the present discussion, we will limit ourselves to the Cuban intervention but it should not be assumed that it is an isolated instance. It is plausibly arguable by reference to general international law that the American policy of non-recognition of Communist China, 27/ the declaration by the President, following a Joint Resolution of the Congress, of Captive Nations Week, 28/ and the


recent naval demonstrations around the Dominican Republic are somewhat more subtle forms of illegal intervention.

Two lines of defense against the charge that United States intervention in Cuba violated international law might be offered. The first of these is that our action, though admittedly intervention, was a legitimate act of national self-defense against the dangers represented by the Castro regime. Certainly international law, like municipal law, recognizes a privilege of using force for self-defense. The real issue concerns the circumstances in which that privilege arises. The generally accepted principle of self-defense in international law was well formulated by Daniel Webster when he was Secretary of State. One claiming the privilege must show "a necessity of self-defense, instant, overwhelming, leaving no choice of means and no moment for deliberation," and the action taken must involve "nothing unreasonable or excessive, since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it."29/ In view of the acknowledged fact that the Cuban venture was in preparation for approximately a year, it seems evident that these criteria of the privilege of self-defense were not met.

The second line of defense postulates a much broader right of self-preservation. Such a right, if established, "would permit a state to violate all norms of international law, thus violating rights of other states, if necessary to avert an impending injury to its interests. In other words, the state has a right to protect itself against an actual or threatened violation of its vital interests, as distinguished from a violation of its rights, even though there be no illegal attack or imminent danger thereof. By such a doctrine a state can do all that needs to be done to preserve its existence even at the expense and in disregard of the rights of innocent states."30/ If there is such a doctrine exempting states from the ordinary obligations of international law, it is arguably applicable to the United States venture in Cuba when that is viewed in the broader perspective of the Cold War. While asserted by some publicists, this doctrine is not found in the generally recognized principles of international law. Nor, for that matter, is a comparable individual right recognized by the municipal law of civilized states. Consider for example the English case of Regina v. Dudley and Stephens. 31/ Two men and a boy were adrift at sea


31. (1884) 14 Q.B.D. 273.
in an open boat. Long after all food and water were consumed, the men killed and ate the boy. The men survived and were convicted of murder, though the jury found that all three would probably have died had not the body of one been used for food. There is a comparable American case. 32 As Professor Brierly has said: "National law, indeed, is so far from recognizing an absolute right in the individual to preserve himself at all costs, that it sometimes even places on him, without any fault of his own, a legal duty to sacrifice his own life; compulsory military service is an obvious case in point." 33 No apparent reason has been advanced why international law should recognize such a broad right of states to protect what they conceive to be their vital interests at the expense of other states from whom no immediate threat is posed.

It would thus appear that the venture of the United States in Cuba could not be justified under recognized principles of international law. If our policy in this instance was in furtherance of our national goals, perhaps we should recognize candidly that, on occasion at least, we are prepared to violate international law to further what we believe to be our national interests. Such a recognition would permit us to champion the needed development of an international Rule of Law, but might moderate our usual self-righteousness about the use of national force to protect or advance what we conceive to be our vital interests. I would not assert categorically that legality is an ultimate standard of value, or that the existing law, municipal or international, always reflects acceptable value priorities. In the kind of world in which we live, intervention like that in Cuba may implement more important values than legality. Sir William George Harcourt, a distinguished international lawyer of the last century, declared in discussing the proposed intervention of Britain in the American Civil War:

I do not intend to disparage Intervention. It is a high and summary procedure which may sometimes snatch a remedy beyond the reach of law. Nevertheless, it must be admitted that in the case of Intervention, as in that of Revolution, its essence is illegality, and its justification is its success. Of all things, at once the most unjustifiable and the most impolitic is an unsuccessful


To gain perspective on the relationship of our Cuban intervention to national goals and international law, consider the conduct of the Soviet Union during the Hungarian revolution of 1956. The Soviet attempted to justify its intervention on the ground that it was made at the request of the Hungarian Government, a fellow member of the Warsaw Pact. It appears that before the attack a member of the Hungarian Government did request the aid of Soviet troops in putting down rebellion, but the Prime Minister, Imre Nagy, denied his authority to do so. The Soviet Union did not attempt to justify its action on the ground of legitimate self-defense. Unless it can be assumed, therefore, that Soviet troops intervened in response to the request of a duly constituted Hungarian Government, the Soviet action in Hungary had no more justification in international law than did the later American intervention in Cuba.

If we are prepared to accept a broad "right of self-preservation" to justify the United States intervention in Cuba, must we not honestly recognize that from its own view of its national interests the Soviet Union can make a similar defense of its action in Hungary? Could not the Soviet say, "A 'democratic' government in Hungary was being subverted by a Fascist clique. The Soviet Union cannot tolerate on its borders a hostile government that may in time lend aid and comfort to the imperialist, capitalist block and thus endanger the vital interests not only of the Soviet Union but of all the peace-loving countries of the socialist camp?"

This illustration is not intended to suggest that the record of the United States in the observance of international law is no better than that of the Soviet Union. It is intended to point out, however, that in the context of Cold War situations we have pursued policies, presumably for the achievement of national goals, that are illegal under international law. The Soviet Union has done the same. In such cases no power is competent to call either to account on the legal principles of international order. Each party ascertains its own interests and asserts its own standards of justification for its conduct.

34. LETTTERS BY HISTORICUS ON SOME QUESTIONS OF INTERNATIONAL LAW, p.41.


36. Ibid., p.276.
Each demands the prerogative of being the judge of causes to which it is a party.

Very few of us today would, I believe, seriously urge that the United States should revert to its historic isolationism and seek to achieve its national goals in a fortress America, oblivious to the rest of the world. We do not need the noble phrases of John Donne to persuade us that we are involved, deeply involved, in mankind. I am convinced that in accepting that involvement we are neither entirely altruistic nor selfishly prudent. Our cultural heritage demands that we be mindful, not only of our own welfare, but also of the interests and aspirations of others. It seems obvious that these interests, often competing, cannot be accommodated if the critical affairs of national states are remitted to the "law of the jungle." What modes of ordering can we consider in order that our national conduct and that of other members of the society of nations can be rationally related to both the achievement of our respective national purposes or goals and an acceptable normative structure?

Very briefly, I would suggest that there are three basic modes of ordering operative among individual members of a group or among larger associations. The first rests on a perception of a community of interest the actor shares with others. He shapes his conduct so as to further those shared interests. Since the interests served are shared, this principle is not entirely egocentric. The restraint it imposes is voluntarily assumed. Much of public international law as it exists today depends on the operation of this mode, the effectiveness of which is, of course, maximized among nations like those of the Atlantic world which share, in general, the same cultural heritage. The second basic mode of ordering rests on the perception of the actor of the dangers he encounters unless he conducts himself in a particular way. He may not threaten the interests or values of others, not because he shares them but because he fears the consequences to his own interests that the other may effect in return. This mode is fully egocentric; it imposes the restraint of mutual terror and its ethical content is strictly prudential. This mode may suggest a natural law like that of Hobbes, but is apt at best to produce a life like that Hobbes saw in a "state of nature": "solitary, poor, nasty, brutish and short." This mode of ordering seems to be the one primarily operative today in shaping the conduct of the great powers in true Cold War contexts. Thus we are committed to the race of armaments, the fine calculation of balance between offensive and defensive capabilities and the constant fear of the pre-emptive nuclear strike.
The third mode of ordering invokes an extrinsic authority to govern. That authority may be religious or secular; it may be accepted voluntarily or imposed. Its essence is that as a superior it directs and orders the conduct of inferiors and achieves this through the threat or actual use of sanctions. This mode is not unrelated to the first two. Governing authority may be granted to a higher agency because this is perceived to be more efficacious in furthering shared interests, because the protection of unshared interests through mutual terror is found inadequate, or for both reasons. Only through the operation of the third mode of ordering can we achieve, strictly speaking, a Rule of Law.

Through the various stages of human history each of these modes of order has been widely used. This history reveals, however, that as problems of increasing complexity and urgency have arisen, it is to the third principle that human creativity has been attracted. I would conclude with the question whether a greater share of our energies and imagination should not now be directed toward the potential utilization of this principle for ordering the relations among nations. It is along these lines that I believe our national goals can best be furthered and related affirmatively to a developing regime of international law.
APPENDIX I

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APPENDIX II

THE GHANA ADVENTURE ENDS

After I received the Deportation Order, when my doctors thought travel feasible, Marilou and I flew to London, I was packed into an ambulance at Heath Row, and taken to the Hospital for Tropical Diseases in the St. Pancreas Hospital Complex. A month in the hospital and about a week in a nearby hotel preceded our return to the United States. When I was able to resume some work, I began the preparation of an extensive report on the Ghana project, mainly for the International Legal Center and the Ford Foundation; I also provided a copy to the Rockefeller Foundation which had generously supported my research for years. Several who saw the report urged that it be published, but I felt some concern that doing so would make more difficult the work Conor O'Brien and others were still trying to do in Ghana in protecting the University. I sent a copy of the report to Conor and, after reflection, he came to share my concern. That concern has long since disappeared, and here I include the report in full. It has the benefit of preparation while the events were still fresh in my mind.

Legal Education in Ghana

A Report to the SAILER Project of the Institute of International Education and the Ford Foundation

The present report will deal briefly with the background of the legal profession in Ghana, with the beginning of legal education there, and with developments after the beginning of SAILER support. The unfortunate series of events resulting in my own expulsion from Ghana and the probable early termination of all SAILER participation in the program require detailed consideration of a range of factors that ordinarily would not come within the scope of such a report.

The Legal Profession in Ghana

The beginning of a legal profession in the Gold Coast may be found in the latter part of the 19th century. While the earliest Africans permitted to appear before the Gold Coast courts had little or no formal qualification, the flow of young
Africans from the Guinea Coast to educational opportunities overseas, primarily in the United Kingdom, soon included a number who studied law. The vast majority of those were called to the English Bar, usually without any University experience, and then returned to the Gold Coast to practice as both barrister and solicitor in a unified profession. The first African from the Gold Coast to qualify as a solicitor in England did so in 1951, and only 10-12 have since earned this qualification. Oriented by his training almost exclusively toward litigation, the Gold Coast-Ghana lawyer has played a negligible role as counselor in non-litigious matters. Historically and to a substantial extent even today, the bulk of the important corporate and commercial work has been in the hands of a small number of expatriate solicitors.

There are approximately 500 lawyers in Ghana today, of whom about 202 are in Government service, including the Judiciary. While the economic attractions of the profession have probably declined somewhat in recent years, the Ghanaian lawyer can still expect a high income and, in a peculiar sense, a high prestige status. There is convincing evidence that the image projected by the Ghanaian lawyer is a compound of greed, mendacity, unscrupulousness, and disregard of the true interests of clients. At the same time he enjoys a certain fear, respect and envy for his power and economic position.

The government of the legal profession in Ghana was vested by the Legal Profession Act of 1960 in the General Legal Council. The Council, under the Chairmanship of the Chief Justice, comprises all judges of the Supreme Court, certain appointees of the Minister of Justice, the Attorney General, representatives elected by the Ghana Bar Association, and the Head of the Law Faculty of the University. In addition to matters of admission to and discipline of the Bar, the Council has important responsibilities for assuring an adequate system of legal education in Ghana.

The Beginning of Legal Education

Aside from certain law courses taught for Economics students in the University College, legal education began in Ghana in late 1958 with the opening of the Ghana Law School. The School, situated near the Supreme Court in Accra, had no University connection. Responsible to the General Legal Council and run by the Director of Legal Education, it offered a program of evening instruction geared to Parts I and II of the English Bar examinations. It was also contemplated that in the future the School would provide a one-year Practical Course as a transition to practice for both Diploma graduates of the School and those who had taken a law degree in the University College.

Since the Ghana Law School figures rather prominently in
later developments, some consideration should be given to the reasons for its establishment. The guiding spirit behind the creation of the Law School was Mr. Geoffrey Bing, an English barrister who until 1961 was Attorney General of Ghana and an influential political adviser of Dr. Nkrumah. Mr. Bing’s justification for the Law School, at the same time that a University program in law was being planned, involved two articulated arguments. The first of these was that Ghana needed quickly a number of legally trained persons, not necessarily of University quality, who could play important roles in national development through both Government service and private practice. He pointed to the concentration of lawyers in Accra, Kumasi, Cape Coast and Takoradi and legitimately argued that means must be found for increasing the supply of legal services and dispersing them more satisfactorily throughout the country.

The second argument advanced by Mr. Bing posited the existence in Ghana of a large number of able people, both interested in and qualified for the study of law, who lacked the financial resources for study in Britain. Many of these persons were civil servants or teachers who could be accommodated by evening instruction in Accra, while they continued their regular employment. Justice to these persons as well as the national interest justified, in Mr. Bing’s view, the establishment of a non-University program of part-time legal education in the Ghana Law School.

A third major element which did not appear in the formal argument was political. The existing Bar of Ghana was economically and politically conservative. Leading lawyers had long played prominent parts in the intellectual-middle class nationalist movements such as the United Gold Coast Convention and the National Liberation Movement. They provided most of the top leadership, usually rather ineffectual, for the United Party which by the late fifties was the principal opposition group. They had long maintained close, though not always tranquil, relations with the chiefs and traditional rulers who were increasingly regarded by Dr. Nkrumah and his associates in the Convention Peoples’ Party (CPP), as the foci of dangerous, divisive sub-national power. To dilute the existing British-trained Bar by a large influx of locally produced lawyers seemed to offer substantial political as well as other advantages.

The Ghana Law School was, therefore, an accomplished fact by the time the International Advisory Committee (Professors L.C.B. Gower of England, Zelman Cowen of Australia, and Arthur Sutherland of the United States) studied the program of legal education and reported their recommendations in 1959. One of the Committee’s main tasks was to relate the functions of the Law School to those of the Department of Law in the University College, which accepted its first group of students in October 1959. The Law Department proposed to offer a four year course
leading to the LL.B. degree. The Report of the Advisory Com-
mittee, accepted by both the University College and the Gover-
ment, recommended that persons taking the LL.B. should be ad-
mitted to practice after completing a one-year, full-time Prac-
tical Course in the Ghana Law School. It was also recommended
that the part-time instruction in the Law School, leading to the
Diploma in Law, should be regarded as a temporary expedient and
terminated not later than 1965, and that thereafter the Law
School, acting in an undefined capacity as an "Institute of the
University," should offer only the final year’s Practical
Course.

Thus, by October, 1959, a two-pronged effort in legal
education had been launched in Ghana. The only formal link be-
tween the two programs was the membership on the General Legal
Council, which was responsible for the Law School, of the Head
of the Law Department in the University. More important, how-
ever, was the fact that John H.A. Lang was appointed as the
first Professor of Law in the University and also as Director of
Legal Education with operational responsibility for the Law
School.

The growing pains of both institutions between 1958 and
1962 need only be summarized. The Law School with highly amor-
phous admission standards accepted large numbers of students,
but the drop-out and failure rates were high. The time required
for the Diploma in Law was extended from two to three years.
When the first group of thirteen students earned their Diplomas
in 1961, they were required to wait almost a year before a Prac-
tical Course was organized for them. In both the Law School and
the University College, shortages of teaching staff were
chronic. Each institution had a small number of full-time
teachers, supplemented by part-time lecturers from Government
law offices and the private Bar. In the University, yearly
course programs were largely fixed on an ad hoc basis; the first
set of course and degree syllabuses was not prepared and ap-
proved until the late Spring of 1962. I would infer from the
circumstances when I assumed responsibility that Professor
Lang’s primary interest was in the Law School and to it he gave
the larger share of his considerable energy.

The Situation in January 1962

In early January, 1962, a Conference on Legal Education in
Africa was held at the University of Ghana under the joint
sponsorship of the University and the General Legal Council.
Delegates and observers from many parts of Africa, Europe and
the United States attended. This occasion provided my first op-
portunity for extensive observation of the difficulties which
had developed in legal education in Ghana. Understanding of
these and later developments requires a somewhat broader picture
of the entire University.
The University College of the Gold Coast was opened in 1948 under a special relationship with the University of London. The teaching staff, largely British, was appointed under London supervision and, not surprisingly, the curriculum had a strong British cast. While provision was made for scientific instruction, science students were scarce. Heaviest emphasis was on the humanities and some of the social sciences. Research productivity of the staff was generally low. The University College was rather lavishly housed in new buildings at Legon, a few miles east of Accra. Student life was organized on the Oxbridge model in residential colleges or halls, with the traditional trappings of academic gowns, high tables and after-dinner port.

Not surprisingly, Dr. Nkrumah's Party and Government were long ambivalent in their attitudes toward the University. Pride in its existence and the expectation of benefit from it mingled constantly with a conviction that all was not right in the University College. Some of the grounds of the conviction are apparent. There had long been an anti-intellectual strain in the CPP, and a relatively small percentage of the educated Ghanaians supported the Party. As David Apter, an American political scientist, once observed, Nkrumah built a Party largely from the "Standard VII boys." The continued dominance of British influence in the University was also an irritant. Carping at the University by leading CPP politicians and the Party press had long been familiar.

I have long been convinced that the University College and later the independent University were legitimately subject to substantial criticisms. Unfortunately political and Governmental spokesmen were rarely able to articulate these well. Their criticisms usually related to the superficialities, the trivia, of University life, such as the wearing of academic gowns by students. With undue sensitivity and defensiveness, the University community commonly characterized such criticisms as attacks on academic freedom and hastened to the ramparts to defend.

Two basic criticisms could, in my judgment, properly be made of the University College. The first might be broadly stated as irrelevance to the society surrounding it. It was, or largely appeared to be, an enclave immune from the stresses and strains, the hopes and aspirations, the needs, and demands of emergent Africa. At a time when the traditional wisdom about Africa urgently demanded supplementation and correction, research, particularly in the social sciences, was negligible. There was a well developed Department of Classics but no Department of Political Science. The Balme Library collection was rich in patristic theology but impoverished in law and many aspects of African culture.
The second basic fault of the University College might be called elitism. In an overwhelmingly illiterate society, even a modest education offered firm assurance of power, prestige and economic security. A University degree of almost any quality and in almost any field set the holder off as a member of a select group that almost literally held the world by the tail. In these circumstances it is not surprising that even on arrival in the University College a student felt set apart, one of the chosen, in the familiar idiom of West Africa, a "big man." To temper such attitudes and to nurture a social consciousness more responsive to the needs of the day would at best have been a difficult task for the University College. That task was not attempted, however. On the contrary, every aspect of life in the College tended to foster elitism. The magnificent physical plant was beautifully situated on Legon Hill, well removed from the crowded streets of Accra. Student life revolved around the residential Halls, each fostering its own exclusivity; virtually no general College life existed. Student rooms were cleaned and beds made by a large staff of stewards. In the imposing dining halls, stewards served. To be sure, students ate at "low table" and rose deferentially when the robed Senior Members marched in to "high table." Even among the elite, however, some are more so than others. In these circumstances, it is not surprising that College life widened dangerously the gap between student and society and fostered the attitude that the degree was not a preparation to serve that society but a title deed to a bungalow, a car and a good salary for life.

Developing nationalism and chronic disaffection with the University College were focused in 1961 on a move to end the College's dependent status and establish it as the independent University of Ghana. In my judgment, this step was not premature, and there is every reason to believe that the University of London was prepared to, in fact did, cooperate fully and willingly in the transition. Unfortunately the move was handled crudely by the Government and its initiative was met by emotion, suspicion and immaturity by many of senior staff of the College.

In the late Spring of 1961, the Government announced that legislation would be introduced to create the independent University of Ghana and that this legislation would automatically terminate all existing staff appointments. Senior members who were interested in continuing in the University were invited to submit applications for new appointments. Understandably this announcement caused much consternation among the staff since it was too late in the year for most to consider or be considered for appointments elsewhere. A flurry of rather intemperate protest resolutions came from the College staff. Nevertheless, the University of Ghana Act came into force in September, 1961. Staff dislocation was far less than had been feared, however. In only six cases were existing appointments not renewed, and a consensus later emerged that with a single possible exception
these losses were beneficial to the institution. In the six cases rather liberal financial settlements were made.

The academic session 1961-62 thus started turbulently. The temper of the teaching staff was on edge. The administration was discouraged, the former English Principal having resigned and the former Registrar being one of the six not reappointed. Nana Kobina Nketsia IV served as Interim Vice Chancellor but most of the administrative leadership came from Professor R. H. Wright, the pro-Vice Chancellor. At this time Dr. Nkrumah decided to implement a recommendation of the earlier University Commission for the appointment by himself of certain Presidential Professors in the University. In theory such appointments might be defensible since they could make available funds, supplementary to the University’s own budget, for a limited number of distinguished scholars who on relatively short-term appointments could contribute to the research, teaching and general intellectual life of the University. In Ghanaian conditions, however, the scheme was most unwise; its implementation had unfortunate consequences for the University as a whole and particularly for the Department of Law.

The first Presidential Professor to be appointed was the Kwame Nkrumah Professor of Law. The appointment went to Mr. A. C. Kuma, a Lecturer in the Law department. While appointed Lecturer on Professor Lang’s recommendation and with the approval of the University of London reviewing authorities, Mr. Kuma was qualified by neither intellectual ability, academic record, nor interest for University teaching. The only justification that might be offered for his initial appointment was the acute shortage of teaching staff in the Department of Law. Kuma professed to be an enthusiastic supporter of the CPP; he had powerful supporters in the Government. Anyone in the University with these qualifications could expect preferment from the President and the Party, and Mr. Kuma enjoyed it soon after joining the University staff.

The first attempt to advance Mr. Kuma came as a proposal to promote him to the rank of Associate Professor. Professor Lang vigorously opposed this step, contending that Kuma’s record as a teacher was unsatisfactory, and the University Appointments Board declined to make the appointment. At this point the President intervened with the Presidential appointment as Professor of Law.

Professor Lang responded to the Kuma appointment by submitting his own resignation. Developments were at this stage when the Conference on Legal Education was convened in the University in early January, 1962. I had come for the Conference, intending to remain thereafter for a few weeks of research. I learned immediately, as doubtless all other participants did, of the Kuma appointment and the Lang resignation. It was apparent, however,
that Professor Lang had no expectation that his resignation would be accepted. He spoke enthusiastically about his hopes and plans for the following year. It seemed quite clear that the resignation was an attempt to force the President to withdraw the Kuma appointment. Some participants in the Conference, notably Professor L. C. B. Gower, attempted to further this solution to the problem. At the time the Conference ended, it seemed to me, and I suspect to the other visitors, that a face-saving compromise would be found and that Professor Lang would withdraw his resignation.

About ten days after the close of the Conference, while I was working in Accra, I received a call from Professor R. H. Wright, pro Vice-Chancellor of the University, asking if it would be convenient for me to call on Nana Nketsia, the Vice-Chancellor. A day or so later I visited the University and conferred with Nketsia and Wright. The former came immediately to the point of the invitation, asking if I would consider coming to the University for at least two years as Professor of Law. I replied that I was, of course, aware of Professor Lang's resignation but that I had assumed that the attempts to retain him would be successful and that I was not in a position to discuss the Vice Chancellor's suggestion while Professor Lang's resignation was under consideration. Nketsia then informed me that the University had already accepted Professor Lang's resignation and that arrangements would soon be made for the temporary assignment of his duties to another member of the Department so as to accommodate Professor Lang's expressed desire to leave Ghana in the near future.

In these circumstances I felt it necessary to explain my own position fully. I pointed out that I had long had a research interest in Ghanaian developments, that I had never considered any other role there and that I would be reluctant to take on responsibilities which would inevitably interfere with the research I was interested in completing. I pointed out, as well, that the Vice Chancellor's invitation raised problems for my family and University whose reactions I could not undertake to predict. For these reasons, as well as the fact that I did not know enough about the University and doubtless the University did not know enough about me, I suggested that we proceed as if no invitation had been issued. I agreed to pursue some relevant inquiries while I remained in Ghana and to do some preliminary sounding of my family and University after I returned to the United States. If thereafter the University of Ghana still had any interest in considering the matter, further discussion could be carried on by correspondence. Nana Nketsia agreed to this approach.

During the remainder of my visit in Ghana, I found time for discussions with University administrators and many members of the teaching staff, including the two remaining members of the
Law Department. Since it was clear that the Professorship of Law should continue to be held by the person serving as Director of Legal Education, I also talked with Mr. R. A Ofori-Atta, the Minister of Justice, under whose general supervision the General Legal Council and the Law School functioned. The principal matters covered in these discussions and the tentative conclusions I reached may be briefly summarized.

(1) What was the explanation for the treatment of Professor Lang while negotiations were apparently progressing for his retention and when he obviously wanted to stay? It soon became apparent that the rather abrupt acceptance of Lang’s resignation did not reflect either University support for the Kuma appointment or lack of desire for a sound program of legal education. The simple fact seemed to be that Professor Lang had lost the confidence of the University, including his own staff in the Law Department. He had alienated many of his senior colleagues by regarding general University oversight of the Department as harassment and obstruction. Later experience in the General Legal Council showed that much the same situation existed there. Professor Lang’s strength had never been as an administrator. My own impression, however, confirmed by others with whom I talked, was that he was a warm, humane and liberal man. These qualities perhaps led him to frequent indiscreet comments on a range of Ghanaian affairs that might properly be regarded as beyond the responsibilities of an expatriate educator. Virtually all the remaining support for Professor Lang in the University and the General Legal Council was inertial. He had himself, I was told, brought the University’s reaction to a head by declaring that he had so completely lost confidence in the institution that he could hardly undertake staff recruitment for the coming year. In these circumstances his proffered resignation did not prove to be an effective weapon against the Kuma appointment; it was accepted readily.

(2) What was the state of University morale and the probable course of relations with the Government? Morale among the University staff was unquestionably low. The tensions produced in the course of disassociation from London had not subsided. The Kuma appointment and his attempted political maneuvering within the University were of general concern. There were hopeful signs however. The heavy-handed action of the Government in terminating all staff contracts had in fact resulted in the failure to reappoint only six people. Their loss was not apparently widely regretted and they had left with liberal financial settlements. While no one did public penance, there seemed to be an embryonic recognition that neither the Government nor the University had acted entirely creditably in the recent difficulties and that better accommodation of the respective interests might be found. While the prospects were not bursting with hope, they were by no means hopeless.
(3) How would the question of general leadership of the University be settled? Nana Nketsia had the title of Interim Vice-Chancellor and he clearly did not want the permanent appointment. As long as he remained, back stopped by Professor Wright as pro-Vice Chancellor, the top leadership would not be vigorous but neither, it seemed to me, would it be obstructive of Departmental development. The choice of a new Vice Chancellor was critical, but the prospect was not for a local, perhaps political choice, It was well known that efforts were being made in Britain to find a satisfactory expatriate. Until the choice was made, a critical uncertainly remained, but the prospects seemed encouraging.

(4) What was the dominant view on the future of the Law School, particularly its relation to the University? I had never been persuaded that the establishment of the Law School was wise and its accomplishments to that time had not been impressive. Unlike Professor Lang, my primary interest and emphasis, if I came to Ghana, would be in the University. If there were a fixed view to the contrary, this would substantially eliminate any inclination I might have to consider accepting appointment in Ghana. In discussions with the Minister of Justice and others, I was assured that there was no fixed policy contrary to my own tentative views and that the Council would be entirely willing to consider such recommendations as I might make.

When I returned to the United States at the end of January, 1962, I felt that useful work might be done in Ghana. Preliminary discussions with my family and the authorities of the University of Michigan raised no major difficulties. If the University of Ghana decided to renew a firm invitation, I was in a position to consider it in the light of my other interests and commitments. In late February, the University of Ghana renewed its invitation. After further negotiation on details I accepted in mid-March.

**Developments During the Spring, 1962.**

Although I was not to assume responsibility in Ghana until September, it was essential that preparatory work be begun immediately. The most critical problem was teaching staff. After Professor Lang’s resignation, only two full time teachers remained in the Law Department: Mr. S.K.B. Asante who had been assigned administrative responsibility, and Dr. B. J. Pooley whose term expired in July. To meet the urgent need created by Professor Lang’s departure, Mr. D. R. Afreh, a young Ghanaian barrister, was appointed Lecturer in Law on a probationary basis. Other teaching was done by part-time Lecturers and by Professor Kuma.

With the cooperation of Mr. Asante, I began an immediate recruitment drive. Candidates for appointment were available but
many lacked the necessary qualifications, either academic or personal. Negotiation by correspondence was slow and not infrequently the general University authorities did not act with dispatch. Although other offers were made, only three actual appointments resulted:

(1) On Mr. Asante's recommendation, Mr. Afreh was moved from probationary status to a regular appointment as Lecturer.

(2) Dr. W. C. Ekow-Daniels, who had applied for appointment in response to a University advertisement, was appointed Lecturer. Dr. Daniels, a Ghanaian, had taken the LL.B. from the University of London and thereafter, while a candidate for the Ph.D., had served for several years under Dr. A. N. Allott as a research officer in the School of Oriental and African Studies. While having at the time no direct responsibility for the Law Department, I had, as an external assessor, an opportunity to review his credentials. I had grave reservations about Dr. Daniels' qualification since he had a poor class (Lower Second) on his London degree and his London Ph.D. was not significantly reassuring. I concurred in Mr. Asante's recommendation of his appointment, however, largely on the basis of a strong recommendation from Dr. Allott of Daniels' mature scholarship, integrity and personality.

(3) While the formal appointment was not made until after I had taken up my post in Ghana, arrangements were substantially completed during the Spring for the appointment of Robert B. Seidman as Senior Lecturer in Law. Mr. Seidman had a distinguished undergraduate record at Harvard, an equally good record at the Columbia Law School where he served as one of the Senior Editors of the Law Review, and had engaged in an active trial and appellate practice in New York and Connecticut for fourteen years. His appointment seemed to offer much needed maturity and experience to the staff.

Perhaps the most significant development during the Spring for the prospective work in Ghana was the appointment of Dr. Conor Cruise O'Brien as Vice Chancellor of the University. Until early 1962, Dr. O'Brien had served as Chief of the United Nations operation in the Katanga. I knew nothing of Dr. O'Brien beyond this fact, and newspaper accounts of developments in Katanga were not especially helpful in projecting an image of the man. Inquiries at the United Nations and elsewhere were encouraging, however; Dr. O'Brien was described as intelligent, open minded and approachable. Favorable comment was also made on his courage and lively sense of humor. His appointment seemed to brighten prospects not only for fruitful development of the Law Department but for the entire University.

The Academic Year 1962-63
I arrived in Ghana on September 13, 1962. Preparations for the beginning of the University term were now on an urgent basis. The Law School was already in session, with a program in which little change could be made for some months. The University therefore claimed most of my time and attention. The various major aspects of development during the year will be described separately.

Relation of the Law School to the University

At the first meeting of the General Legal Council, I discovered that the Council was receptive to early consideration of the status of the Law School and particularly its future relation to the University. The record of the School had been disappointing. Although in operation since 1958, it had as yet produced no lawyers. The first group of ten or less was expected in mid-1963. A substantially part-time teaching staff and an entirely part-time student body were unlikely, in my judgment, to produce a product responsive to the needs of the country. While the interests of students in the School deserved full protection, I was convinced that steps should be taken as soon as possible to wind-up the Law School.

In October, 1962, I presented to the General Legal Council a paper outlining my views and presenting recommendations for action. After full discussion in the Law Faculty Board, substantially the same paper was presented to the Executive Committee and Academic Board of the University.

The paper outlined the history of legal education in Ghana, described the existing programs of the Law School and the University, and suggested the problems which had arisen. The recommendations, as modified in certain details following discussions in the University and the General Legal Council, may be briefly stated:

1. The program of the Ghana Law School should be phased out as rapidly as possible with fairness to the students in the School. Final closing of the Law School should occur in July, 1964.

2. Responsibility for all legal instruction, both "academic" and "practical" should be assumed by the University which should modify its own curriculum to meet these increased demands.

3. The University should provide five years of instruction in Law, divided as follows: a three year non-professional B.A. (Honors in Law), to include some general, liberal education, study of the basic legal institutions and certain of the less professional specialized courses such as Public International Law. This degree program would cater not only for the prospec-
tive professional but also for persons who after three years in the University would make careers in the civil service, diplomatic corps and business concerns both public and private. For those seeking professional qualification, the University should offer a two-year, post-graduate LL.B. degree.

(4) The General Legal Council should accept the B.A. and LL.B. from the University as the basis for immediate admission to the Bar of Ghana.

Guiding these measures through the University and the General Legal Council required several months of complex and at times amusing negotiation. Each body was keenly aware of its own powers and prerogatives, though neither had a similar sensitivity about the other's domain. The result was that the Council often found itself tempted to deliberate on proper University degree requirements, and University bodies not infrequently wanted to express strong views on the appropriate criteria for admission to the Bar. Jurisdictional lines were finally disentangled, however, and the several recommendations adopted. The University agreed to give immediate effect to the new two-degree program, making it applicable to all students currently in the Department even though some minor dispensations were required. In order to accommodate students who would earn the Diploma from the Law School before its final closing, the University also agreed to admit them as special, two-degree students for their final professional study.

Several advantages seemed to accrue from the unification of the system of legal education. Competition for staff between the Law School and University was eliminated, along with the dissatisfaction that had previously arisen from the different terms and conditions of service in the two institutions. Prospects were improved for committing the entire teaching program to a full-time staff which would also be engaged in systematic research into the law of Ghana. A closer cooperation between the University and leaders of the Bench and Bar was expected as a result of making the Chief Justice and two other members of the General Legal Council co-opted, non-voting members of the Law Faculty Board. Finally, a more flexible program was made available to students. No longer would they be committed, on first entering the University, to a four-year degree course that assumed full professional qualification as the objective. The B.A. degree, requiring three years and having an educational integrity independent of the LL.B., would permit students to decide on a more mature basis whether their career objective was the Bar. When fully implemented in 1965, the new system would also provide substantial economies, while assuring the country a steady flow of educated lawyers to meet its developing needs.
Change of Status of the Law Department

Since its inception in 1959, the Law Department had been a unit within the Faculty of Social Sciences. In the general reorganization of the University following its independence, a decision was taken to make the Law Department a separate Faculty under its own Dean. In accordance with the new University Statutes this action was taken and I was elected Dean of the Faculty of Law. While not necessarily related to the consolidation of law teaching within the University, the grant of Faculty status to Law was an appropriate recognition of the new, enlarged responsibilities.

Curriculum Revision

The new program required a careful reexamination of the Law curriculum. In the past it appeared that courses had merely "grown" and the courses to be offered in any particular year had depended unduly on the vagaries of available teaching staff. Actual course syllabi for the old LL.B. degree had not been prepared and approved by the Academic Board until the Spring of 1962, after Mr. Asante had assumed responsibility for the Department. It was recognized then that many of the syllabi were tentative; they related to courses which had never been offered and were prepared in the absence of instructors who would be responsible for teaching them.

When the new degree structure was approved by the Academic Board, the Faculty began a systematic curriculum revision. All existing syllabi were studied and revised. Consultations included the present members of the Faculty as well as new appointees, not yet arrived, whose views were sought by correspondence. Several new courses were required. In one of these, Taxation, the Faculty had the benefit of the experience and knowledge of Professor Boris I. Bittker, Southmayd Professor of Law at Yale University, who visited Ghana on the Faculty's invitation and submitted an extremely helpful report.

Clearly related to the tasks of curriculum revision was an informal Faculty seminar that met weekly during the Trinity Term. Most members of the Faculty had had their legal education in Britain, a minority in the United States. Sharing the common law system has not prevented the development of profoundly different attitudes and techniques in legal education in the two countries. Actual differences are further compounded by widespread misconceptions on each side. The purpose of the seminar, which was quite informal, was not indoctrination in either persuasion. Rather its objective was to clarify viewpoints within the Faculty, establish better communication and, insofar as possible, extend the areas of agreement on the objectives of University education in Law and the best techniques for reaching those objectives. While significant differences of expressed
view and even greater differences of actual teaching technique survived the seminar, I believe it contributed to the consensus which stood behind the syllabi adopted in the new curriculum and encouraged a continuing self-criticism among the members of the Faculty.

Development of Teaching Staff

No task facing the Faculty was of greater urgency than the recruitment of additional qualified teachers. On my arrival in September, 1962, there were only two regular members of the teaching staff: Mr. S. K. Asante, LL.B. (Natl.) LL.M. (Lon.), who in his first year of teaching had done an excellent job in directing the Department after the resignation of Professor Lang, and Mr. D. K. Afreh, LL.B. (Birm.) LL.M. (Lon.). Mr. T. O. Rose, B.A. (Princeton), LL.B. (Yale), was beginning his second year in Ghana under the auspices of the Maxwell School of Syracuse University, teaching part-time in the University and the Ghana Law School. Dr. W. C. Ekow-Daniels and Mr. Robert B. Seidman joined the staff as full-time members in October and December respectively. Mr. Gordon R. Woodman, LL.B. (Cantab), was in his second year as a Research Fellow in the Faculty.

The remainder of the course load was carried by part-time lecturers from Government and private practice:

(1) Mr. Justice Nii Amaa Ollenu of the Supreme Court had been appointed Honorary Professor of Law in July, 1962. Judge Ollenu assisted in teaching the customary law of real property and also contributed generously of his wisdom and experience in all the deliberations of the Faculty.

(2) Mr. J.K. Agyemang, Lecturer in the Ghana Law School, taught the course in Torts.

(3) Mr. A.N.E. Amissah, Director of Public Prosecutions, taught the Criminal Law course during the Michaelmas Term and thereafter assisted Mr. Seidman on certain aspects of Ghana criminal law practice.

(4) Mr. Kwasi Gyeke-Dako, Senior State Attorney in the Attorney General’s Department, taught the course in Public International Law.

(5) Mr. E.A.L. Bannerman, Senior Lecturer in the Ghana Law School, taught Evidence during the Michaelmas Term.

(6) Mr. Gordon R. Woodman, Research Fellow in the Faculty, assisted with the teaching early in Michaelmas Term. As the staff expanded, it became possible to relieve him entirely of teaching assignments in order that he could devote full time to research and writing on the customary land law of Ghana.
During Michaelmas Term, I taught two courses, one of which I continued throughout the year. With this staff it was possible to service the course program during 1962-63. Teaching loads for regular members of the staff were too heavy for a substantial research effort, however, and an undue proportion of the courses were committed to teachers whose primary obligations lay elsewhere. I therefore began a systematic effort to find additional full-time staff. The guidelines for this effort were described as follows in my letter to the Vice-Chancellor of November 23, 1962:

"I would like now to indicate the policy views I will undertake to implement in supplementing the Law Faculty and then consider the problems that will be encountered.

"(1) Needed development can be achieved only by the sustained efforts of long-term staff. One and two year appointments are at best a stop-gap. To some extent they will probably be necessary for several years. Every effort should be made, however, to recruit persons from whom many years of service to the University can be anticipated.

"(2) There is not necessarily implicit in the desire for long-term staff a criterion of national origin. As a purely practical matter, however, it will rarely be possible to enlist the aid of expatriates on anything but a short term basis. Therefore, the practical consequence of my view would be that primary emphasis should be placed on the recruitment of qualified Ghanaians. I would re-emphasize, however, that the essential factor is long-term service. As qualified persons offering that assurance become available, I will recommend their appointment without regard to ethnic or national criteria.

"(3) Teaching and research in Law in this University require persons of outstanding ability. I see no reason to anticipate any necessity for compromising this standard. I will, therefore, continue to employ various temporary expedients until fully qualified persons can be recommended for regular University appointment.

"(4) The responsibilities of a University law teacher for instruction, research and scholarly writing require a full-time commitment. I would not, therefore, anticipate that regular Faculty members would be permitted to engage in private practice. Occasional consulting work, however, for Government or private persons can broaden the experience of the teacher and further the public interest. In general, I would depend on the judgment and discretion of the individual teacher in determining how much consulting he can reconcile with his primary University responsibility."
"(5) Lawyers of the quality needed for this Faculty are, in crass terms, highly merchantable. Their available opportunities in private practice, Government and business are numerous and economically attractive. In general, I do not believe it will be feasible to attract to the University the necessary manpower unless devices are found for increasing the economic attractions of appointment here. One such device would be an avowed professional differential in University salary scales. Another would be appointment to higher academic rank, with consequent higher salary, much earlier than would be conventional elsewhere in the University. I rather suspect that both devices will have to be employed.

"(6) Recruitment of the kind projected here cannot rely on the relatively passive methods of advertisement, application and late appointment. I believe we must seek out the people we want, stimulate their interests in an academic career and, if they are responsive, move to appointment without delay. The able young lawyer appreciating the range of his opportunities as he approaches the end of his formal studies will naturally want early assurances from the University to weigh against other options. Insofar as we recruit among lawyers in private practice or Government, necessary adjustments in leaving prior pursuits also require extended advance notice of appointment."

In December 1962, I visited the United States and Britain for the purpose of interviewing prospective additions to the Faculty. In this connection I received invaluable assistance from the SAILER office in New York and particularly from Dean John Bainbridge of Columbia and Dean Charles Runyon of the Yale Law School.

On my return to Ghana, negotiations related to our staff position continued within the University. These resulted in the following developments:

(1) The establishment of the Law Faculty was increased to provide for two additional Senior Lectureships. We were thus able to consider more senior teachers as well as the promotion of younger men. The revised senior establishment of the Faculty, exclusive of certain posts allocable to non-professional law teaching for other units of the University were as follows:

1 Professor
4 Senior Lecturers
7 Lecturers
1 Research Fellow

(2) A satisfactory solution to the problem of making law teaching in the University economically attractive to the able young Ghanaian lawyer was difficult to find. The English tradition in the University foreclosed early consideration of the
device American faculties have used - an avowed professional
differential in salaries. To lessen the immediate problem,
though not to solve it on a long-term basis, I was able to
secure for all Ghanaian members of the staff salary increases
considerably in excess of the amount that standard University
practice would have provided for 1963-64. These adjustments were
a great help in the recruitment effort since they affected the
offers that could be made to prospective Ghanaian teachers.

(3) The following new appointments to the Faculty were made
for the academic year 1963-64:

(a) Joseph R. Agyemang, LL.B. (Nott...), LL.M. (Lon.), Lect-
turer in Law for a five year term.

(b) George K. Ofosu-Amaah, B.A. (Southampton), with post-
graduate study in Cambridge, Lecturer in Law for a five year
term. Prior to his appointment, Mr. Ofosu-Amaah had served in
the office of the General Counsel of the United Nations.

(c) Thomas A. Mensah, B.A. (Legon), LL.B. (Lon.), LL.M.
(Yale), Lecturer in Law for a five-year term. Prior to his ap-
pointment, Mr. Mensah had completed two years at Yale and was
ready to submit his doctoral thesis there.

(d) Michael Thoyer, B.A. (Mich.), J.D. (Northwestern),
LL.M. (Columbia), Lecturer in Law for a two-year term.

(e) Jeremy T. Harrison, B.S. and LL.B. (San Francisco),
LL.M. (Harvard), Lecturer in Law for a two-year term. Prior to
appointment, Mr. Harrison served as Lecturer in Law in Catholic
University of America.

(f) Vern G. Davidson, B.A. and LL.B. (U.C.L.A.), Lecturer
in Law for a two-year term. Prior to appointment, Mr. Davidson
served as Associate in Law in Columbia University.

(g) Gordon R. Woodman, LL.B. (Cantab.), Visiting Lecturer
in Law for a one-year term.

(h) Judith Reinhardt Thoyer, B.A. (Mich.), Law Librarian
for a two-year term.

The appointments of Messrs. Mensah, Agyemang and Ofosu-Amaah
were especially gratifying since they are Ghanaians and offered
the prospect of long-term service to the University. In connec-
tion with the appointments of Mssrs. Thoyer, Harrison, Davidson
and Mrs. Thoyer, as well as the earlier appointment of Mr. Seid-
man, the Faculty received important financial assistance from
the SAILER Project. It was hoped that by the terminations of
these short-term appointments it would be possible to replace
most of the expatriates by qualified Ghanaians.
A peripheral aspect of the staff situation was the status of Mr. Kuma, Presidential Professor of Law. In allocating teaching responsibilities for 1962-63, I informed Professor Kuma that no course would be assigned to him. He had the privilege of preparing and delivering in the University occasional, public lectures; when he wished to do this I would be glad to cooperate. I also invited him to prepare for me a report on needed research in law and related social sciences, with particular reference to organization and financing. Professor Kuma agreed to undertake this assignment.

Shortly after my arrival in Ghana, the Vice Chancellor asked what I proposed to do about the "Kuma problem." My brief answer was "Nothing." I indicated that in my judgment no such problem currently existed, pointing out that Professor Kuma’s appointment involved no assignments of particular responsibilities and that such assignments fell to me. I reported on the arrangement I had made for the use of Professor Kuma outside the teaching program during the year. The Vice Chancellor approved the course taken which, we believed, would give Kuma an opportunity to prove his talents and commitment to University interests, while eliminating the risk of prejudice to the teaching program if his performance did not improve.

While Professor Kuma’s relations within the Faculty of Law were thereafter pleasant, he showed singularly bad judgment and aggressiveness in dealing with certain other persons in the University. He made offensive and unwarranted charges against a teacher in another Faculty, who reported the matter to the Vice Chancellor. When Kuma failed to carry out satisfactorily assurances given to me that he would retract the charges and avoid such embarrassments to the University, I told the Vice Chancellor that, while I would not take steps to procure Kuma’s dismissal, I would not undertake to defend him if the President saw fit to terminate his appointment.

Professor Kuma was dismissed by the President as of February 1, 1963. He then took the position that he automatically reverted to the status of Lecturer in Law which he had held prior to his Presidential appointment. I advised him, however, that in my view his acceptance of the Presidential Professorship was tantamount to resignation from his University post and that he could be considered only as a candidate for appointment to the Law Faculty, subject to the criteria currently applied. This view was supported by such relevant University records as existed and was accepted by the Vice Chancellor and the University Council.

Mr. Kuma did not apply for a new appointment and his relation to the University was thus completely severed. In fairness to him, it should be said that he showed toward me every
courtesy and evidence of good will, both before and after his departure from the University.

Choice of a Successor to the Deanship

From the beginning of my work in Ghana I was keenly aware of the brevity of my term and of the importance of early action in finding my successor. In this connection it seemed to me that the University had basically two courses available. The first was to attempt to find another expatriate who might have the advantage of some academic experience but would bring, almost inevitably, the disadvantages of brief tenure and probable loss of continuity in the work of the Faculty. The other course involved the sacrifice of experience in teaching, research and university administration in an effort to find a qualified local lawyer who could provide strong, continuing leadership for the Faculty. After considering a number of possibilities, I concluded that the best available candidate was Mr. Justice Nii Amaa Ollennu of the Supreme Court. Judge Ollennu had a long and distinguished record of public service in Ghana. Prior to his call to the English Bar in 1940, he had served as a secondary school teacher. While at the Bar, he served as a government-nominated member of the old Legislative Council, as a member of a number of important select committees, and as the leader of one of the smaller political parties. He had been appointed to the High Court in 1956 and elevated to the Supreme Court in 1962. He was a productive scholar, having published two important books on the customary law of Ghana. Judge Ollennu had a long-standing interest in education and had been appointed Honorary Professor of Law in the University in 1962. This post was not merely honorific, however; Judge Ollennu was a regular participant in the discussions in the Faculty and assisted in teaching the course in customary property law.

I discussed with the Vice Chancellor the possibility of bringing Judge Ollennu to the University as Professor of Law and Dean of the Faculty at the end of my term. Dr. O'Brien, though not well acquainted with Ollennu, was generally sympathetic to the idea and suggested that I discuss the possibility informally with the members of the Law Faculty and the leading Ghanaian professors in the University. These conversations disclosed a unanimous view that Judge Ollennu's appointment would be an excellent step for the University. In the Ghanaian tradition, however, like that of England, it would be a surprising move for a lawyer at the pinnacle of his profession as a member of the Supreme Court to consider leaving the Court for another post. I therefore discussed with Judge Ollennu whether he would be willing to consider such a move. After several weeks of deliberation, he informed me that if in the judgment of the University he could render greater service to Ghana in an academic post than on the Court, he would be willing to have his name considered. In August, 1963, I discussed the prospect of Judge Ol-
lennu's leaving the Court and coming to the University with Sir Arku Korsah, Chief Justice of Ghana, and secured his approval for the move. In September, the Vice Chancellor took up the matter with the President who also gave his approval. The way thus seemed to be clear for an orderly transfer of responsibility at the end of my term without loss of momentum in the Faculty's program. I also made arrangements for Judge Ollennu to visit the United States and Britain for three months during the spring of 1964 in order to extend his acquaintances in the law teaching world and to become more familiar with developing attitudes elsewhere.

Unfortunately, the prospective appointment of Judge Ollennu as Dean of the Faculty was one of the early casualties of the campaign against the Law Faculty and the University which began in October, 1963. This development will be considered later in the report.

**Law Teaching for Non-Professionals**

For some time prior to my coming to the University the Law Department had offered instruction in certain legal subjects for students in the Department of Economics. Law was also taught in the School of Administration, a separate institution located in Achimota, which was integrated into the University during the academic year 1962-1963. The School of Administration had on its staff two lawyers, but they were completely independent of the Law Department as it then was.

It seemed clear to me that a number of advantages could be gained by unifying responsibility for all law teaching in the University within the Faculty of Law. To this end a number of steps were taken during my first year in Ghana. The first of these was to propose that a law option be included in the syllabus for the general Bachelor of Arts degree. This option would have involved instruction by members of the Law Faculty in certain legal subjects as a part of a general liberal education. This innovation received the approval of the Executive Committee of the Academic Board, but responsibility for implementation was delegated to the Board of the Faculty of Arts. Prior to my departure, the Arts Faculty had not acted on this proposal.

The syllabus for the degree in political science which was established during the year 1962-63 contained provision for certain law courses. To develop detailed syllabi for these, I had discussions with the Acting Head of the Department of Political Science. In my view, the type of course which had been familiar in the social science departments - an informational grab-bag of assorted private law rules - had no real educational justification. The discussion produced a set of syllabi emphasizing governmental structure and public law. I undertook to staff these courses with qualified teachers from the Law
Faculty who, it was hoped, would impart to the students some of the methodological discipline of law study as well as a body of relevant information.

Law instruction in the School of Administration presented a more complex problem, since the School already had lawyer members of its teaching staff. As part of the general move to integrate the School into the University, there was substantial pressure on me to accept the School's two law instructors as members of the Law Faculty and in this connection to assume responsibility for instruction in the School. This I declined to do since the two men were not qualified for appointment to the Law Faculty under the criteria I had been applying. The problem was finally solved, at least on a short-term basis, by an agreement with the Director of the School whereby the two incumbent instructors were granted extended study leave to permit them to go abroad and improve their qualifications. While I could offer no ultimate assurances of appointment, I indicated that when the period of further study was completed, the Faculty would be willing to review the credentials of the two lecturers as candidates for appointment. In the period of their absence on study leave, the Director of the School undertook to finance two lectureships on the Law Faculty in exchange for an undertaking that the Faculty would staff the law courses for Administration students. The effect of this arrangement was to increase the establishment of the Law Faculty by two Lecturers.

During the year it was also possible to review the existing syllabi for law courses in the School of Administration. From this review, in which Mr. Seidman played a major role, came revised syllabi that promised instruction at an appropriate quality level and better directed toward the probable needs of business administration students.

The School of Administration also offered certain special programs for non-degree students. Two of these were for hospital administrators and for the administrative personnel of local government units. The agreement with the Director involved the Law Faculty's assuming responsibility for developing these courses to satisfactory levels and staffing them. Mr. Seidman and Mr. Davidson made important contributions to these aspects of our work.

There has long been discontent in Ghana with the administration of justice in the Local Courts which serve the great majority of the population. The judges of these courts are not lawyers, and lawyers are in fact barred from practicing before them. In an effort to bring about some improvement in the Local Court system, I wrote to the Minister of Justice in May, 1963, offering to provide within the Faculty of Law a short course of instruction for Local Court judges during each of the University's long vacations. In subsequent conversations with
officers of the Ministry, I elaborated this suggestion into a proposed syllabus for the course. In order to service Local Courts throughout the country, it was necessary to consider residential instruction, and to avoid overloading the limited teaching staff available, it was necessary to schedule the courses during long vacations. After considering these proposals from the Faculty of Law for some time, the Minister informed me on August 30, 1963, that it was not considered advisable to begin such training for Local Court judges. The basis for the Minister's decision appeared to be a conviction that the existing judges were not educable. His formally stated reason merely referred to the Government policy to replace the present judges with legally qualified men and women. Thus, we were not able to extend the range of our instruction to include this important segment of the law personnel of Ghana. Our inability to do so became quite significant in the campaign against the Faculty in the latter part of 1963.

Physical Plant and Library

Since the beginning of instruction in Law in the University in 1959, the Law Department had occupied one wing of the general library building. In the early days the space available was no doubt adequate and making it available to the Law Department did not in any way inconvenience the general library. The situation had drastically changed, however, by the academic year 1962-1963. The space available for the law library was over-crowded and a substantial number of books already purchased could not be shelved. Only three classrooms were available, and reasonably satisfactory office space could be provided to only four members of the Faculty. The growth of the general library had also created an urgent demand for more space. Thus, the pressure for the Law Faculty to find housing elsewhere was strong indeed.

It was my hope that a law building adequate for the basic teaching and research needs of the Faculty, as well as an affiliated Institute of Legal Research, would be included in the next phase of the University's capital development. Under the best of circumstances, however, this possibility could not mature for several years. To meet the emergency needs, I prepared rough sketches of temporary buildings for the Law Faculty and presented them to the University's Development Committee in November, 1962. These were approved and funds appropriated for construction. The actual building began in April, 1963, and the new buildings were ready for use at the beginning of the academic year 1963-64.

The new quarters of the Faculty comprised four buildings of pre-stressed concrete construction. One fully air-conditioned building housed the law library with sufficient stack space for 15,000 volumes, seats for about 100 readers, and a separate periodicals room. Another building contained two classrooms with a
capacity of 45 each and a third classroom with a capacity of 120. This larger classroom could be divided by a collapsible partition, thus giving us two smaller classrooms if desired. Two other buildings contained administrative and clerical offices and a separate office-tutorial room for each member of the Faculty. Thus the Faculty was adequately accommodated in its own quarters. The speed and economy with which accommodation was provided for the Law Faculty in these pre-fabricated structures proved attractive to others, and similar units were erected for a number of other units of the University.

Research Program and Law Journal

One of the most pressing needs in the Law Faculty and in the University in general was an active program of research attuned to the developing needs of the country. The shortage of teaching staff in the past had made a major research commitment by the members of the Faculty extremely difficult. Beyond this fact, however, the English orientation of many members of the Faculty tended to produce a conception of legal research that was almost exclusively analytical. Professor Lang had been aware of the need to stimulate research interests in both teaching members and students and had encouraged the establishment of a law journal. One issue of a modest mimeographed publication, called the Legon Law Journal, appeared under student editorship in the Spring of 1962. No satisfactory arrangement for its continuation had been made, however.

With the improvement of our staff situation during 1962-63, it became possible to begin very active encouragement of research activities in the Faculty. In the first instance these activities seemed best directed toward the preparation of teaching materials which would be better suited to the instruction of African students. The greatest contribution in this direction by any member of the Faculty was made by Mr. Seidman. In installments he published casebooks in Criminal Law and Administrative Law and developed a substantial part of the materials for the course in Evidence. In Criminal Law he used primarily statutes from Ghana and other African countries, cases arising in African circumstances, and a substantial amount of data provided by the social sciences. Much useful work in developing teaching materials was also done by Mr. Thoyer in the fields of Taxation and Contracts. Extremely important research on customary property law for both teaching materials and scholarly publication was done by Mr. Woodman, Mr. Justice Ollennu, and Mr. Asante. After his arrival, Mr. Harrison began developing the first organized body of Ghanaian materials in the field of judicial procedure. Local arrangements were made for the initial duplication of teaching materials so that they could be placed in students’ hands for pre-class study, thus curtailing the unfortunate reliance on lectures.
Anticipation of an increased flow of research and writing made appropriate the reconsideration of a local journal for the publication of our research products. The Legon Law Journal under student editorship did not seem a satisfactory device at this stage of development. The Faculty, therefore, decided to assume responsibility for the editorship of a journal mainly devoted to Ghanaian law. Such a journal could provide opportunities for student research and writing and, in the course of time, experience in editing, much in the manner of the leading American law reviews. The journal was renamed the University of Ghana Law Journal and arrangements were made with Sweet and Maxwell in London for publication and distribution internationally. The Journal was placed under the editorship of Mr. Seidman who organized a board of student editors from the fourth and fifth year classes. These students would not in the first instance perform actual editorial functions but would do research and write shorter case notes and comments. Out of this experience it was hoped a scholarly tradition would be developed which could be passed on to succeeding groups of students.

The Journal was scheduled for publication in two issues each year. Manuscripts for the first issue were submitted to Sweet and Maxwell in December, 1963, for publication in early 1964. The second issue was to appear in the early Fall of 1964. One of the most regrettable byproducts of the deportation of Mr. Seidman and me was the decision of Sweet and Maxwell to suspend plans for the publication of the Journal until it became clearer whether the remaining staff in the Law Faculty would be competent to assume responsibility for the production of the Journal on a continuing basis. Insofar as I am aware, this determination has not yet been made.

The needs for research in law and related disciplines went far beyond what could be met by the teaching staff of the Faculty. We needed greatly increased library facilities and the resources to support field investigations. Scholars who could devote their full time to research and writing were needed to supplement the efforts of those involved in teaching. While the University had been generous in its support of the Faculty, within the limitations imposed by its general budget, it was clear that financing a major institutional research program would require the participation of outside agencies. It was my hope that during the academic year 1963-64 the organization of this support and the planning of a Center for Advanced Legal Studies could be made the major development project of the Faculty.

It seemed desirable in planning a permanent home for the Law Faculty to include provision for a research library and sufficient office space for non-teaching research staff. Before my expulsion from Ghana, I had an opportunity to initiate discussions on this development with the Vice Chancellor, certain rep-
representatives of the Government, particularly the Minister for Foreign Affairs, and representatives of the Ford Foundation. It is, of course, speculative what success these discussions would have enjoyed if events in Ghana had not occurred as they did. Political developments, particularly those impinging on the University, led the Ford Foundation field representative to the conclusion that further investment in Ghana of the kind I had suggested was not wise at that time. While I remain convinced that major research in law and the related social sciences is a primary need in Ghana and the other African countries, it does not seem feasible in present Ghanaian circumstances to press such a development.

Ideally, socio-legal research in Africa would be organized on a regional basis and would involve participation of the staff of the host University as well as visiting scholars from various African countries and from abroad. With national jealousies at their present levels, it does not seem possible to secure agreement on any site for the development of a regional facility. Furthermore, efforts to develop one are frustrated by a peculiar circularity. The question whether a particular institution would be accepted as the site for a regional research organization is greatly affected by the extent of the facilities it can offer. On the other hand, the acquisition of the needed facilities will depend in large measure on the kind of acceptance and support the institution itself currently enjoys from others in the region. Thus the assessment becomes circular. In my own view it will be necessary to gauge the likelihood of a particular institution's gaining acceptance and support once the facilities and resources are made available to it. Thus a certain element of risk is imposed on the foundations and governments interested in stimulating such a regional development. As the poker player would say "They must bet on the come." It may be feasible, however, to begin on a relatively modest basis with the development of library facilities supplemented by a certain amount of money to support field research. In the first phase of development, outside participation would probably come from individual scholars and not in the form of institutional commitments from other universities or governments. If a research program could be begun on such a basis, I would hope that in the course of time it would acquire, by the merits of its products, the support of a much wider range of scholars and institutions in Africa and elsewhere.

Ghanaian Law Students

The successful development of legal education in Ghana depended on the quality of our students and the relationship that could be established between them and a teaching staff made up in large part of expatriates. In assessing these factors, it is necessary to consider the educational background of our students, the criteria of admission to the University and to the
Faculty, as well as the educational philosophy and techniques of the teaching members of the staff.

The education system in Ghana is largely modeled after the British. It is, in my judgment, one of the most regrettable aspects of the British legacy to Africa. In large part, the curriculum is geared to the backgrounds and needs of English students and has relatively little direct reference to African conditions or circumstances. Educational techniques emphasize rote learning to assure success on essentially regurgitative examinations. These techniques and the educational philosophy implicit in them strongly affected the Law Faculty. Substantially changing them became one of my primary objections which was shared by a number of my colleagues.

Admission to the University of Ghana requires five subjects, including English language at GCE (London), of which two must be at advanced level. Within the British scheme, therefore, the level of University admission is placed reasonably high. Because of the traditional attraction of law to Ghanaian students the numbers expressing interest in admission to the Law Faculty have been sufficiently large that we were able to be more selective than the University itself. In 1961-62, the Faculty instituted a special admission examination designed to test the student's facility in written communication and his ability to analyze arguments and restate them cogently in his own language. The test has been used to limit admission to the Faculty rather severely. For example, about 80 students wrote the examination in April, 1963, and of these approximately one-half were admitted to the Faculty. By the use of higher selection standards we were able to improve the quality of classroom work and reduce the incidence of academic failure. Since all of the students rejected by the Faculty of Law were absorbed by other units of the University, many of which could doubtless make a stronger claim in terms of national need than the Faculty could, there seemed to be no basis for concern over an undue limitation of educational opportunity. In 1963-64 our student body was approximately as follows:

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Students</th>
</tr>
</thead>
<tbody>
<tr>
<td>First year</td>
<td>39</td>
</tr>
<tr>
<td>Second year</td>
<td>28</td>
</tr>
<tr>
<td>Third year</td>
<td>17</td>
</tr>
<tr>
<td>Fourth year</td>
<td>28</td>
</tr>
<tr>
<td>Fifth year</td>
<td>18</td>
</tr>
<tr>
<td>Non-degree</td>
<td></td>
</tr>
<tr>
<td>students</td>
<td>25</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>155</strong></td>
</tr>
</tbody>
</table>

The period of disorganization in the Law Department through the academic year 1961-62 had created rather difficult morale problems in the student body. The previous administration had
also, in my judgment, erred in the direction of an undue paternalism toward the students. The influence of these factors was most pronounced on the leading classes. After my arrival, at the beginning of the academic year, I met all of the students in the Faculty to discuss with them my own attitudes on legal education and the attitudes I would try to encourage in other members of the staff. I emphasized that I did not come to Africa expecting less of students than I would expect elsewhere. The standard of performance would be high and consequently a heavy burden of daily preparation and periodic review would be placed on all students. Those who were not interested in performing in accordance with these standards or who were ultimately found unable to do so would be excluded. There was some indication that this rather blunt discussion caused initial consternation among our students. As time passed, however, it became increasingly clear, not only from the actual performance of the students but from comments made to members of the teaching staff, that they came to accept high standards and to take pride in meeting them. Many of our students indicated that they had always been led to believe that American standards of education were significantly lower than those prevailing in Britain. As the months passed, they at least came to doubt the validity of this conclusion.

Raising standards of admission and firming up the demands on our students for the vigorous and consistent use of their abilities were far less difficult tasks than reshaping the educational philosophy and techniques of senior members. Several of our teachers, influenced by their early education in British Africa and matured in British universities, saw legal education primarily as learning rules and doctrine. To the teacher they assigned the role of elucidating the principles and explaining the rules. While lip service was paid to tutorials, which in some British universities do much to redeem the system, the principal mode of instruction in Ghana was the lecture. Too frequently the students came to lectures without prior preparation on the materials to be considered and quietly took their notes. These, with some supplementation from later text reading, became the basis for "revision" when preparation for final examinations began.

While information about certain legal doctrines and rules is essential, its acquisition is by no means the principal objective of legal education. In addition to a general capacity for disciplined thought, the common law system with its rapidly expanding statutory gloss requires a highly developed skill in case analysis and statutory interpretation and an ability to develop useful doctrinal generalizations from the particulars of prior experience. The data on which these skills are developed and on which they will be exercised later include, or should include, case decisions, statutes, regulations, and other material not specifically legal, which projects the social context of problems and stimulates critical judgments. Legal education as
thus conceived cannot be imparted by lectures in which students are mere listeners. In the main students develop by doing or attempting the lawyer’s tasks under the guidance of a teacher whose functions are to organize an apt body of working materials, to stimulate the student to consider them in such a way as to sharpen his own analytical skills and insights, and by his questions and criticisms to light the students’ path toward discovery, but not to carry him along it.

Legal education, of this kind and quality, is hard work for both student and teacher. It does not deny the value or importance of information about legal rules and doctrine; it merely insists that this be acquired while skills and insights are being developed, thus making it possible to use the information creatively in the solution of new problems.

The extent of acceptance of this view of legal education in the Law Faculty in Ghana was fairly accurately defined by reference to the American or British background of the teacher. The Americans in general taught Socratically, welcomed student participation in discussions, were less concerned that the students be able to cite chapter and verse in Ghanaian law, tended to prefer teaching materials arising out of an African context, were ready to use general social science data to suggest new dimensions of a problem, and on examinations were more concerned about the quality of the students’ reasoning on a problem case than his ability to write an informational essay under some general legal rubric. Our colleagues educated in the British system relied more heavily on lectures, stressed the importance of knowledge about legal rules and tended to become uncomfortable outside the flat plane of positive rules and doctrine. There were, of course, significant variations within each group. If judgment is based on what actually occurred in the classrooms, however, and not entirely on the declarations of teachers as to what they did, the categorization of the members of the Law Faculty suggested has general validity.

While I rejected in the main the British approach to law teaching, it was not my desire to nurture an unquestioning Americanization. I sought no drab uniformity of approach. Least of all would I have been inclined to attempt innovations by edict. It was important, however, for our teachers to become self-conscious and self-critical. To that end, informal conversations about teaching techniques and objectives became almost daily fare in our group. The only slightly more formal Faculty seminar during Trinity Term also contributed to an understanding of the various viewpoints. I am relatively sure there was some cross fertilization to which our students, as well, contributed. At least some students who in one or more courses have been encouraged to question, to criticize and to attempt to defend their own analyses will never again be content with passive note-taking on lectures.
In the difficult period leading up to the deportation of Mr. Seidman and myself, the full support of the students in the Faculty was beyond question. The problem at that time was restraining their strong inclination to protest the actions of the Government against the University. I have every confidence that the impact of the American participation in the work of the Faculty will be a lasting one on those students who were exposed to it. I believe also that most of the members of the teaching staff who had their own educations in Britain found the different perspectives of their American colleagues stimulating. Hopefully, even after the direct American involvement in law teaching has ended, the American insistence that rule-learning through neat lectures is not legal education will still influence the Faculty of Law.

General University Assignments

In anticipation of my going to Ghana I decided that it would be wise to devote full time to the affairs of the Faculty of Law and not to dilute my efforts by participation in a variety of general University matters. In a certain sense, this would have been a wise course since involvement in general University problems could become not only a heavy charge on my own time but could also multiply the possibilities of offending and alienating sensitive and perhaps influential members of the community. Soon after my arrival, however, it became clear that substantial isolation from the general concerns of the University would be neither possible nor prudent. As Dean of the Faculty of Law, I became ex officio a member of certain of the critical boards and committees of the University. To a number of others, I was elected by the Academic Board. My conviction steadily grew that the welfare of the Faculty of Law depended so intimately on the growth and well being of the University that I was obligated to work on as broad a basis as possible. Dr. O'Brien, the Vice Chancellor of the University, was providing vigorous and imaginative leadership for the entire University, and I felt it incumbent on me to give him every support of which I was capable.

I served ex officio on the Academic Board of the University and its Executive Committee, as well as on the Board of the School of Administration. By election of the Academic Board I served on the Finance Committee of the University, the Library Committee, the Scholarship Committee, and the Disciplinary Board. By appointment of the Vice Chancellor I became a member of the Development Committee and the Committee of Management of the University’s Superannuation Scheme. I also served as Vice Master of Mensah Sarbah Hall and as a member of the Council of the Hall. In addition to these continuing obligations, I undertook a number of ad hoc assignments at the request of the Vice Chancellor or the Executive Committee of the Academic
Board. On my arrival the internal governance of the University proceeded informally on the basis of older patterns established for the University College; new University statutes were urgently needed. At the Vice Chancellor’s request, I drafted the University Statutes and those were approved by the Academic Board and adopted by the University Council. While I believed that it was not the proper function of members of the Law Faculty to render routine legal services to the University, it was not possible to implement this view on an absolute basis. From time to time, therefore, I provided legal opinions to the Vice Chancellor or other University bodies. There were many other such special assignments. Increasingly, over the months I was in Ghana, my rapport with the Vice Chancellor was strengthened and I had the privilege of serving as his sounding board and adviser on many problems not involving the Faculty of Law in any sense.

Relations with the General Legal Council

In addition to serving as Director of Legal Education of Ghana and Director of the Law School, I was a member ex officio of the General Legal Council. The success of my work in the former posts, as well as in the University, depended to a considerable extent on the development of effective working relationships with the Council, in particular with its Chairman, Sir Arku Korsah, and other leading members. The approval of the Council was required for the closing of the Ghana Law School, the delegation of teaching responsibilities to the University, and the revision of criteria for admission to the Bar so as to upgrade the quality of the profession. I wish to take this opportunity to pay tribute to the members of General Legal Council with whom I worked most closely. These included Chief Justice Sir Arku Korsah, Justices William B. Van Lare, Edward Akufo-Addo, and N. A. Ollenu, and the Attorney General, Mr. B. E. Quaw-Swanzy. Deliberations in the Council were usually long and frequently tangential; decisions were often unduly delayed. I became convinced, however, that the working majority of the Council was seriously interested in the development of a sound educational program and in improved standards for admission to the Bar. Every recommendation for action that I brought to the Council was, in fact, adopted. I am glad to pay tribute and to express my appreciation to the members of the Council with whom I was privileged to work.

No Bigger Than a Man’s Hand

My first year in Ghana was singularly productive. It was possible to push the work of development with generally encouraging results. Only a few minor episodes tended to mar the picture. These would not require mention, were they not obviously related to the later developments in 1963-64.
In October, 1962, when Dr. W. C. Ekow-Daniels arrived to join the Faculty, I was immediately impressed by his rather thinly-disguised hostility. It soon came to my attention that his attitude was taking objective form in conduct clearly prejudicial to the orderly development of the Faculty and to the University itself. I learned, for example, that he had called upon Sir Arku Korsah, the Chief Justice, and Dr. J. B. Danquah, a prominent lawyer and political figure, to complain about curricular developments which I had proposed in the Faculty. I would not have thought this particularly surprising or objectionable, had Dr. Daniels also expressed his reservations and criticisms to me or sought to have them debated in meetings of the Faculty Board. He did neither before attempting to undermine the developments by untrue and distorted reports to leaders of the Bench and Bar.

As a result of my membership on the Disciplinary Board of the University, I was well aware of the serious view taken by the Board and by the Vice Chancellor of such extra-curricular conduct. I therefore considered whether it would be wise to take the matter up with the Vice Chancellor and have him consider the propriety of disciplinary procedures. I finally concluded, however, that Dr. Daniels’ conduct was probably attributable to immaturity and the excessive ambition of a young man who had been abroad for a number of years and who was anxious to make himself known to leaders of the profession in Ghana without delay. I hoped that avoidance of administrative action against him, coupled with ample opportunity for him to express his views in the Faculty and have them considered by his colleagues, would in the course of time bring him into a better working relationship with us. This course seemed to be encouraged also by conversations with the Chief Justice in which he indicated that he had reprimanded Dr. Daniels for his activities. In the latter part of the year, I had some hope that my treatment of Dr. Daniels would be successful. As the later account of developments in 1963-64 will indicate, however, I had a singular failure in making Dr. Daniels a cooperative member of the Faculty.

On November 22, 1962 a letter to the editor from one Kodjo Odoi appeared in the Ghana Evening News. The thrust of the letter is well indicated by the following paragraph which I quote:

"What is the use of closing the Law School in 1964 when the last candidates to be admitted cannot complete the course before 1965, assuming that none of them will fail in any of the exams? Was it the new head of the school—an American—who wishes to have his own way? In the interest of Ghanaians, the government must step in and save an unhappy situation."

A few days later, on November 27, a letter from H. M. Basner, a South African communist who, although a lawyer, was employed in Ghana as a journalist, appeared in the EVENING NEWS,
in which Mr. Basner made the following comments:

"Only socialist legislators can initiate socialist laws, but you need socialist lawyers to draft, interpret and administer them truly. Above all, unless every citizen can receive the same quantity and quality of legal aid when he needs it, there is no true equality to all men before the law... Mr. Odoi is perfectly justified in feeling that the whole present trend of legal education is to run out as many British and American legal luminaries as possible in Ghana, absorbed in the sacred rights of private property (and in clients who pay high fees). ...

"But above all, don’t let anyone who is not a socialist teach the lawyers who will have to practice law in a socialist country.

"Diligence in the sciences and other disciplines are [sic] also needed, but nothing like the care which must be exercised on this most valuable and vital sector of any developing country."

The third letter in the series appeared in the EVENING NEWS on December 3, 1962. The writer said in part:

"There are progressive lawyers who understand the present problems facing our dear state, and Ghana needs them. There are socialist lawyers like Comrade Basner whom the country badly needs to help train socialist lawyers in conformity with Osagyefo’s ideas and ideals.

"We need a socialist head to man our Law School, be he white or black. American or Russian. We must be vigilant in exposing all diabolical plans to build a socialist paradise in future Ghana. [sic]"

One letter to the foregoing effect might have been ignored. When three had appeared, it seemed likely that this was the beginning of a campaign against not only the specific plans for the Ghana Law School but also against me and other expatriates on the Law Faculty. I did not think it wise for me to enter publicly into the controversy. I, therefore, called on the Chief Justice, explained my concerns to him, and asked if he would consider issuing a press release responsive to the three letters in the EVENING NEWS. He agreed to do so, and I therefore drafted a statement which was subsequently approved by the General Legal Council and issued by the Chief Justice as Chairman of the Council. The statement made it entirely clear that the decision to close the Law School involved giving all present students in the School a reasonable opportunity to complete the work required for the Diploma in Law, that students earning the Diploma would be admitted to the University to complete their professional
work, and that the objective of the Council was to concentrate scarce teaching resources in order to improve the system of legal education in Ghana. The Chief Justice's statement received full publicity in the three Ghanaian newspapers and seemed successful in ending the campaign. Again, however, as later developments showed, we had won only a delay and not an ultimate victory.

On January 6, 1963, the CPP held a rally at the stadium in Accra to celebrate Positive Action Day. The President made an appearance in the stadium but departed well before the festivities were to be concluded. Very shortly after he left the stadium, someone threw at least one hand grenade, killing or wounding a number of persons. A few days later a brief article appeared in the EVENING NEWS questioning what the "so-called Michigan professor at Legon" was doing in the stadium on March 6 behind the President's stand. According to the article, the professor referred to was asked to leave; the implication was clear, however, that he had some involvement in the terrorist attack. Since I was the only professor at Legon having any possible connection with Michigan, I could only conclude that the newspaper referred to me, although I had not been near the stadium on January 6. It was impossible to determine whether this was legitimate case of mistaken identity or a purely fabricated charge. I lodged a strong protest against this newspaper reference with the Vice Chancellor and requested that he discuss the matter with the President. On January 21st, the Vice Chancellor informed me that he had spoken to the President who professed to know nothing about the newspaper comments and to be shocked to hear of them. The President assured the Vice Chancellor that he would take steps to see that a retraction appeared. As I expected, no actual retraction was published, but for the next several months there were no further attacks of this kind on me. In the circumstances, I felt that I could not expect more than this.

Summary of Developments in 1962-63.

At the end of the academic year 1962-63, developments seemed to warrant an optimistic annual report to the Vice Chancellor. Our curriculum had been fully revised and seemed as responsive to need as we could make it for the next few years. The teaching staff had been supplemented to the point where teaching loads were compatible with major research activity, and we had University authorization for further faculty appointments during the next academic year. The main development project for 1963-64 was to be the planning and financing of a West African Center for Advanced Legal Studies in the University of Ghana. This would require negotiation for substantial additional support, planning for improved physical facilities, and the possible appointment of a limited number of full-time research staff. I could approach the end of my own tour with reasonable
optimism since the arrangement for Mr. Justice Ollennu to succeed me seemed to be progressing satisfactorily.

Events Since September 1963.

The developments since September 1963, culminating in the virtual destruction of the Faculty of Law, do not lend themselves to analysis under separate heads. The various events were closely interrelated. I will, therefore, deal with them chronologically, merely suggesting initially that they might be viewed as involving a number of related efforts:

1. The effort to end the academic independence of the University and to make it a facility for indoctrination in the ideology of the CCP;

2. An effort to reduce foreign influence in the University and particularly in the Faculty of Law;

3. An effort to intimidate students and staff of the University to the point where they would be passive observers, if not active supporters, of the government’s activities;

4. An effort to reshape fundamental legal and governmental institutions of Ghana, particularly the judiciary, and to further the concentration of absolute power in the executive.

The nature of developments makes it impossible to concentrate totally on the University. To some extent it will be necessary to consider the University’s status in a wider political context.

On September 17, 1963, the Vice Chancellor wrote to me indicating that he had discussed with the President the proposal to bring Mr. Justice Ollennu to the University as Professor of Law. The President gave his entire approval to Ollennu’s release from the Supreme Court and his appointment in the University. The Vice Chancellor suggested, however, that before proceeding with the Ollennu appointment, he would like to have me consider the possibility of my remaining an additional year in the University with the prospect that Ollennu would succeed me in 1965. I informed the Vice Chancellor that I would give careful thought to his suggestion and would discuss it with my family and my own University.

On September 18, the Vice Chancellor sent to me for comment a memorandum he had prepared as the basis for discussion of a new citizenship training program, extending to the universities, which had recently been announced by the President and for which responsibility had been given to Mr. Kwaku Boateng, Minister for the Interior and then Acting Minister for Education. The Vice Chancellor pointed out that the University had not yet received
any official communication from Mr. Boateng, but that it seemed desirable in advance of such an approach for the University to define its own position in relation to this delicate matter. The Vice Chancellor proposed four basic principles on which the University should stand:

"1. The University accepts responsibility for citizenship training, in the sense that it aims to produce graduates who will be responsible and enlightened citizens of Ghana and of Africa, and who will play a full and useful part in the constructive work facing their generation.

"2. In the field of citizenship training, as in other matters, the University is always prepared to develop new courses or extend existing ones in order to meet needs which make themselves felt in the University or in the country.

"3. The University is always prepared to discuss such matters, or any phase of its activity, with the relevant organ of state.

"4. The University cannot abdicate any part of its academic responsibilities. Only the competent University organ, subject to the authority of the Academic Board and of the Council, can determine what courses of lectures can be given at the University for students enrolled at the University. This responsibility cannot be relinquished in favor of any outside body or person. This principle is vital to the life of the University and admits of no compromise."

On September 21, I wrote to the Vice Chancellor, giving my preliminary reaction to his suggestions concerning the University’s position on the citizenship training program:

"I would surely accept the four basic principles set out in your memorandum. If we stand firmly on them and try to impress on the organizers of the programme that good and useful citizenship involves a number of characteristics not all of which can effectively be emphasized and developed in a single institution, we might develop an appreciation of specialized functions that would permit the University to limit its role to truly educational activities. For example, good health, appropriate religious sentiments or possession of basic military skills might in different contexts be desirable components of good citizenship, the nurture of which few, if any, would think best committed to a University. As you clearly point out, the wise position for the University is not that it should be exempt from the obligation to contribute to good citizenship, but rather that the unique contribution of the University can be seriously endangered by expecting of it functions which, if needed, can best be entrusted to some other organ."
"In one respect I may be inclined to go beyond the point you concede in your final paragraph. It seems to me we should draw a sharp distinction between persons engaged to teach and a much wider group of people who might from time to time appear and speak on the University campus. With respect to the first group I am entirely clear that responsible University bodies must make the selection, evaluating qualifications and assuring that an appropriate academic level is maintained. Within this group are included all to whom a regular course is entrusted, participating lecturers in such a programme as African Studies in the first year, and even the casual lecturer who might be invited in by a Department or Faculty to supplement its regular teaching. The crucial datum in all these cases is not that the person involved will present only ascertained facts, be totally objective and divorce entirely his own value perceptions. What is involved is the University's warranty that the person has equipped himself to present the relevant facts, is committed to free enquiry and to drawing objectively the implications of the data gathered, and to recognizing and acknowledging as honestly as is humanly possible the critical boundary line between his knowledge and his faith, between what he can teach as fact and what he might appropriately suggest on some occasions as his own personal opinion which others are free to accept or reject according to their own persuasions.

"Beyond the group whom the University engages and warrants on the criteria above, I would think it entirely appropriate for a great University to provide a forum for others who could not possibly qualify on academic grounds. An outstanding department of music might have invited Guy Lombardo, during the heyday of his popularity, to present a concert, despite the well known fact that his saxophones were always one-half key off and musically he was rather fearful. Despite my own deep-seated doubts of the ability of most committed Communists to accept and carry out the central obligations of membership in a real University, I have consistently argued in the United States that no self-respecting university would deny a Communist speaker the opportunity to present his message. Recently the principal of a high school in Boston refused the use of its auditorium to a southern, segregationist Governor who had been invited to defend his policy before a northern audience; Harvard permitted him to speak on its campus. Many other illustrations could be given. The central viewpoint I would urge is that creeds, faiths and tastes are social facts which must be evaluated and dealt with, that it is consistent with legitimate educational policy to provide students an opportunity to assess these as presented by real converts, and that it is inconsistent with the fundamental assumptions of a great university to try to insulate its students from the critical social facts of their time. Holmes put the point very nicely once when he observed that the only entitlement of an idea to survive was its ability to meet competition in the free market place of ideas.
"The relation of the views just expressed to the citizenship programme need not be detailed. Certainly your point on the development of courses to meet the country's needs is included. Also included, however, would be the possibility of permitting non-academic spokesmen for the CPP to address University students on the campus, to present to them the ideology and programme of the Party. Other political groups are not illegal in Ghana, and, if they sought similar opportunities, I would favor granting them the same privileges. If the Government thinks other groups are subversive, its appropriate action would be to declare them illegal. It cannot, I think, expect the University to ban groups which under the law of the land are still legitimate.

"I fully recognize the hazards involved in the policy I recommend. On the other hand, I can see a reasonable basis for hope that the President will understand and ultimately support such a position in the University. The Government has never contended that political opposition per se is impermissible but has rested on the contention that constitutional processes of opposition had been abandoned. What the University would propose doing would be neither secret nor subversive. It would involve public comment and discussion of ideas and viewpoints constituting actual forces in the society. While not courting abrasive contacts with the Government or the Party, the University cannot accept restrictions which would deny its essential character. As I have said, I think that character can be preserved in Ghana."

On September 27, the Vice Chancellor sent to me a further memorandum on the University's contribution to the citizenship training program. He proposed that the University organize a series of lectures, under the general title "The Future Graduate as Citizen," comprising the following lectures: two lectures on the seven-year plan, one dealing with agriculture and the other with power and industry, three lectures on the development of African unity, and one lecture each on Ghanaian culture, the government of Ghana, the laws of Ghana, medicine in Ghana, and Ghana's armed forces. In response to this, I made some suggestions on choice of lecturers and also proposed that in lieu of the final topic, we might substitute Ghana's civil service. It seemed doubtful to me that the armed services merited special treatment as against the civil service and the diplomatic corps. I also suggested an additional lecture on education in Ghana.

On September 30, I received the first intimation that real trouble for the Law Faculty was in the wind. That evening, a few hours before I left Ghana to attend a legal conference in Venice, I received a call from the Registrar of the University saying that he had had urgent inquiries from the Secretary to the Cabinet, Mr. Okoh, as to the reasons why Mr. E.A.L. Ban-
nerman had not been appointed to the Law Faculty. Bannerman is a middle-aged Ghanaian lawyer who had been appointed Senior Lecturer in the Law School by Professor Lang. During the extreme staff shortage in the University, he was also used as a part-time Lecturer there. After my arrival, Mr. Bannerman continued to teach the course in Evidence for one term, but on Mr. Seidman’s arrival in December, 1962, he took over the Evidence course and Mr. Bannerman was not used further. Since the final examination for the course had to be sent to the External Examiner in mid-December, however, I had asked Mr. Bannerman to prepare it. The External Examiner completely rejected the examination on the ground that it was not at University level. Since I fully shared that judgment but did not want to embarrass Bannerman, I said nothing to him and had Mr. Seidman prepare a new examination which the External Examiner immediately accepted. When Mr. Bannerman inquired about appointment in the University, after the General Legal Council decided to close the Law School, I assured him that if he cared to submit an application it would be fully considered. I also indicated the criteria the Faculty would use in evaluating applications. Mr. Bannerman did not in fact submit an application; so we had had no occasion to consider his suitability for University appointment.

I was later informed that Mr. Bannerman had gone to the President to complain that he had not been appointed in the University because of political discrimination. This was of course absurd. Even if I had thought his political position relevant, I could not have used it in Mr. Bannerman’s case since I had no knowledge of his politics. When the Registrar called on September 30, I did not think it wise to elaborate on the Bannerman problem. I merely informed him, therefore, that Mr. Bannerman had never been considered for University appointment because I had received no application from him. I hoped the matter would end here. If Mr. Bannerman did submit an application, I felt quite confident that investigation of his academic record and professional career would show no qualification for appointment to the Law Faculty.

On my return from Europe in mid-October, the Vice Chancellor reported on conversations he had had with Mr. Boateng, the Minister for the Interior, concerning the citizenship training program. On October 3, the Minister called on him in an apparently friendly and reasonable mood to discuss the University’s involvement in the program. He declared that, Ghana being a socialist country, education for citizenship was education in socialism, and that he wished to see the University students instructed in socialism. The Vice Chancellor told Mr. Boateng that the socialist conception of society, history and economics were, in fact, already being expounded in the relevant Departments of the University, notably Economics and Political Science. The Vice Chancellor suggested that in these Departments some of the teachers were convinced socialists, while others
were not. In dealing with this viewpoint, it was not the University's approach to impose it on students as the sole possible view, nor was any other theory of society so presented. He indicated that it was basic to the University's life that this should be so, and that the students must be able to make up their own minds between conflicting viewpoints, all of which had been fairly presented to them.

The Minister did not take issue with this approach but indicated that he wanted an opportunity to convince the students that socialism was the only valid viewpoint and that he believed he could do so. In discussing the position of the University students, the Vice Chancellor indicated that in his view the majority of them were patriotic Ghanaians and good Africans. On matters like colonialism, they felt just as other Africans did. It was true that they were critical of some aspects of life in Ghana, and they were particularly sensitive on the group of issues which the words "academic freedom" represented for them. The Vice Chancellor indicated that he did not think these attitudes undesirable in students and that in his view the University students were rather more responsible and considerably less cynical than most students in such European universities as he knew. Mr. Boateng did not dissent from this view nor did he indicate his assent. He suggested that Professor W. E. Abraham of the Department of Philosophy would be a good person to talk to the students about the African conception of socialism and that he would like to address the students himself on the same subject. He proposed that these lectures take place under the auspices of the Institute of African Studies.

In accordance with a suggestion made earlier by Mr. Michael Dei Anang, the Vice Chancellor suggested to the Minister that it would be desirable before any formal lectures were presented, to arrange a meeting between representative students and some Ministers and senior civil servants at which there would be frank and free discussion on both sides. Mr. Boateng thought that such a meeting would be useful at some stage but said that he would first like an opportunity to talk to the students, after which they would have an opportunity of putting questions to him. The Vice Chancellor re-emphasized his view that a prior informal meeting would be most desirable since otherwise students might misunderstand the purpose of a lecture and might be unwilling to participate in any discussion centered around it. He stressed that the students were very sensitive on this kind of problem and would keenly resent anything that appeared to them to be brainwashing, that they would be quick to suspect that the discussion following a formal lecture on such a theme would be simply used as a means of separating the sheep from the goats, that is, finding out which of the future graduates were politically reliable and which were not. Mr. Boateng protested, of course, that he had no such idea in mind. The Vice Chancellor undertook to carry out further discussions within the University
along the lines indicated in this conversation with the Minister.

On October 10, the Vice Chancellor sent to Mr. Boateng a proposed outline for a series of lectures designed for citizenship training at the University level. The list is as follows:

1. The African conception of socialism (two lectures).
2. The seven-year plan (two lectures).
3. African unity (three lectures).
5. Medicine in Ghana.
7. Civil service of Ghana.
8. Ghana’s armed forces.
9. The trade unions.
10. Agricultural development.
11. Aspects of educational practice.
12. Technological education.

In his letter transmitting the proposed list to the Minister, the Vice Chancellor re-emphasized the vital importance of assuring that these lectures would be of a high standard, capable of stimulating a wave of intellectual interest in the University and giving rise to discussion. In earlier conversations, the Minister had emphasized the great urgency he felt in getting this program started within the University. The Vice Chancellor proposed that the lecture series begin in Lent term, that is, in January 1964, in order that the lecturers might have an ample opportunity to prepare and thus to avoid slipshod harangues which could turn the whole thing into a farce. On this point of timing, the Vice Chancellor was prepared to stand absolutely firm against the pressure of the Minister for starting almost immediately.

Another important point which the Vice Chancellor did not mention in his letter to the Minister, in order to avoid putting ideas into his head, was his own belief, supported by his ad-
visers in the University, that all lectures should be voluntary and extra-curricular and that students should in no way be examined on them. The Vice Chancellor described this as a "stand or fall" point. Up to that time no one had expressly proposed that the lectures should be compulsory and examinable, but some of the suggestions for structuring the program, e.g., integrating it in African studies, might indicate that this was the view taken by the Minister. On this matter, however, the University was not willing to compromise in any way. By this time the manner of the Minister in conducting the discussions with the University had become somewhat highhanded, and we feared that in the near future a head-on conflict with him might be inevitable.

In late October, I advised Dr. O'Brien that, following discussions with my family and with the Dean of the Law Faculty at Michigan, I had decided that it would be necessary for me to limit my stay in Ghana to the two years originally contemplated. I was extremely grateful for the opportunity to work in the University and believed that useful development had taken place. On the other hand, in the light of the prospect that Mr. Justice Ollennu would be able to move from the Supreme Court to the University, I had every reason to believe that this development could be continued after he succeeded me as Dean of the Faculty of Law.

On October 26, the President came to the University to deliver a formal address at the opening of the Institute of African Studies. In the course of this address he made certain observations about the Faculty of Law which should be quoted in full:

"There exist in our Universities, faculties and departments, such as law, economics, politics, history, geography, philosophy and history, the teaching of which should be substantially based as soon as possible on African material.

"Let me take an example. Our students in the Faculty of Law must be taught to appreciate the very intimate link that exists between law and social values. It is therefore important that the Law Faculty should be staffed by Africans.

"There is no dearth of men and women among us qualified to teach in the Law Faculty."...

"Are we really sure that our students are in touch with the life of the nation? That they and their teachers fully appreciate what is going on in our society? The time has come for the gown to come to town.

"In this connection I can see no reason why courses should not continue to be organized at the Law School in Accra for lay-magistrates, local government staff and other officers both in
government and industry, who wish to acquire a knowledge of the law to assist them in their work.

"The staff of the Law Faculty in this University should be able to organize such courses for the benefit of the people in the categories I have mentioned.

"It should also be possible for individual lecturers and professors on their own initiative to give lectures on subjects of their own choosing, to which the whole University and others outside it are invited."

These remarks gave every indication of being a gloss on the original text, being in no way required by the general thrust of the President's speech. They appeared to take the University community entirely by surprise. Certainly the Vice Chancellor, who had seen the draft speech prepared for the President by Mr. Thomas Hodgkin, Director of the Institute of African Studies, had no advance knowledge that the President would make such comments about the Law Faculty. The most disturbing aspect was the unspoken premises on which the President seemed to proceed: that the Law Faculty was unaware of the intimate relation between law and social values, that we were continuing to work with a totally alien curriculum, and that, if any changes were to be made in order to make the program of the Law Faculty more responsive to the needs of Ghana, such steps could only be taken through the complete Africanization of the Law Faculty. The President also seemed to err in his assumption that the Law Faculty had been either oblivious of the need, or unwilling to cooperate in meeting the need, for special instruction for lay-magistrates and other special groups not seeking professional qualification. Finally, it was most disturbing to see the President indulge in the easy but fallacious assumption that because Ghana had a reasonable number of lawyers, it also had an adequate supply of persons qualified to teach law in the University.

I had intended to attend the opening of the Institute of African Studies and to hear the President's speech. Unfortunately, I was under the impression that he was to appear on the following day, the 27th, and I did not hear about his comments until the evening of the 26th, when I was attending a diplomatic reception in Accra. A number of people asked about my reaction to the President's comments. On the morning of October 27, I called on the Vice Chancellor shortly before he left for a conference with the President at Flagstaff House. I discussed with the Vice Chancellor some of the details of our work in the Law Faculty, most of which he already knew, and undertook to put together a sheaf of relevant documents for his use.

Early in the afternoon on the 27th, the Vice Chancellor asked me to call at his home for a report on his conversation with the President. He thought the talk had gone very well. The
scope of the discussion is indicated by the following excerpt from an aide memoire prepared by the Vice Chancellor after the conference:

"Arising out of the President’s remarks on this subject at the opening of the Institute of African Studies, I told the President that in my opinion few parts of the University had been put on a better footing than the Law Faculty. The course had been revised in a revolutionary manner, changing it completely from an old fashioned Anglocentric syllabus to a thoroughly modern one with the emphasis on African needs. I illustrated this from the revised syllabus which I had with me, and with which the President declared himself impressed. I stressed that the credit for this change was due, in the main, to Professor Harvey. The President enquired how long Professor Harvey would be with us, and I told him one year. He then asked whether, in the light of what I had told him, we could not prevail on Professor Harvey to remain longer than this. I told him that we had tried to persuade Professor Harvey in this area, but that he had finally made up his mind that he would have to leave at the end of the year. Mr. Seidman, however, who presided over the Faculty in Professor Harvey’s absence, would be staying longer, and indeed might stay indefinitely, as I hoped he would. I explained Mr. Seidman’s situation, and the President assented to the idea that it would be well to retain his services for as long as he wished to stay. I mentioned to the President that, as agreed earlier with him, we expected that Judge Ollenu would replace Professor Harvey as Dean of the Faculty. The President now expressed some doubt about this, wondering whether Judge Ollenu’s academic qualifications were adequate. I suggested that the President should see Professor Harvey and myself to discuss this and other matters pertaining to the Law Faculty. The President agreed to this.

"In the course of the discussion, the President mentioned that he would have liked the Faculty of Law to concern itself not only with its own students, but with people like local court magistrates who were very much in need of some kind of rudimentary legal training. I told the President that, as it happened, Professor Harvey had made proposals last July to the Ministry of Justice for the setting up at the University of short-term courses of instruction for such magistrates during the long vacation. This proposal was, however, turned down by the Ministry of Justice and accordingly, of course, the Faculty of Law had not been able to undertake the courses. The President expressed surprise at this information."

I shared the Vice Chancellor’s optimism following this discussion with the President and looked forward to an early opportunity to discuss with him the existing program of the Faculty of Law, our policy on the recruitment of senior staff, and our plans for further development.
During his conversation with the President on October 27, the Vice Chancellor also reported on the progress of the discussions he had been having with Mr. Boateng, the Minister for the Interior, on the citizenship training program. He showed the President a list of the proposed subjects and lecturers which the President approved. Dr. Nkrumah suggested, however, that there should be a lecture on the Convention Peoples’ Party, as he thought the nature and character of the party were not understood by the students. The Vice Chancellor asked the President if he himself would be willing to give such a lecture and the President tentatively agreed to do so, as well as to meet a representative group of students for an informal discussion. The President also indicated that he would like to dine in the University from time to time, perhaps once a month. Throughout these discussions the President was cordial and seemingly quite reasonable.

On October 29, Mr. Justice Nii Amaa Ollennu called on me to discuss the proposal that he leave the Court and come to the University. He indicated that it had come to his attention that a member of the Law Faculty was extremely hostile to him and constantly attacked him in discussions with politically prominent people. Ollennu felt that if he left the relative security of the Court, he would only face personal embarrassment and the probable loss of all effectiveness on the Law Faculty. I told Judge Ollennu that I was not surprised by his report since I was aware of some of the ambitions within our group but asked him to give further thought to the matter before asking me to have his name withdrawn from consideration as my successor. This he agreed to do. In our discussion no names were mentioned but I was well aware that the member of the Faculty to whom Judge Ollennu referred was Dr. W. C. Ekow-Daniels.

On October 30, I discussed my conversation with Ollennu with the Vice Chancellor, and we agreed that the only possible course was to bide our time, hoping that the attack on Ollennu could be blunted and that the plan to bring him to the University could be carried out. The reservations expressed by the President in his discussion with the Vice Chancellor the previous week indicated, however, that the effort to undermine Ollennu’s appointment in the University had already reached a fairly advanced stage.

In the same conversation on October 30, the Vice Chancellor reported that he had received a communication from the President’s office saying that one matter the President had failed to discuss with the Vice Chancellor in their conversation on the 27th was the appointment of Mr. E. A. L. Bannerman to the Law Faculty. The letter said that the President understood that Bannerman had now filed an application for appointment, that the President had met Mr. Bannerman and was very anxious that he be
appointed. The Vice Chancellor said that this was the first any such pressure had come to him from Flagstaff House. I gave Dr. O'Brien the background on the Bannerman case, indicated that I believe the usual University procedures and criteria should be applied to his application and that in my judgment he was not qualified for any University appointment. The Vice Chancellor asked for the files and we discovered that Mr. Bannerman had, in fact, recently filed an application for appointment as either Professor or Senior Lecturer. I undertook to take up certain references on Mr. Bannerman which might be considered if his application later came before the Appointments Board.

A relevant non-University matter should be mentioned at this point. The post of editor of the Ghana Law Reports had been vacant since October, 1962. Following advertisement and the consideration of several applicants, the General Legal Council offered the post to Dr. J. B. Danquah. Dr. Danquah was a senior member of the Bar in Ghana, who, though not particularly well regarded as a lawyer, had had a long and fairly distinguished career as a writer, scholar, and political figure. He was long the leader of the opposition United Party and was the candidate of that Party for the Presidency in 1960. The administrative steps involved in appointing Dr. Danquah to the post were not completed until the autumn of 1963.

By a letter dated October 30, 1963, signed by the Secretary of the Cabinet, the adverse reactions of the President to the appointment of Dr. Danquah were brought to the notice of the Judicial Secretary for the attention of the Council. The Secretary indicated that "Osagyefo is surprised that having regard to the long history of Dr. Danquah's opposition to the government and his policies, the General Legal Council offered him this appointment without considering it necessary to seek the views or the approval of the Minister of Justice or the government before confirming it. Osagyefo has directed that if this is the way the Legal Council is going to make use of the public funds at its disposal, then its subvention should be stopped." The Secretary asked that this matter be brought to the attention of Chief Justice and that he be informed for the information of the President what action the Council proposed to take.

On November 1, the Secretary of the Cabinet wrote another letter to the General Legal Council recalling the statement made by the President in his address at the opening of the Institute of African Studies concerning the continuation of instruction in the Ghana Law School. He referred briefly to the fact, which had been reported to the President by the Vice Chancellor, that the Minister for Justice had rejected the proposal of the Faculty of Law to provide special courses for local court magistrates and other persons. He went on to say that the President was anxious that the Law School should continue to provide courses for persons who wished to acquire a knowledge of the law to assist them
in their work and wanted action taken as soon as possible to provide such courses in the Law School with the cooperation of the University and the Institute of Public Education. Finally, the President suggested that Mr. E. A. L. Bannerman should be retained as head of the Law School for the purpose of offering this kind of training.

On November 2, the General Legal Council met to consider these two communications from the President. The discussion in this meeting need not be recounted in detail. It was evident that the pressure from the President caused widespread consternation. An effort was made by many to find a way to relieve the Council of its present embarrassment without causing it a substantial loss of face. A number of members pointed out that the Council was so closely identified in the public mind with both the Bar and the judiciary that action by the Government tending to humiliate the Council would reflect on the other groups. Dr. Danquah was a member of the Council and remained in attendance during the session. His contributions tended to be highly emotional and directed toward general political criticism of the Government. The members of the Council representing the Bar supported Dr. Danquah. The general tenor of the discussion was well summed up in the comment of one of the Justices of the Supreme Court who urged that the Council must accept the realities of the situation: it either buckles under to the Government or is cut down. He observed that it was foolish to talk about fighting for principle unless one were prepared to die for principle. He concluded that he was not prepared to do so and he doubted if other members of the Council were. Many speakers urged Dr. Danquah to resign from the post of editor in order to relieve the pressure on the Council. The Council finally decided to adjourn the meeting until November 5, in order to permit Dr. Danquah to consider what action he would take. With respect to the second matter raised by the Secretary to the Cabinet, that is, the continuation of instruction in the Law School, the Council took no action. It merely decided that I should discuss this problem with the President during my scheduled meeting with him the following week and should seek a clarification of his views.

On November 2, the Vice Chancellor sent to me a copy of a letter from the President in which the President suggested the adoption of a procedure in the University "whereby appointments of Heads of Departments and Faculties, such as Political Science, Law, and other Departments, could be made after you have discussed such appointments with me as Chancellor of the University." The Vice Chancellor also sent for comment his draft reply to this communication. He stressed to me his concern about the implementation of the President's suggestion in the case of the Department of Political Science where Professor Henry L. Bretton of the University of Michigan had recently been appointed Professor and Head of Department, to take up his duties
in September, 1964. In view of the fact that the Bretton appointment had already been made, it might have been possible to take the position that the President's request for consultation concerned only appointments to be made in the future. On the other hand, the express reference to the Department of Political Science created the risk that if the President's views on Professor Bretton's appointment were not sought, he might feel that the Vice Chancellor had been less than frank with him.

In his draft reply the Vice Chancellor accepted the procedure whereby Heads of Departments would not be appointed without prior discussion with the President, acting as Chancellor of the University. He pointed out, however, that under the University statutes Deans of Faculties were elected by the members of the Faculty Board itself and were not chosen by the Appointments Board or by the University Council. The Vice Chancellor also informed the President that Professor Bretton had been appointed to the chair of Political Science. In discussions with the Vice Chancellor, I strongly supported the view that the University should not stand on the technicality that Professor Bretton's appointment had already been made but should make full disclosure to the Chancellor and seek to secure his support for Professor Bretton's appointment. It should be emphasized that the procedure proposed by the President and accepted by the University at this time did not grant to the President any appointive power. On the contrary, it committed the University only to seek the President's views with respect to the prospective appointments of Department Heads. These views could then be taken into account by both the Appointments Board and the University Council when they came to consider the ultimate appointment.

It will be recalled that during his conversation with Dr. O'Brien on October 27, the President had accepted the suggestion that he should see me to discuss developments in the Faculty of Law. Subsequently, I was asked by the General Legal Council to use this meeting as an occasion to discuss with the President the suggestions he had made on continuation of instruction in the Ghana Law School. On November 5, the Vice Chancellor sent to me a copy of a letter, dated the previous day, from Mr. E. J. Okoh, Secretary to the Cabinet, in which Mr. Okoh said:

"As you requested, I have asked the President about the possibility of another meeting with you and Professor Harvey to discuss the future plans of the Law Faculty.

"Osagyefo does not consider that such a meeting is necessary now, in view of the full discussion he had with you at your earlier meeting, and I believe also at the dinner in your house last Friday.

"In this connection, Osagyefo has asked me to reiterate the
view he expressed at the opening of the Institute of African Studies that steps should be taken to insure that the staff of the Law Faculty is Africanized completely as soon as possible."

In the Vice Chancellor's draft reply to this letter, in which I concurred, he pointed out again that my term in the University would end at the close of the academic year 1963-64 and that there would be consultation with the President regarding my successor. This was appropriate under the earlier agreement since, as Professor of Law, I was regarded as a Department Head as well as Dean of the Faculty of Law. The Vice Chancellor also pointed out that, of the remaining twelve members of the Law Faculty, six were Ghanaians and six were expatriates. Thus, the percentage of Ghanaians in the Law Faculty was higher than in the University in general. The Vice Chancellor urged the President to reconsider the matter of seeing me. He indicated his own impression that some members of the Law Faculty had had an opportunity to convey to the President views which were not entirely objective, while the person responsible for the Law Faculty had had no opportunity to inform the President of the state of affairs as he saw them.

The Vice Chancellor's reference to reports emanating from other members of the Law Faculty arose out of the fact following the President's speech at the Institute of African Studies on October 26, we had been informed that Dr. W. C. Ekow-Daniels had publicly boasted that he had drafted those passages of the speech attacking the Faculty of Law. It later appeared from his own admissions that Dr. Daniels had also urged the President to withdraw his consent to see me and, according to his statement, had prepared for the President's signature the letter refusing the promised interview. While it is entirely possible that Dr. Daniels tended to overemphasize his actual influence in these matters, he certainly appeared to be actively engaged in an attempt to prejudice the Faculty in the eyes of the President by false and malicious reporting and criticisms. In his draft reply to the President, the Vice Chancellor indicated his awareness that these reports on the Faculty of Law purported to rest on "grounds of a socialist character." The Vice Chancellor concluded by saying "I am quite satisfied that the real motives had nothing to do with socialism and much to do with their personal interests." I shared Dr. O'Brien's conviction that the time had come for meeting as directly as possible the behind-the-scenes scheming and malicious distortions of which we had been informed.

In view of the continuing refusal of the President to see me, I notified the Chief Justice that I would be unable to make the inquiries on behalf of the General Legal Council which it had authorized me to make when I saw the President. I also prepared a brief memorandum for the President describing the program in the Faculty and in the Ghana Law School, with parti-
cular reference to the concerns and implicit premises of the President as indicated in his speech at the Institute of African Studies. I forwarded it to the Vice Chancellor for submission to the President.

At the adjourned meeting of the General Legal Council on November 5, Dr. J. B. Danquah submitted his resignation as editor of the Ghana Law Reports. The principal discussion at this meeting concerned payments of compensation for Dr. Danquah’s losses in terminating his practice in order to accept the post of editor. The Council recommended that he be given an ex gratia payment and authorized the Chairman and another member of the Council to negotiate with the President to this end. The President later refused to approve any ex gratia payment to Dr. Danquah and thus the unhappy matter ended. At the conclusion of the meeting of the General Legal Council on November 5, I indicated to the Council that I had refrained from participating in the debate on the Danquah matter and also from voting, since in my judgment it involved an issue of Ghanaian politics and not a matter of the professional judgment of the Council, thus making it inappropriate for me as an expatriate to participate.

On November 11, the Vice Chancellor sent to me a letter from the Minister for the Interior enclosing his proposals for a series of lectures to be given in the University in connection with the citizenship training program. Mr. Boateng proposed four lectures during the Michaelmas Term emphasizing "Nkrumahism" in general. The lectures were to be given by Mr. Boateng on Civic Responsibility in the Universities, by Dr. W. C. Ekow-Daniels on the Legal Implications of Nkrumahism, by Mr. Isaac Chineboah on the Educational Implications of Nkrumahism, and by Professor W. E. Abraham on the Conceptual Basis of Nkrumahism. During the Lent term the emphasis of the lectures would shift from Nkrumahism in general to Nkrumahism in Ghana, and for the third term they would dwell on the application of Nkrumahism in Africa. As lecturers for the second and third terms Mr. Boateng proposed a number of leading figures in the CPP, including some of its most extreme apologists such as the editor of the Ghana EVENING NEWS, Mr. Eric Heyman. Mr. Boateng proposed that this lecture series be included in the program of the Institute of African Studies.

The reply of the Vice Chancellor to this communication from Mr. Boateng followed lines we had previously discussed and agreed upon. The Vice Chancellor pointed out that in connection with the citizenship training program there had been from the beginning two possible approaches: the first would be for the University to draw up its own program, integrating it as far as possible into its regular curriculum and in general sponsoring the lecture series. The University had been quite willing to do this. The second approach, which the Minister seemed at the moment to favor, was for the lecture series to be devised by the
Minister as the person responsible for the program, in which case the University would merely provide facilities for the delivery of the lectures and notify students of them. This the University was also prepared to do.

The Vice Chancellor emphasized, however, that he, as responsible academic Head of the University, could not approve including in the curricula of the University courses of lectures which had not been drawn up by a competent University body. This involved the vital issue of principle that an academic body must have full responsibility for its course of instruction and cannot relinquish this responsibility to any others. Since the Minister proposed that his lecture series be included in the program of the Institute of African Studies, it would appear that this principle was called into question. In this letter, and in a personal conversation with the Minister on November 8, the Vice Chancellor indicated that the University could not and would not compromise on its insistence that the lecture series proposed by the Minister, if offered, should be extracurricular, non-compulsory and non-examinable. In the conversation on November 8, the Minister denied that he had ever contemplated structuring the lectures in such a way as to transgress this principle. With this understanding, the Vice Chancellor indicated that he saw no reason why the University could not announce the series and provide lecture halls for the several occasions.

Mr. Boateng also agreed at this time to meet a group of the students and academic and administrative staff on November 18, for an informal discussion. This meeting was, in fact, held and Mr. Boateng spent a rather uncomfortable evening circulating among small groups of students who apparently had no hesitation in expressing their comments, questions and criticisms. I attended this meeting but did not participate in the discussions with the Minister. It was my impression that the other senior members of the University who attended also abstained from the discussions, leaving the field open to the Minister and the students.

Another pressure on the Law Faculty having seemingly dangerous political support arose from the effort to establish in the University a program of instruction for external degrees under the auspices of the Institute of Public Education. The Institute was directed by Professor J. C. DeGraf-Johnson who was one of the few vehement supporters of the Party in the University. Professor DeGraf-Johnson had been appointed Director of the Institute by the President himself, and, as the head of an organization independent of the University though affiliated with it, he was able to avoid a number of the usual University controls on his activities. It seemed quite evident that Professor DeGraf-Johnson was in an empire-building phase and was utilizing all his talents for political ingratiation in support
of his program.

During the academic year 1962-63, I had been asked by the Executive Committee of the Academic Board to serve as Chairman of a special study committee responsible for developing a set of guiding principles for the development of external degree programs within the University. The report of this committee was adopted by the Executive Committee and ultimately by the Academic Board. The position thus adopted recognized the need for extending educational opportunities as broadly as was consistent with the maintenance of high quality. The University's position was made clear, however, that external degree program should be comparable in quality with those offered for internal degrees, that the syllabus and examination standards should be the same and that these programs should be organized only when available staff of the requisite quality could be appointed through usual University channels.

The Law Faculty considered its involvement in an external degree program and I advised the Vice Chancellor and Professor DeGraf-Johnson that, while we were sympathetic to the objective, our limited staff, currently available and in immediate prospect, should not be diluted by assigning to it responsibility for further instructional programs. It was necessary to maintain this position unless our teachers were to be diverted from the research and writing that legal development in the country urgently demanded. I was fearful that yielding to the pressures would merely serve to create within the University a new program no better than the one in the Ghana Law School which the General Legal Council had recently decided to terminate. In a number of discussions with Professor DeGraf-Johnson and members of his staff, I explained my own position and that of the Law Faculty. It was quite clear, however, that Professor DeGraf-Johnson was not prepared to accept this view. He tried in a number of ways to exert political pressure on me and to go behind me to enlist the individual support of members of the Law Faculty for an instructional program in law organized directly under the auspices of the Institute. That some of the President's troublesome attitudes rested on reports and arguments from Professor DeGraf-Johnson seemed a safe assumption.

Another aspect of the University's program which was feeling considerable outside pressure at this time was the proposed development of a Medical School with the assistance of the American Government. When American aid was first suggested, there seemed to have been a misunderstanding within the Ghana Government on the extent of the assistance that might be expected. In the course of time, however, the American government made clear its intention to limit aid to funds for the construction of a basic sciences building and additional funds for the employment of teaching staff, the latter backed by a guarantee that such staff would be provided for five years. No arrangements were
made for the financing of a teaching hospital. This misunder¬
standing probably led to some ill will on the Ghanaian side, but
negotiations looking toward the consummation of the contracts
between the Government and the United States continued long
after the limitation on assistance had been made entirely clear.
There was, as well, a continuing annoyance arising from the ex-
tremely slow pace of negotiation and final approval in Washing-
ton. Here again, however, uncertainty of policy and delay on the
Ghanaian side probably contributed somewhat to the problem.
Progress was nevertheless being made. Dr. Richard Cross, former-
ly of the Medical School of the University of Pittsburgh, had
been appointed Professor of Medicine and Dean of the Faculty of
Medicine. He was actively engaged in completing negotiations for
the grants. The time had been reached when it seemed possible to
expect the final approval of the grant and loan contracts in
Washington by late November or early December, 1963. Two groups
of pre-medical students had already been admitted to the
University, and the leading class was scheduled to begin clini-
cal work in October, 1964. While having no direct responsi-
bility with respect to any of these matters, I had been involved
for several months in consultations with the Vice Chancellor
and, during his visits to Ghana, with Dr. Cross on various
aspects of the Medical School development.

In late November, 1963, the Vice Chancellor was notified of
a Cabinet decision unilaterally terminating all negotiations for
American participation in the development of the Medical School.
The Cabinet memorandum did not state grounds for this action but
merely declared that it had been decided that an adequate Medi-
cal School could be established in Ghana with resources already
available in Accra and at the University. Such a decision would
not have been surprising much earlier, but at this stage of the
negotiations it filled us in the University with consternation.
The Vice Chancellor immediately made plans for a trip to Europe
in an effort to recruit the minimum staff required for the
beginning of instruction in October of the following year. The
Pro-Vice Chancellor visited Nigeria to explore the possibilities
of having medical schools there absorb our students who would
soon be ready for clinical work.

The well springs of the Cabinet decision were not difficult
to determine. A South African doctor, Dr. Joseph Gillman, who
was Director of the Ghana Institute of Health, had long been
fundamentally opposed to the whole idea of an agreement with the
United States. Dr. Gillman obviously wanted to control medical
education in Ghana to an extent that he probably did not think
possible if the Medical School developed within the University
and with American cooperation. Whether his position had any
relevance to the general East-West struggle I would not un-
dertake to say, but it had been clear for some time that Dr.
Gillman was extremely hostile to the United States and, having
access to the President, was making every effort to undermine
the proposed cooperation. Thus Dr. Gillman nurtured the growing anti-American feelings of the President as well as his distrust of the University.

In these circumstances there was little the University could do except make every effort to find the resources necessary to replace those which had been expected from the United States. As the Vice Chancellor observed when the Cabinet decision reached him, "This isn't changing horses in midstream; it amounts to shooting your horse under you just as you reached the opposite bank." Perhaps fortunately, since my departure from Ghana, a decision has been made that the proposed Medical School will be an independent institution rather than part of the University.

On November 20, the Vice Chancellor informed me of the most pointed action to that time against the Law Faculty. Nana Kobina Nketsia IV, Chairman of the University Council and an intimate of the President, reported that it was the President's view that expatriate members of the Law Faculty should be dismissed immediately. The Vice Chancellor informed Nana that he was not prepared to take any such action and that, if there were an insistence on it, it would be necessary to include him as well. Nana urged Dr. O'Brien not to take an extreme position as yet and indicated that he himself was urging the President to withhold action on the ground that dismissal would involve the substantial expense of paying off the contracts of the dismissed teachers. The Vice Chancellor replied that the cost, great or small, was not the issue; rather it was the integrity of the University's appointment procedure and the security of tenure of its staff, free from outside pressure. Nana felt, however, that as a practical bargaining point he could make good use of the cost factor with the President. The Vice Chancellor, therefore, agreed to ask me to prepare a schedule showing the costs involved. I prepared such a schedule and submitted it to Dr. O'Brien.

Dr. O'Brien indicated no great optimism over the prospects of blunting the attacks on the University. He said that the President was in a difficult and hostile mood, that the prevailing atmosphere in Flagstaff House was now strongly anti-American and anti-State Department. This attitude imperiled the Law Faculty more than others because of the substantial American involvement there. It also supported those in the University who were willing to exploit general political tensions for their own benefit. The Vice Chancellor complained strongly to Nana Nketsia about the activities in Flagstaff House of Dr. W. C. Ekow-Daniels and Professor Abraham. Nana did not deny their activities but said their influence should not be overestimated. The Vice Chancellor was doubtful, however, that Nana knew the extent to which these two had access to the President.
I informed the Vice Chancellor that in no circumstances would I resign from my post. If dismissed by a competent University body, I would, of course, have no alternative to relinquishing my duties. Otherwise, I would continue to perform them according to my own judgment. In these circumstances, if the Government should insist on getting rid of me, it would have to deport me. I added that if the pressure on me should now subside and I were able to finish the year in the University it seemed clear that a strong political effort would continue to determine the choice of my successor. I mentioned that one of the Ghanaian members of the Law Faculty had told me the previous day that if the choice of my successor seemed to be political it would be necessary for him to reconsider his own position and that he would probably leave the University. I also told the Vice Chancellor that I would strongly advise all of my staff to remain with the University and try to do a good job. Since I could understand the misgivings they would have over the appointment of Dr. Daniels as my successor, however, I would advise the American foundation which had assisted us with the salaries of some of the expatriate members that if these teachers should decide that they ought to resign, every effort should be made to see that they did not suffer financial loss. The Vice Chancellor approved my position as thus outlined.

Since the President continued to refuse to see me, it was necessary for the General Legal Council to find some other means of responding to the proposals from the President on the continuation of instruction in the Law School. The President’s communication of November 1, did not make clear whether any continuing instruction should be for persons seeking full professional qualification or should be limited to courses for civil servants, lay magistrates and others who needed an elementary knowledge of law for the better performance of their duties. The Council had no reluctance to support the latter in the Law School but felt strongly committed, I think, to the earlier delegation of teaching responsibility for professional qualification to the University. In an effort to obtain clarification of the President’s views and to formulate proposals for the Council, the Chief Justice assembled a sub-committee of the Council consisting of himself and Justices W. B. Van Lare and Edward Akufo-Addo. He invited the Minister of Justice and me to meet with the sub-committee to consider the steps to be taken.

After a meeting of this group at which we discussed the position of the local court magistrates, with the Minister of Justice reiterating his view that very few of the present judges were educable, I suggested that I would prepare a working paper for the consideration of the subcommittee and ultimately of the Council. If the Council approved the paper, it could be submitted to the President as the basis for clarifying his views and perhaps coming to agreement with him. This working paper was
adopted by the Council. It reviewed the development of legal education in Ghana and suggested that education for professional qualification should be entrusted fully to the University, as the Council had already decided. The paper also outlined the kinds of instruction in law for those not seeking professional qualification which were now available in the University and elsewhere. It expressed the desire of the Council to cooperate fully in establishing new programs to meet further needs as these could be identified. To meet one such need, the training of local court judges, it proposed the establishment of a post-recruitment training program which, in the course of time, would replace most of the present magistrates with better qualified personnel. The working paper was transmitted to the President but elicited no response prior to my departure from Ghana. There were indications, however, that if the President ever seriously considered the proposals it contained, he rejected them. The fact that the three judges on the sub-committee also made up the Special Court sitting on the second treason trial (to be discussed below) doubtless prejudiced the working paper.

On November 22, the Vice Chancellor had a meeting with the President at which certain aspects of the status of the Law Faculty were discussed. The tenor of this conversation is indicated by the following excerpts from an aide memoire prepared by the Vice Chancellor:

"As regards the Law School Faculty, I told him that we agreed to the objective of Ghanaianisation. We were most concerned, however, to ensure that progress towards Ghanaianisation should be made here, as in other branches of the University, in an orderly fashion, and that there should be no brusque termination of contracts which would, in my strongly held opinion, lead to unrest at the University and probably to departures of many valuable members of the University, including both Ghanaians and expatriates. I felt that this would be gravely damaging to our common objectives. The President appeared to acquiesce in this view, and did not urge that any immediate steps should be taken. He went on, however, to criticize Professor Harvey’s outlook and, in particular, his inaugural address, in which he had sought to detach law from social values. I said that I had had some discussions and even arguments with Professor Harvey on this particular theme, and I did not seek to defend his thesis. I said I was convinced, however, that any view professed by Professor Harvey was a view honestly held by him, and that he had rendered extremely valuable services to the University, notably in the field of the revision of the curriculum. In any case, Professor Harvey was due to leave at the end of the academic year and I would discuss with the Chancellor the question of a successor. The President here said that he wished to be clearly understood on this matter. He did not wish, in any way, to dictate to the University, who should be appointed. He fully appreciated the academic considerations in-
volved here and had no wish to upset them. However, where con-
siderations of policy entered in, as in the field of political
science, he felt he should have an opportunity of expressing his
views, before an appointment was made. ... 

"I ventured the opinion that in the whole field of mat-
ters related to the Law Faculty the President might have been
misled by inaccurate information disseminated, for interested
reasons, by one member of that faculty, whom I named. The Presi-
dent smiled and said that he thought I myself had been misin-
formed. This member had not been his informant. He said that his
informant had been outside the University. I indicated that an
informant outside the University could be briefed by one inside
the University, but we did not pursue this field of enquiry.

"Throughout the interview the President was cordial and
on many occasions affirmed his support for the University and
his sensitivity for the University's character. At the end of
the conversation he said that, as he saw it, he and I together
were laying the foundations of something important for the fu-
ture of higher education in Africa."

The gross distortion of my own views contained in this
statement by the President was extremely frustrating since it
was used as a weapon not only against me but the Faculty as
well. On this occasion I came closer to a statement in anger
than at any other time in the long weeks of mounting pressure.
The report from the Vice Chancellor on his conversation with the
President led to the following exchange of correspondence which
I set out in full.

"Dear Conor,

"Your report on your conversations with the President
yesterday was most interesting and I am grateful for your let-
ting me see it so soon. As you can well imagine, the results of
the conference are of great concern to me.

"I am greatly surprised to learn that my philosophical
position has in some way become controversial, as evidenced by
the President's criticism of my inaugural lecture in which, to
use the words of your report I "sought to detach law from social
values." I have stated my position publicly on more than one oc-
casion and I shall not burden you with a full statement here. If
you are interested in pursuing this matter, I would suggest you
read my two lectures on the Rule of Law, in the attached book-
let. [The two lectures appear in the principal text at pp. .] I
also enclose a copy of my inaugural lecture which may require
re-examination.

The essence of my view may be stated quite simply: law is a
technique of social ordering whose value content is not self-
validating and which in turn cannot be validated by reference to some a priori, self-evident order which can claim universal validity, I should have thought it obvious to even the least subtle mind that if one accepts this analytical premise the source one examines for the value content of a particular legal order is the society that order is to serve; see here particularly the [early paragraphs] of my inaugural lecture. This view is further illustrated by the concluding sentence of that lecture: "At the formal opening of the Ghana Law School in January, 1962. Dr. Nkrumah declared that 'the law should be the legal expression of the political, economic and social conditions of the people and of their aims for progress.' Such a relativistic and pragmatic approach has in my judgment led to the implementation of the value acceptances described in the evolution of the law of Ghana since independence."

I have commented in similar vein elsewhere. For example:

(1) In the paper on the work of this Faculty which I presented to the Conference of English Law Teachers, held in Oxford on June 28-29, 1963, I said: "Extensive discussions within the Faculty during the academic year 1962-63 led to an abandonment of the old four year LL.B. programme and the adoption of the present scheme. All course syllabuses were also revised and syllabuses developed for the new courses. The unifying purpose of the revisions was to provide an ample framework, clearly relevant to Ghana, within which the basic lawyer's skills of analysis, synthesis and critical evaluation could be developed to a high degree. Since the Faculty is now responsible for all law teaching in Ghana to full professional qualification, knowledge of the existing law is naturally stressed. In a rapidly developing society, however, where older legal institutions may have become obsolete and rapid social change constantly raises novel problems, the Faculty attaches primary importance to the development of capacities for creative participation in the adaptation of law to new social needs."

(2) In my annual report to you, dated 25 September, 1963, I summarized our curricular revisions by saying "The Faculty are prepared for the coming year with a carefully considered curriculum responsive in our best judgment to the developing needs of Ghana."

(3) In a paper presented to an International Conference on African Law held in Venice between October 3 and 6, 1963, I said in partial summary: "With strong emphasis on two important points I conclude. The first of these is that the best African development will not result merely from the assimilation of foreign legal or governmental models, even though assimilation involves some local adaptation. The leaders of the new African countries have in general been quite eclectic, willing to consider foreign experience and models. Many of these remain from
the colonial period or have been newly adopted. It is essential, however, that these be examined and re-examined with a critical eye to determine how well they meet African needs. It seems probable that many will be found wanting in this respect."

I need not pile up further evidence of the gross distortion of both my viewpoint and my actual work in this Faculty which is implicit in the President’s reference. This distortion may suggest three possible explanations: (1) that the President has never read my inaugural lecture or any other expression of my views and has merely relied on misrepresentations; (2) that the President has in fact read but was incapable of understanding; (3) that the President has read and has understood but continues to distort to achieve some further aim. I find each of these explanations quite plausible. Perhaps you will have some view as to which is the proper one.

I cannot regard the above as a mere academic tempest in a teapot, nor do I find any real assurance in the President’s remarks to you yesterday. His gravitation between pious platitudes about non-interference in the University and support for its development on the one hand and objective conduct of exactly the opposite sort is well known. One need only recall that only one day after a completely unwarranted attack on this Faculty, he expressed to you the hope that I might be persuaded to stay beyond this year. I think the time has come for real clarification, so that I may know where this Faculty stands and how planning for its future may take place. Thus far, I have not discussed developments with my colleagues but, as you well know, there are no secrets in Legon. I have been told by Ghanaian friends that knowledge of the various pressures on this Faculty are widely known and discussed in the University. Thus far, three Ghanaian members of my staff have approached me about leave arrangements which will enable them to avoid the impending battle. One of our expatriate teachers has come to seek my help in finding a position elsewhere. The man tentatively selected to succeed me has beaten a hasty retreat, and no very clear successor is in sight. I, therefore, suggest very strongly that steps be taken as soon as possible to determine whether the President’s platitudes have real meaning. These are:

(1) Discussion with the President of specific names to be considered for the Professorship of Law. I am in a position to suggest certain names for preliminary clearance so that the University might begin negotiations.

(2) Ascertainment of the status of present expatriate members of this Faculty beyond the present academic year. One must assume, I think, that Nana’s recent message was not idle gossip. I cannot in good conscience hold off much longer in informing my expatriate staff of the security or lack of security of their tenure.
(3) Clarification of our recruitment needs, particularly as affected by the possible departure of all expatriates, and of the range of choice we may have in making new appointments. Steps toward recruitment must be taken in the near future if we are to find and attract acceptable people. I will be glad to discuss these matters fully at your convenience.

Yours,

William B. Harvey

"Professor W.B. Harvey  CONFIDENTIAL  Faculty of Law  Legon.

"Dear Bill,  November 25, 1963.

"I have been distressed, ever since our last conversation, and especially since receiving your letter, by the thought that you felt I had let you down in my conversation with the President, and still more distressed by the uneasy feeling that there might be some truth in this.

"The President, in raising, as he did, the subject of your philosophical views, took me rather by surprise and found me somewhat at a loss. First of all, I have never been sure that I really understood or could accept the full implications of your views on the nature of law. This was not because I felt them to be in any way inappropriate to Ghana's needs, but rather - as I have argued with you before - that they seem to me to be all too appropriate to the needs of any state and to be of little aid or comfort to, say, judges operating in extreme situations such as South Africa or Nazi Germany. You have accused me here of raising the ghost of Natural Law, and this may well be so; it could be the result of my Catholic upbringing. In any case, you will understand that, granted this condition of thought - clouded as I am sure you will consider it - I was in no position to make a ringing defence of your thesis when the President criticized it. I must admit that I also had in mind the thought that there was no harm in letting him let off steam about your thesis and that I would do better to reserve my fire for the issue on which it would be needed: the retention of the expatriate members of the Law School. This was, to use the Nkrumahist vocabulary, tactical action rather than positive action. In retrospect, however, I am not very well pleased with this particular passage in the discussion. My best course would have been, I think, to have refused to be drawn into a discussion of your philosophical
views at all. I regret having handled it, as I did, and I hope you will accept this sincere expression of my regrets.

"I should make clear that the words in my report about seeking to detach law from social values are supposed to be oratio oblique. These were the President's actual words.

"Of the possible explanations of the President's attitude that you suggest, I believe that the first is the correct one. I know that a colleague of ours, whom you will have no difficulty in identifying, has complained to other colleagues of the ideological inadequacies of your inaugural lecture and no doubt he has complained in other quarters too.

"I think that the general remarks on your second page are extreme and pessimistic. It is all very well to speak of "pious platitudes," but it is something that the platitudes of those in power do at least remain pious, even in private conversation. The impression I have is that the President will continue to exert pressures on this University, but that at points where he finds resistance - as he does on the issue of the expatriates in the Law School - he will not increase the pressure to the point where something breaks. That at least is the degree of reassurance I took from his conversation on Friday. If his intention were to have such changes made at all costs, he would necessarily have taken a harder line in his discussions with me. I don't agree with your implication that his professions of concern for the University are hypocritical. I think they are quite real, although I cannot, as you know, agree with all the conclusions to which they lead him.

"I can well understand your concern about the anxieties felt by your colleagues in the Faculty of Law. As regards your specific suggestions, the following are my views:

"1. If you will let me have your list of names, I shall go to the President for preliminary clearance.

"2. It would, in my view, be a serious mistake to attempt to ascertain from the President the status of present expatriate members of the Faculty beyond the present academic year. You know exactly how this matter stands. The President had indicated to me his view that these members should be replaced "as soon as possible." I indicated to him in writing in a letter which you have seen that, in effect, we would try to replace the younger members by Ghanaians as soon as their contracts fell in, and I indicated that I thought we should keep Seidman for as long as possible. The President has not replied in writing to this, and my understanding, in our conversation, was that he would not press for any more urgent action. Should he do so, I have already made clear to you, I think, my own position: that I am not prepared to terminate contracts, or to acquiesce in their
termination, because of political pressure. In short, if these contracts are to be terminated, my own will have to be terminated with them. I have no reason to assume that the President is at all likely to proceed to such extreme action. Nana Nketsia, with whom I have discussed the matter fully, and who feels that the situation is at present evolving favourably, entirely agrees with me on this. An attempt to ascertain the status of the members concerned would be mistaken, I think, on two grounds:

"(a) it would be a tacit acceptance of the Government’s power to remove members of the University. It is for the University, not for the Government, to decide this kind of question, and this position we must most jealously maintain;

"(b) our enquiry on this might well revive the question which may be dead; in fact I think it is at least moribund, although I may be wrong. In any case, our enquiry could at best elicit no more than a reiteration of the President’s view that they should go "as soon as possible." We have no interest in eliciting such a reiteration. At worst - and the worst is, as so often, rather more probable - it might, being interpreted as a sign of weakness, provoke a more draconian and explicit demand from Flagstaff House. The thing to do here, in my strongly held opinion, is to sit tight, and this is what I propose to do.

"I see no reason why this position should not be explained (in general terms) to your expatriate staff.

"3. Our recruitment needs must, I think, be assessed on the basis that expatriates will remain - with the exception of any who voluntarily choose to go - but the times are unpropitious for the recruitment of new expatriates.

"I should be happy to talk all this over with you as soon as possible. I need hardly say that I entirely share your concern about the whole situation, and that it has been much on my mind since the day of the President’s address at the opening of the Institute. I believe, however, that the situation is improving.

You know how greatly I have relied on your steadying counsel in many moments of crisis and I hope you realise how grateful I am to you for this. I would be extremely sorry if I felt that any degree of misunderstanding should have arisen between us as a result of my recent interview, and I hope you will regard the present letter as, in part, an earnest effort to dissipate any such possible misunderstanding.

Best wishes,

Yours sincerely,
"Dear Conor,

"Many thanks for your good letter of today. My only regret with respect to my letter of the 23rd is that you may have interpreted it as an attack on you or on what you are doing for the University. It was intended as neither. I have valued and continue to value the friendship and confidence which have characterized our relation, and I can assure you that these are unimpaired.

"As you doubtless detected I came closer to losing my temper when I read about the President’s reactions last Friday than I have at any earlier time. The fact that my own views are the focal point of attack while I have no direct opportunity to clarify or defend them explains my own sense of frustration. In these circumstances the President’s continued refusal to see me tends to support the somewhat pessimistic view I take of the assurances given. I fully appreciate the position you were in when the President broached the subject of my philosophical views. I know full well the reservations you have about them, reservations I might add which many other thoughtful people have expressed.

"On this issue I would add only one brief comment. As you aptly point out, my view would provide little comfort to the South African or German judge who might like to moderate the law he is asked to apply. If the law has been validly enacted and is unambiguous, his judicial oath demands that he apply it. This result may be regrettable but I don’t think the situation is improved by permitting the judges to resort to essentially natural law norms. History clearly reveals what a short and easy step it is from the proposition that only that which is just can be law to the proposition that that which is law is therefore just. Gesetz ist Gesetz was the Nazi motto which rested on exactly that short step. It might also be remembered that the same natural law approach which might aid the South African or Nazi
German judge enabled Aristotle to justify slavery and the Supreme Court of the United States for half a century or better to strike down social legislation as unconstitutional. If my view appears to cast us all adrift in a great relativistic sea, it also has the virtue of insisting that the law as enacted cannot justify itself, that someone’s standard of just law must be called into play, and that that standard can lead the attack directly on the primary law-making agencies—the executive and legislature.

"At this stage I fully accept your judgment on the three specific steps I suggested. With respect to the first, I would propose discussion of three possible successors to me. The first is Ollenu whose position might be reconsidered at this time. The second is Kwamena Bentsi-Enchill whose c.v. is attached. If an expatriate can be considered at all, I would suggest Professor Willard L. Boyd of the University of Iowa Law School; I attach his c.v., as well.

"On my second point, I finally conclude that you are right. We must accept the assurances at face value and proceed on the assumption that all present contracts will remain intact. Since the circumstances do not seem to me to provide the assurance I would like my people to have, however, I am troubled by the possible unfairness to them if the worst should develop. Perhaps adequate protection is provided, however, in the assurance of monetary compensation if they are summarily dismissed.

We will therefore proceed with recruitment limited to Africans. I would not lower the standards previously set, however, even if this means holding vacancies and increasing the loads of present staff. Certainly in one area the exclusion of expatriates blocks any recruitment. There is no possibility of finding a competent African teacher for Comparative Law. It is ironic that the exclusionary policy will foreclose our offering the one course most intimately related to the President's goal of African unity.

"Please don't let my transient pessimism suggest that the Law Faculty has its tail between its legs. I am considering adopting the following motto which I'd be glad to share with you: "Illegitimi Non Carborundum" which might be roughly brought from the "vulgar" Latin as "Don't let the bastards grind you down."

"With all good wishes,

Sincerely,

W.B.H."
I deeply regretted the fact that my comments on the Vice Chancellor's discussion with the President should in any way suggest a criticism of Dr. O'Brien. I had and still have the greatest respect for his courage and integrity, and I fully appreciated the skill, insight and devotion he brought to the leadership of the University. My probably intemperate comments on the President's statements and Dr. O'Brien's reply did not in fact disrupt the close and cordial working relationship I had enjoyed with the Vice Chancellor.

The posture of the Law Faculty's problems following these discussions may be briefly summarized as follows.

The urgency previously attached to ridding the Faculty of expatriates had apparently subsided, but we continued under a cloud. With the possible exception of Comparative Law where the Vice Chancellor thought the President might be induced to make an exception if a suitable person could be found, our recruitment of staff for the following year was effectively limited to Ghanaians. This limitation applied also to the choice of my successor. I had proposed consideration of two Ghanaians, Mr. Bentsi-Enchill and Mr. Ofosu-Amaah. While Mr. Justice Ollennu remained a possibility, it seemed most unlikely that the vicious political attacks on him and his own expressed desire to be withdrawn from consideration left any life in his candidacy. On the other hand, Dr. Daniels had declared to many persons over the past two months his full expectation of appointment as the next Professor of Law. In the circumstances it seemed wise to move as rapidly as was reasonably possible to the consideration of candidates for the post, and arrangements were therefore made to have the conventional advertisement placed.

Events outside the University in December, 1963, finally foreclosed any possibility of developing a modus vivendi between the President and the Law Faculty and strongly supported the general campaign against the University. To understand these developments, one needs a brief history of certain political developments in Ghana. Organized political opposition to the Nkrumah Government long ago expired. The Government has contended for several years that its political opponents had abandoned constitutional processes of opposition in favor of violence, intimidation and efforts to accomplish a coup d'etat. Unfortunately, the actual facts provide some support for the Government's contention, though it certainly is not conclusively established.

In August, 1962, on the return of the President from a state visit to Upper Volta, he paused briefly to greet the people in the village of Kulungugu in northern Ghana. Very shortly after the President stopped, a hand grenade was thrown among his party, several people were killed or injured, and the...
President himself was wounded. Shortly thereafter the Government declared a state of emergency in Accra and Tema and imposed a variety of emergency controls. In the succeeding months, there were other terrorist attacks on groups of CPP supporters in and around Accra in which a number of persons, including women and children, were killed or injured. In early 1963, seven persons were arrested as participants in these terrorist attacks and were brought to trial in March. Five were charged with treason and conspiracy to commit treason and two with misprision of treason. Against four of the treason defendants the evidence was overwhelming; in fact, by their own admissions in open court they had been participants in the series of terrorist activities. The case was extremely weak against the fifth defendant on the treason charge and even weaker against the two defendants charged with misprision. The trial was held before a Special Court comprising Chief Justice, Sir Arku Korsah, and Justices Van Lare and Sarkodee-Addo. All of the defendants were convicted and those charged with treason were sentenced to death. It was clear that all of the defendants in this trial were minor figures, engaged in the actual acts of terrorism but without political leadership roles. The prosecution attempted to establish a relation between the defendants and certain leaders of the United Party as well as some prominent figures in the Convention Peoples’ Party itself. This effort was in my judgment singularly unsuccessful.

Among the CPP politicians whose names figured prominently in the treason trial were Tawia Adamafio, formerly Minister for Information and Broadcasting, Ako Adjei, formerly Minister for Foreign Affairs, and H. H. Cofie-Crabbe, formerly General Secretary of the CPP. These men had been arrested and detained under the Preventive Detention Act shortly after the attack on the President at Kulungugu in August, 1962. In August, 1963, Adamefio, Adjei and Cofie-Crabbe, along with two persons identified with the opposition United Party, were charged with treason and brought to trial before a Special Court comprising Sir Arku Korsah and Justices Van Lare and Akufo-Addo, all members of the Supreme Court. The trial lasted for better than three months, and the Court finally took the matter under advisement. On December 9, 1963, the Court announced its judgment. The two minor opposition figures were convicted and sentenced to death. Adamefio, Adjei and Cofie-Crabbe were acquitted, and the Court ordered their release. They were not released, however, being retained in police custody and returned to prison under the authorization of the Preventive Detention Act. Extensive comment on the trial and the evidence adduced by the Government is unnecessary here. It suffices to say that, in my judgment, and that of the other lawyers with whom I occasionally discussed the case, the Government had completely failed to produce evidence justifying conviction of the three major defendants. The cases against the other two were somewhat more problematical since one of them at least had confessed his involvement in certain anti-
state activities. The other had also confessed but contended that he did so while of unsound mind. His testimony at the trial and other conduct tended strongly to suggest that he remained of questionable sanity. The primary concern here, however, is with the effect of the Court's judgment in acquitting the three principal defendants who had been associated with the President in the ruling party.

The judgment of the Court was announced on December 9th, and the reaction of the Party press, the Attorney General who had prosecuted the case for the Government, and the President himself was immediate and extreme. On December 10th, the President dismissed Sir Arku Korsah from his post as Chief Justice of Ghana. Although regrettable, this was a fully constitutional act on the part of the President. The Republican Constitution of 1960 foreclosed removal of Judges of the superior courts except on an address to the President from the National Assembly, passed by a two-thirds majority of the entire membership on stated grounds of misbehavior or infirmity of mind or body. This guarantee did not apply to the office of Chief Justice however. The Chief Justice served in that office at the pleasure of the President. Thus, on his removal from the Chief Justiceship, Sir Arku remained a member of the Supreme Court. On December 11th, however, he resigned from the judicial service and left the Court entirely. Later in the month Mr. Justice Van Lare also resigned. Of the Special Court only Mr. Justice Akufo-Addo remained a member of the Supreme Court.

The contemptuous criticisms of the Court by the Attorney General, the Party press and the President, and the President's action against Sir Arku, were justified by the CPP on the ground that in the context of such a political trial it was incumbent upon the Chief Justice to advise the President in advance of the public announcement of the judgment what the Court's action would be. It was argued that the President would thus be able to take the necessary measures for the preservation of public order which otherwise might be disturbed by popular reaction against the judgment. This appears to be pure rationalization. I have every reason to believe that Sir Arku did in fact give the President advance notice of the judgment and that the President refused to accept this information, instructing Sir Arku to return to his colleagues and bring back a judgment of conviction. In view of the case presented against the three who were acquitted, one must conclude that the President expected the Court to bring in a conviction without regard to what the evidence may have shown. The extreme reaction of the President to the judgment is probably attributable to his fear of Adamafio and his probable conviction that Adamafio was engaged in a treasonable plot despite the Court's acquittal.

Before the full pattern of Governmental reaction to the Court's judgment in the treason trial had developed, I left
Ghana on a series of visits to other African law faculties and research centers. I was out of the country from December 15, 1963 until January 27, 1964. From newspaper accounts during this period and also from reports I received on my return to Ghana in January, I learned of other developments. Some were related to the judgment in the treason trial, and several impinged directly on the independence and integrity of the University.

The primary action of the Government was to initiate a referendum in accordance with the Republican Constitution of 1960 for the purpose of authorizing certain amendments to the Constitution. One of these would grant to the President completely discretionary authority to remove from office any judge of the Supreme Court or High Court; the second would make Ghana in law as well as in fact a one-party state. Another response which did not require constitutional amendment was taken immediately by Parliament; an Act was passed granting to the President the power retroactively to annul any judgment of a Special Court. The power thus granted to the President was soon exercised and the judgment acquitting Adamafio, Adjei and Cofie-Crabbe was declared void.

A great many people in Ghana were seriously disturbed by the actions of the Government but relatively few expressed their criticisms. Among those who did were the students in the University. Through their student organization they passed a resolution condemning the dismissal of the Chief Justice and asking for his reinstatement. Another was Dr. O'Brien, the Vice Chancellor of the University. At the time of the President's action against Sir Arku, Dr. O'Brien was in Europe attempting to recruit teaching staff for the Medical School. From Geneva he issued a statement to the press condemning the action against Sir Arku and urging his reinstatement. When I returned to Ghana in January, I learned that when the Vice Chancellor returned to Legon on December 20, he had immediately requested an interview with the President in order to inform him fully of the basis for his Geneva statement. The President refused to see the Vice Chancellor who then wrote a long letter setting out in full the views underlying his statement. Dr. O'Brien explained that he had issued the statement, not in his personal capacity, but as Vice Chancellor of the University. He pointed out that he had followed the evidence adduced in the treason trial carefully and that in his judgment it did not support a conviction. On the contrary, the evidence, as he viewed it, could only have led to an acquittal by any court honestly formulating its judgment on the basis of the evidence presented to it. Thus, said the Vice Chancellor, he could only conclude that Sir Arku had been dismissed because his integrity as a judge led him to respect the facts before him and to predicate his judgment on them. In the view of the Vice Chancellor this respect for facts was central to the entire role of the University in Ghana, and he, therefore, felt called upon to condemn the action of the President.
and to urge the reinstatement of Sir Arku.

While I fully agreed with the views expressed by the Vice Chancellor and admired his courage in expressing them, I believed it to be an error of judgment for him to speak out on this occasion and particularly to speak out as an officer of the University. I could see no practical gains that might be achieved by such action, while the risks to the University from his comments on a matter not directly within the University's sphere of competence seemed to me full of danger for the institution. I had concluded myself, when the judgment was announced and Sir Arku dismissed, that I would not publicly comment on it even though arguably, as Dean of the Faculty of Law, it fell more clearly in my sphere than in that of the Vice Chancellor. One of the immediate results of the public statement of Dr. O'Brien's views was a loss of contact with the President. The President refused to see him from December 20, until January 24; thereafter when the deportations of University staff raised a fundamental issue of Government policy affecting the University, the President again refused to consult with the Vice Chancellor.

Two other events of considerable importance occurred in the University during my absence in January. The police conducted a search of the apartment of Dr. Dennis Osborne, a member of the staff of the Department of Physics, and arrested Dr. Osborne. Also arrested at the same time was Professor J.C. DeGraf-Johnson, Director of the Institute of Public Education. On the strong urging of the Vice Chancellor and Professor Alan Nunn May, Head of the Department of Physics, Dr. Osborne was released on the assurances of the Vice Chancellor that he would remain in Ghana for questioning until an investigation had been completed and would not carry on discussions with any Ghanaians. It was unclear whether the latter of assurance foreclosed Dr. Osborne's continuing his teaching duties. Professor DeGraf-Johnson was apparently held under the Preventive Detention Act and was not released prior to my departure.

The second important development affecting the University probably arose out of the action of student groups in forwarding to the President a resolution protesting the dismissal of the Chief Justice. The President ordered that the University be recessed for seventeen days. The publicly announced purpose of this recess was to permit the students to return to their homes to vote in the constitutional referendum during the latter part of January. The more plausible explanation, however, was that the Government feared the expression of student opinion and possible student demonstrations if they remained in residence at Legon. Students at the University of Science and Technology in Kumasi and at the University College in Cape Coast were also sent home.
I returned to Ghana on January 27, 1964. Events began to take ominous shape very quickly thereafter. By a letter dated January 27, the President indicated to the Vice Chancellor that he had "come to the conclusion that certain steps must be taken if we are to attain our objectives in the Universities, particularly with the regard to the African orientation and general discipline of these institutions." The President then presented six "directives" to the University on which he invited the comments and suggestions of the Vice Chancellor. He concluded the letter by saying, "It is my wish that the directives should be implemented before the Universities reopen." The six directives were as follows: (1) wherever practicable, all hall tutors should be Ghanaian; (2) the appointments of Heads of Departments and Faculties should receive the approval of the President acting as Chancellor; (3) all academic appointments should carry adequate teaching obligations; (4) the Chancellor should be informed of the appointment of all academic staff who are not to be paid by the University; (5) all University scholarships should be tenable for the duration of the particular course, but subject to annual review on the basis of "satisfactory performance and good conduct"; and (6) all scholarships tenable by Ghanaians in the Universities should be channeled through a committee to be set up within the Scholarships Secretariat, the membership of this committee to include representatives of the University.

On January 29, I spent virtually the entire day in consultation with the Vice Chancellor on the drafting of an appropriate response to this communication from the President, to consideration of a first draft with the Executive Committee of the Academic Board, and to the final polishing of the Vice Chancellor's reply. The directives from the President presented some complex problems. A certain number of them were prima facie unobjectionable. In some instances, however, it was difficult to determine the motivation of the directive and, therefore, careful probing was required to determine the ways in which agreement to implement it might be utilized. In other cases the directives left open extremely vital issues as to who would carry out certain actions which would be justifiable if based on traditional University criteria but would be totally unacceptable if grounded on essentially political considerations.

The reply of the Vice Chancellor to the President may be summarized. He accepted the idea that hall tutors who were primarily responsible for moral tutelage of students should be Ghanaians; in fact, this was almost completely the current situation. With respect to the demand that the approval of the Chancellor be sought for the appointment of Heads of Departments and Deans of Faculties, we recognized that this went beyond the earlier undertaking of the Vice Chancellor to consult with the President in connection with such appointments. In the circumstances, however, it seemed a practical necessity to accede to
the strengthened demand of the President that his approval of the appointment of Heads of Departments be sought. Dr. O'Brien insisted, however, that such action be taken only after an Appointments Board of the University had considered the proposed appointment of a Head of Department and had acted affirmatively on it. The approval of the President as Chancellor would then be sought and his views reported to the University Counsel which, under the governing Statutes, had the final authority to make the appointment. Dr. O'Brien pointed out that he could not undertake to keep from the Council the name of any person who had been approved by an Appointments Board but not approved by the President, since this would be contrary to the University of Ghana Act and the Statutes of the University which made the Council the supreme governing body of the University. He informed the President also that under the Statutes of the University the Dean of a Faculty was elected by the members of the Faculty Board. For this reason a step involving the approval of the Chancellor could not be accepted.

With respect to the third directive, the Vice Chancellor pointed out that academic appointments did in general carry adequate teaching obligations but observed that in certain units persons heavily committed to research might have their teaching loads adjusted downward. He therefore recommended that the term "adequate teaching obligations" should be interpreted in such a manner as to protect the position of research fellows. He also emphasized that the University Statutes granted to the Head of a Department the responsibility for organizing the teaching program of the Department and assuring that research was carried out.

The proposition that the Vice Chancellor should inform the Chancellor of the appointment of all academic staff who were not to be paid by the University was accepted and a list of those currently in that situation was prepared and submitted. We did not interpret the President's directive to include persons who were regularly appointed by the University and compensated by it at normal rates but had supplementary financing from other sources. Thus, the members of the Faculty of Law whose salaries were supplemented by SAILER funds were regarded as regular University appointees and not included in the list.

The annual review of University scholarships was the most troublesome of the President's directives. The dangers arose from the fact that the directive did not define the critical terms- "satisfactory performance and good conduct" - and did not specify who would carry out the review. The GHANAIAN TIMES interpreted good conduct as "close identification with the spirit and objects of the Convention Peoples' Party," a standard no university could accept. The implicit threat of the President not to permit the reopening of the University until his directives were implemented strongly counselled every reasonable ef-
fort to avoid or at least delay a head-on clash over the scholarship review issue, however.

The failure of the directive to specify the agency to carry out the annual review seemed to offer the best possibility of avoiding conflict with the President, while conceding nothing which would damage the University. Annual review was in fact the current practice. On the basis of reports from hall tutors and examination results, the University officers advised the Scholarship Secretariat which students remained in good standing and eligible for financial aid. Our hope was to preserve this system.

In Dr. O’Brien’s reply to the President, he accepted the principle of annual review of scholarship awards. At the same time, he declared that the University would accept responsibility for conducting the review under procedures to be established by the Academic and Tutorial Boards, of which the President would be informed. We decided against an effort to spell out more fully the meaning of "satisfactory performance and good conduct," relying on the University agency making the review to keep these standards consistent with the University's tradition.

On the matter of undergraduate scholarships tenable by Ghanaians in the Universities of Ghana, Dr. O’Brien accepted the proposition that these should be channeled through a committee to be set up within the Scholarships Secretariat which would include representatives of the Universities. He specified that in the case of the University of Ghana the representatives should be elected by the Academic Board. Certain scholarships, however, which had been offered to the University by outside bodies and had been accepted for grant under procedures fixed by the donor and the University, could not be affected without the agreement of the donor. A list of such grants and the procedures followed in awarding them was sent to the President. Finally, the University reserved the function of awarding its own postgraduate scholarships which in the main were used to train Ghanaians of outstanding academic ability for later appointment to the University’s own staff.

Since we feared that the President’s letter transmitting his directives contained an implicit threat not to permit the reopening of the Universities until these directives were in some way implemented, the Vice Chancellor suggested that his agreement, set out in the letter, and the undertaking to work out procedures in accordance with the constitution of the University should be regarded as implementation of the President’s directives. Finally, he urged that the University authorities themselves be given the responsibility for making known to the students the policies reflected by the agreement. If these were publicly announced during the University recess, we feared that there might be serious misapprehension and anxiety among
the students.

By a letter to the Vice Chancellor of January 30, the President accepted the comments and suggestions on his directives made by the Vice Chancellor. Thus, at least temporarily, we felt that the integrity of the University's own procedures and its independence had been protected. With respect to the matter of announcing the policies, however, the suggestion of the University was not carried out. On February 5, after the students had returned to the University, the President's office announced the annual review of scholarships and the channeling of all scholarships tenable by Ghanaians in the universities through a committee within the Scholarships Secretariat. The University regarded this scheme as fully subject to the procedures specified in the Vice Chancellor's letter to the President. The Party press, however, reported it as part of a program to reorient the elite and warned of even sterner actions against "students who do not conform to the new era." Undoubtedly efforts to use scholarship grants for political purposes will continue.

On January 29, I became ill and from January 30 was bedridden. Aside from consultations I was able to have in my home or hospital, I was unable to participate in the further events leading up to my departure from Ghana. On the morning of January 30, the Vice Chancellor informed me of a visit he had just had from Mr. Otoo, head of the Security Service, and Mr. Mfodwo of the Special Branch. The purpose and effect of this meeting were set out as follows in an aide memoire prepared by the Vice Chancellor:

"Mr. Otoo, Head of Security, and Mr. Mfodwo of the Special Branch, called on me in my office this morning.

"Mr. Otoo explained that they had reason to believe that the University was the scene of subversive plots against the Government and that certain people here had been "planted" by other Governments for their own purposes. It was necessary in the interests of the security of Ghana to get rid of certain people. They asked me, therefore, to require the resignations of certain senior members.

"I expressed surprise and disquiet at this proposal and indicated that I should like to know much more about what was involved and to have an opportunity of reflection before I could even contemplate taking action of the kind required. I asked for evidence of the supposed plot and plantings and for the names of those whose resignations they desired to obtain. They indicated that, owing to the nature of Security and the interconnection of these cases with others which were under study, they would be unable to communicate to me any of the evidence which they had. They assured me, however, that their request was not lightly
made and was adequately motivated. They had four names in mind, all of them expatriates, as follows: Professor Harvey, Dean of the Faculty of Law, Dr. Seidman, Senior Lecturer at the Faculty of Law, Mr. Chester, Lecturer (?), School of Administration, and Monsieur Greco of the Department of French. I said that the first two gentlemen were well known to me and that I had the highest regard for them both as men and University teachers. Their dedication to their profession of studying and teaching the law was intense and left them little or no time for outside activities. I found it extremely hard to believe that either of them could be connected with subversive activities. I would regard it as an extremely serious matter for the University if they were obliged to leave and I would have to consider, if this should happen, what I should do myself.

"As regards Mr. Chester, I did not know him personally and I asked if I might discuss the case with Mr. Amegashie, Head of the School of Administration. Mr. Otoo agreed that I might do so. I explained that Monsieur Greco was in a somewhat different position as he had been reprimanded by the Head of the Department for failure to give adequate attention to his professional duties and the Head of his Department reported that he appeared to give most of his time to outside activities. In these circumstances I felt that the University could not vouch for him in the same way as for teachers and scholars who, like Professor Harvey and Dr. Seidman, were known to be giving all of their time and energy to the work of the University,

"I recognized that the Security Service had its work to do and I had no interest in any effort to protect people who were really engaged in conspiracy to overthrow the Government. My concern, however, and the responsibility which I accepted when, on the President's invitation, I became Vice Chancellor, was to cherish the interests of the University, which meant in present circumstances to insure that it suffered as little damage as possible as a result of the emergency and its repercussions. Every time a teacher was, for example, searched or detained or required to leave the country, the University suffered some damage. Sometimes this might be inevitable, but if it assumed sufficient proportions the damage done might be such that the University would not recover from it. I pointed out also that in troubled times such as we were living through, there was a grave danger of malicious denunciation by interested parties. There were people, for example, who stood, or thought they stood, to gain by promotions consequent upon the enforced departure of the two senior members of the Faculty of Law. One of these people might conceivably have been sufficiently unscrupulous as to denounce these gentlemen for his own ends. Mr. Otoo and Mr. Mfodwo appeared to agree that such possibilities could not altogether be ruled out.

"I said that as soon as I had seen Mr. Amegashie to obtain
his reaction in the case of Mr. Chester I would seek an inter­
view with the President on this matter and I hoped they would
take no action in the meantime. They agreed to this and ex­
plained that the President was not aware of the initiative they
had taken. Mr. Otoo then went on to discuss the students,
stressing the need for greater supervision of their activities.
I told him of the President’s initiative in relation to Hall
Tutors and that we were putting the suggested changes into ef­
fect wherever practicable. I also stressed that in my opinion
reports regarding student unrest were exaggerated and highly
coloured and I pointed out that the students had, without excep­
tion, dispersed in an orderly manner when required to do so by
the University authorities at the beginning of the recess. If
they were seeking opportunities for anti-Governmental manifes­
tations they would surely have taken this as a golden op­
portunity instead of dispersing quietly as they had actually
done. Mr. Otoo said that this was due to my personal interven­
tion and that "if you had been a Ghanaian things would have been
different." I said that that was speculation; what should surely
give the Security Service grounds for satisfaction was the fact — viz. that all the students had dispersed in an orderly manner.

"In conclusion Mr. Otoo made some general remarks about the
University, saying that it "looked at everything through British
eyes." I said that this had never been less true than at the
present time and pointed out that I myself did not look at
everything, or indeed at anything, through British eyes. Mr.
Otoo did not press the point.

"Throughout the interview Mr. Otoo and Mr. Mfodwo were
courteous and considerate in their manner although not prepared
to yield ground on the matters under discussion."

I immediately told Mr. Seidman of this conversation with
the Vice Chancellor, as I had kept him informed of developments
through the long period of pressure on the Law Faculty. In the
past I had said little about my concerns to the other members of
the Faculty, except when events were public knowledge and
directly affected the Faculty. I wanted, if at all possible, to
avoid demoralization of the younger people over events which
they could in no way control and difficulties which might be
resolved before they came to affect the actual work of members
of the staff. After talking with the Vice Chancellor on January
30, however, I decided that a full disclosure of the pattern of
developments to all members of the Faculty was necessary. I,
therefore, asked them to meet at my home in the late afternoon
of Friday, January 31.

The meeting was going on in my bedroom when the arrival of
officers of the Special Branch was announced. They came in and
served a deportation order on me, allowing me twenty-four hour
to leave the country. At 6:00 a.m. the following morning I was
served formally with a copy of the Executive Instrument, signed by the Minister for the Interior, on which the earlier order was based. It is of interest that the Executive Instrument was signed by the Minister on January 30. It seems likely, therefore, that the Minister signed the order immediately after the visit of the Security Officers to the Vice Chancellor and that the Vice Chancellor's urgent request for a stay of any action in order to permit his discussing the matter with the President was totally disregarded. Mr. Seidman was also served with a deportation order a few hours after mine. We were given until 6:00 p.m. on Saturday, February 1, to leave the country.

On Saturday morning the Vice Chancellor began a desperate effort to see the President and to secure first an extension of the deportation orders and ultimately their cancellation. I believe similar efforts were made by Mr. William P. Mahoney, the American Ambassador, or members of the Embassy staff. Because of my own condition, it seemed quite clear that I could not travel by 6:00 p.m. that day. The alternative possibility, of course, was that I would be placed under arrest if I remained in the country. At 4 p.m. Saturday afternoon, the Vice Chancellor was able to see the Minister for the Interior who said he had been asked by the President to deal with Dr. O'Brien on the matter of the deportations. The Minister granted 7-day extensions but declined to discuss deportations further. It should be mentioned that Mr. Lloyd Garrison of the New York Times had learned of the deportation orders but at the request of the Vice Chancellor and the American Ambassador agreed not to file a story until the orders had been announced publicly by the Government. It was felt that this would facilitate efforts by the Vice Chancellor and the Ambassador to secure the withdrawal of the orders.

The following week was one of intense activity in the University. Our students returned to Legon on February 4, and the tension among them mounted dangerously when they learned of the deportation orders and the arrest of certain student leaders, including one of our law students. There was a noisy and unpleasant demonstration around the American Embassy led by the Party extremists; this offered no encouragement to the efforts being made on behalf of the Americans who were under deportation orders. The Vice Chancellor wrote to the President a strong request for an appointment to discuss the deportations and more generally their effect on the University. Two other members of the University who had been invited to Ghana by Dr. Nkrumah himself and who presumably still enjoyed his confidence wrote to him along similar lines. These were Mr. Thomas Hodgkin, Director of the Institute of African Studies, and Professor Alan Nunn May, Professor of Physics. The President refused to see the Vice Chancellor and Professor May. He did agree to see Mr. Hodgkin but at this meeting declined to discuss the deportations.
During this period the only opportunity the Vice Chancellor had to see the President came as the result of his accompanying a distinguished visitor from abroad on a ceremonial call on the President. At first, the President did not invite Dr. O'Brien into his office when the other visitor was taken in. When Dr. O'Brien was later called in, he attempted to raise the deportation issue with the President. Thereupon the President's friendly and rational manner disappeared and in a highly excited fashion he asked the Vice Chancellor if he did not know that there had been another attempt on his life. (This occurred on January 2, while I was in East Africa.) The President went on to say that he had enough evidence, presumably of participation in the assassination attempt, to bring me and Mr. Seidman to trial. The Vice Chancellor replied that if this were the case, charge and trial might be a good thing in order to clear the air. The President summarily rejected this suggestion, however, and closed the discussion by announcing firmly that we would simply be deported.

One issue which loomed large in the thinking of the Vice Chancellor during this period was what his response should be to actions against members of the University community, particularly the deportations, and to the refusal of the President to see him during this critical period. The Vice Chancellor had indicated on more than one occasion, as the pressure on the Faculty of Law mounted, that, if the departure of the expatriate members of the Faculty were forced, he would find it necessary to reconsider his own position. I am confident that the Vice Chancellor realized that he was almost as much under attack as any of those against whom deportation orders were actually issued. I am equally clear that if only Dr. O'Brien's personal interest had been consulted, he would have made the deportations the occasion for his own resignation from the University. My own view on the proper course for Dr. O'Brien in these circumstances was not in doubt. The Government had threatened to present new University legislation which would reconstitute the University Council and vest control of the Council more directly in functionaries of the CPP. Revision of the University Statutes had also been threatened, and we feared that the effect of such revision would be to reclaim for a reconstituted Council a number of essentially academic functions, like appointments, which the present Statutes delegated to the Academic Board. I firmly believed that Dr. O'Brien's primary obligation was to remain in his post and do everything possible to protect the integrity of the University's basic structure. Secondly, it seemed to me necessary that Dr. O'Brien continue to provide such protection as was possible to the members of the University community who were still carrying out their duties. I discussed his response to the deportations with Dr. O'Brien at some length and he agreed that for the foreseeable future he should not resign.

My colleagues informed me that student sentiment in favor
of demonstrating in opposition to the deportations and other related acts of the Government was mounting sharply. The law students seemed to be most prominent in this unrest. An assembly of all students in the Faculty was therefore arranged for Friday afternoon, February 7. Unfortunately, I was not able to attend, but various members of the Faculty addressed the students, urging them to remain calm and to avoid demonstrations and other responses to the current provocation. When the meeting was almost over, the students indicated that they wanted to hear from Dr. Daniels. In his talk, Dr. Daniels attempted to make two points: the first was that the reports of his responsibility for the recent developments were untrue; second, that false and malicious rumors were being spread generally in the country and, as the Party press was urging, such rumor-mongering should be eliminated. Dr. Daniels comments were unfortunately greeted with jeers from the students, but there were no further outbursts against him.

The following morning all students were addressed by the Vice Chancellor who urged them to remain calm and to do nothing to exacerbate relations with the Government. Special point was lent to the Vice Chancellor’s appeal by information that the CPP would hold a large demonstration in the University that day. Later in the morning, about two thousand demonstrators, led by high officials of the Party and editors of the party press, arrived in the University. Many of the demonstrators carried placards denouncing intellectuals, imperialists and neo-colonialists; a number carried large clubs. The demonstrators moved from the main gate toward the halls of residence and the administrative buildings. In some of the halls they broke windows, and caused other minor damage. The students stood by and observed in silence. If they had responded in any way to the actions of the demonstrators, I fear that the outcome would have been tragic. The leaders of the demonstration met with the Vice Chancellor and other administrative officers of the University. The Vice Chancellor dissuaded them from trying to address the students, and in late morning the demonstration dispersed. I believe everyone in the University felt great pride in the maturity and responsibility shown by the students under extremely difficult circumstances.

On Saturday afternoon, February 8, Mr. Seidman and four other persons who had been added to the deportation list departed from Ghana. Mr. Seidman, who was interested in remaining in Africa to teach, proceeded to Lagos and on to East Africa to investigate possible opportunities in the Law Faculties in Addis Ababa and Dar es Salaam. I was not yet permitted to travel and did not leave the country until Thursday, February 12. At that time my wife and I flew directly to London where I entered the Hospital for Tropical Diseases.

If a more personal note may be permitted, I would pay spe-
cial tribute to my wife for her calm courage and cheerful efficiency during these difficult days. While the deportation was not a surprise, we had not been able to make significant preparations for it as far as our personal affairs were concerned. Because of illness I was completely unable to help during the final hectic period. The members of the Law Faculty and their wives, the American Embassy staff and many friends, both Ghanaian and expatriate, were extremely kind and helpful, but the real burden of planning and doing fell on my wife. She arranged for our son to leave ahead of us and travel directly to the United States. She sold our major belongings and found her way through the complex of red tape in transferring our funds. She packed and arranged for the shipment of our goods and saw me comfortably into hospital in London. Her energy was boundless and her good cheer almost constant. I could not begrudge her a few tears since they were shed for the University we both loved, the friends whose well-being deeply concerned us, and the people of Ghana who invariably showed us their friendliness and good will.

Reports from Ghana since my departure indicate that a superficial quiet has returned to the University compound. Tension remains high, however, and pressures on the University have not abated. The President has presented to the Vice Chancellor a demand for the immediate appointment of three persons to professorial chairs, including Dr. W. C. Ekow-Daniels to the chair of Law and Professor W. E. Abraham to the chair of Philosophy. In this connection, the President has claimed for himself, as Chancellor of the University, a right to designate persons for appointment, with University bodies being limited to formal ratification. The Vice Chancellor has rejected this view and has insisted that no academic appointments can be made other than by duly constituted University agencies. Beyond this general insistence on University procedures for all appointments, the Vice Chancellor has added substantive objections to the appointment of Dr. Daniels. At this time the issue has not been fully resolved. The enactment of new University legislation granting to the President, as Chancellor of the University, direct power to make appointments remains a possibility.

At the time I left Ghana, I strongly urged all members of the Law Faculty, both Ghanaian and expatriate, to remain in their posts and continue their teaching as long as there was no direct interference in their classrooms. I was hopeful that we would be able to get our students through at least the present year on a satisfactory quality basis. It is only fair to point out that several of the expatriate members of the Faculty were strongly inclined to resign immediately in protest against the deportations and other interferences with the University's independence. There was also an understandable fear that remaining in the University and particularly in the Faculty of Law under the circumstances would be interpreted to show sympathy and sup-
port for the Government’s conduct. While I fully understood and appreciated the feelings of my colleagues, I urged them to subordinate their personal interests and continue the work. This they agreed to do, though several have subsequently submitted their resignations to take effect at the end of this academic year. Others have indicated that if the Government succeeds in forcing the appointment of Dr. Daniels on the University and the Faculty they will have no alternative to resigning. This group includes both expatriates and Ghanaians.

Underlying Causes of the Difficulty

The Government of Ghana did not at any time disclose the actual basis of the deportations. Mr. Seidman and I requested a hearing and opportunity to meet the charges against us, but this request was not even acknowledged by the Minister for the Interior. While much criticism of the University in general appeared in the Party press, such comments were frequently based on patently incorrect information. They cannot be relied upon to disclose the actual grounds for the Government’s attack on the University. In attempting to analyze the operative factors leading to the deportations and the more general effort to bring the University to heel, there is, therefore, an element of speculation. I will merely suggest here the factors which seem to me most important.

All of the events must be considered against the general background of the University’s status in Ghana as described at the beginning of this report. Even in the colonial period, the University College was commonly regarded as anti-Government and the departure of the British colonial power in 1957 did not significantly change that situation. The University has not been seen by Dr. Nkrumah’s Government as a vital, relevant force in the developing society of Ghana. As I have indicated, this attitude toward the University has been, in my judgment, to a substantial degree justified by the facts. There is a regrettable spirit of elitism among the student body and to a considerable extent among the teaching staff. The externals of University life have remained strongly patterned on English models. In such circumstances minor events and suspicions can precipitate major crises in the relation between the University and Government.

The past year or so has presented a number of factors to complicate the problem of University development. The most important of these, in my judgment, is the state of mind of the President himself. While Dr. Nkrumah has clearly lost much of his general popularity and probably is not the unquestioned dictator many think him to be, he is still the dominant force in the Government. Other forces find some scope for their operation only insofar as they are able to gain the President’s ear and play on his thoughts and emotions. To understand the Ghana situation, therefore, one must try to understand the mind of the
It seems rather clear that over the last year or more there has been in the President's thinking a developing anti-Americanism. This feeling has been manifested in a number of ways, but it is by no means clear why it should have developed. I would offer the following hypothesis. The President is increasingly frustrated, particularly in his efforts to achieve leadership in the Pan-African movement. His failures in this context have been sharp and recurrent. I think he is emotionally incapable of accepting the fact that other relatively independent African leaders distrust him and reject his leadership. In these circumstances, it is a convenient rationalization that he is frustrated not by the rejection of his African peers but by the machinations of the great powers, particularly the United States. I suspect the focus on the United States is largely attributable to developments in the Congo on which the President's feelings are extremely strong. Dr. Nkrumah's profound, almost psychopathic, fear of such American agencies as the Central Intelligence Agency is well known. Virtually every issue of the Party newspapers carries a diatribe against the C.I.A., and suggests that every American abroad should be suspected as an agent. The President was strongly impressed by Tully's book on the C.I.A. which, I understand, he has distributed in large numbers to his acquaintances in Ghana and elsewhere.

These fears of great power intervention in Ghana and elsewhere in Africa have been nurtured by internal attacks on the President himself and members of his Party. It must be remembered that he has been the object of two assassination attempts, in one of which he was actually wounded. Other terrorist activity has been aimed apparently at the destruction of confidence in the Government and the President. These events were sufficiently disturbing in themselves. I believe, however, that the assassination of President Kennedy contributed greatly to Dr. Nkrumah's fear and insecurity. If the leader of the United States, with all the protection he is accorded, can be assassinated, how much greater are the chances of this occurring in Ghana? Finally, the President's feeling of insecurity was increased by the judgment of the Special Court in the second treason trial, acquitting Adamafio and others. I strongly suspect that the President was convinced, regardless of what the evidence adduced in court may have shown, that Adamafio was in fact plotting against his life. The acquittal probably suggested to the President that even the judiciary was supporting treasonable activities.

In these circumstances it has been increasingly easy for a group of ruthless extremists within the Party to gain the President's ear and to secure his support for actions they think desirable. Most of the advisers who now seem closest to the President do not occupy official positions in the Government; in
the main they are identified with the Party press which has long represented the most extreme wing of the CPP. Most prominent among them are Mr. Batsa, editor of SPARK, Mr. Baffoe, editor of the GHANAIAN TIMES, Mr. Heyman, editor of the EVENING NEWS, and Mr. Basner, the South African lawyer who works as a journalist in Ghana. Mr. Boateng, the Minister for the Interior, would probably fall in this group on the basis of his views. He has been on sufficiently uncertain political ground, however, that I would not regard him as a mayor force in his own right. I suspect that he has been merely a willing and useful tool of the persons mentioned earlier. These advisers use the conventional language of communism though I have never felt any assurance that they are communists either by conviction or by any organizational test. Much more likely, it seems to me, is that they use the cliches of the extreme Left in an opportunistic effort to express their own dominant hatreds and to further their own personal power.

This group is inclined, I believe, to reject the essential values of the University and to see it primarily as a medium for indoctrination. Their efforts to this end were substantially aided by a small group of people within the University who, whatever their convictions, saw in the attacks on the University most useful means for furthering their own ambitions. The most important members of this University group were Professor W. E. Abraham, Associate Professor of Philosophy and Dr. W. C. Ekow Daniels, Lecturer in Law. Professor Abraham obviously played the role of intellectual leader of the CPP and enjoyed the confidence of the President. In addresses delivered within the University and in writings for the Party press, he urged the use of the University's instructional program for Party indoctrination. He and Dr. Daniels were active in efforts to organize party units among the students in the University. On one occasion, it came to my knowledge that after a meeting with students in one of the halls, Professor Abraham and Dr. Daniels distributed money to the student group. This rather shocking conduct on the part of University teachers was apparently designed to impress upon the students the benefits available through support of the Party. Professor Abraham aspired in the first instance to appointment to the chair in Philosophy, which he has since received, but even more importantly to Dr. O'Brien's post as Vice Chancellor of the University.

The preceding report has indicated from time to time the activities in which Dr. Daniels appeared to be engaged in his campaign against the Law Faculty. Because of the critical role of law and legal institutions in a developing country, Dr. Daniels had a readily sympathetic audience when he carried to the President distorted reports on development within the Law Faculty. I was informed that he publicly boasted of his having drafted the parts of the President's address in which the public campaign against the Law Faculty was launched. I was also in-
formed that he told one of his colleagues that he was responsible for the President's refusing to see me, thus depriving me of any opportunity to correct the misapprehensions on which the President was proceeding. Dr. Daniels also made quite clear on many occasions and in many groups that he fully expected to be appointed Professor of Law on my departure. He criticized curricular developments to persons outside the University, while refusing to raise these matters for discussion within the Faculty Board. Dr. Daniels posed as a strong adherent of Ghanaian socialism. I have no reason to take these pretensions seriously, or to believe that he understood socialism, even in its most elementary sense. On the contrary, Dr. Daniels' entire course of conduct while I was associated with him led me to the conclusion that he was merely an opportunist using the attacks on the Faculty and the University as a means of promoting his own interests. Unfortunately, that interest tended to focus his efforts on the Faculty of Law.

Finally, expressions of views within the University emphasized that Government action was not unquestioningly accepted. One need only cite as examples the resolution of University students protesting the dismissal of Sir Arku Korsah and the public statement of the same character made by the Vice Chancellor. While unquestioning adherence to the Party faith was being generally demanded, there was concrete evidence of a continuing disposition in the University to evaluate and to criticize. It is not surprising, therefore, that the efforts of the Party extremists, aided by opportunists within the University and channeled through the office of the President, were focused on the University in general and particularly on the Faculty of Law whose research and teaching explored the primary instrument of power. In such circumstances, a commitment to seeking the facts, to demanding a rational relationship between facts and judgment - in short, to education - unquestionably appears subversive. In this sense the charge that Mr. Seidman and I were engaged in subversive activities is justified.

Conclusion

The developments in the University of Ghana during the past year could hardly lead to an optimistic assessment of the present circumstances or of the future. The attacks from the President and the party extremists have severely damaged the University. Fear and uncertainty are widespread among the senior staff and the students. The continuing pressure on Dr. O'Brien and his refusal to yield to it suggest that his leadership will not remain available to the University much longer. The arrest or expulsion of teachers and the attempts to make appointments on the basis of political considerations have seriously undermined the standards previously maintained. This development cannot fail to prejudice the quality of instruction available within the University and thus the quality of its products.
Events in Ghana have not gone unnoticed elsewhere, and the international image of the University has been seriously damaged.

On the other hand, there are a few factors which might properly lead one to hope for and even to expect better days ahead. Not all of the sound teachers in the University have departed. It is, as a matter of fact, a tribute to the devotion of many members of the University faculty that they have decided to remain through these difficult times. Some Departments, less politically vulnerable than the Law Faculty, have not been directly disturbed. I suspect that the President still realizes that sound education is indispensable to the realization of Ghana's plan for development. The President's attitudes toward education often seem strangely schizophrenic; on the one hand, he is instrumental in channeling a high percentage of the national budget into education and in many ways demonstrates a desire to see the University and other parts of the educational system flourish. On the other hand, his fear and insecurity are able to overcome his judgment and cause him on occasion to support those who would destroy much that has been well built in the University and in the secondary school system. The latter occasions with all their disappointments and frustrations cannot completely obscure the widespread demand for education or entirely defeat the hope that this demand will again claim the support of the President and other leaders.

Finally, even the deportations had a brighter side. Insofar as grounds for this action were stated, either directly or by implication, they were in large measure functionally justifiable on an abstract basis. We were accused of subversion, of acting contrary to the security of the state. On a more moderate basis, we were accused of having no perception of the societal setting in which we were acting as educators and, therefore, of failing to relate the curricula we developed and the teaching we did to the social values and aspirations of the people. While I reject completely the factual basis for these charges and deplore the arbitrary measures adopted for dealing with them, it must still be recognized that on an abstract basis they reflect legitimate concerns of those having political responsibility in a developing country. I think it especially significant that at no time during this unhappy period did race or color appear to be a significant factor. My colleagues and I were not deported because we were white (in fact three of the six were in fact Negroes), nor because we were expatriates. I find in these circumstances, therefore, some basis for hope that opportunity will remain available in Ghana and elsewhere in Africa for those who are sincerely interested in the development of sound educational institutions. I think it especially important that we should not yield to discouragement over the recent reverses. Even if the present situation in Ghana does not now encourage further investment of manpower and other resources, change could come rapidly. We should be in a position to respond without delay to
requests for assistance whenever they come and we can reasonably expect opportunities for useful work.

My own work in Ghana will long remain one of my most stimulating and satisfying experiences. While I left the country with great sadness, I left entirely without bitterness. Many Ghanaians of all walks of life made efforts to demonstrate their concern for my welfare and for the work I had done. Their goodwill will long remain among my most cherished recollections. I do not believe the efforts my colleagues and I devoted to legal education in Ghana were wasted. Some seeds were sown that in a better time will grow and make at least a small contribution to a better Ghana and a better world.

* * *

To the foregoing report, written in 1964, I would add a brief coda recalling memories undimmed by the intervening thirty-five years.

When the doctors concluded that I could travel, passage was booked for Marilou and me on a Swiss Air flight to London, where I was to enter the Hospital for Tropical Diseases. As our departure hour approached, Conor O’Brien sent his car to take us to the airport. I think myself little given to emotional displays, but as we drove out of the University area, the tears fell, not for myself, but for the University both Marilou and I had come to love and for whose well-being our fears were acute.

When we arrived at the airport, Marilou was taken into the airport by the American Charge d’Affaires (Ambassador Mahoney being out of the country) to attend to the formalities of our departure. I sat or reclined in the back seat of the car, with the door fully open, while several hundred people, most from the University -- students, faculty, and administrative staff -- made their way past to say goodbye. As I shook their hands, expressed my appreciation for their concern, and wished them well, I realized that if commitment and courage were to be found, they were in this group. Their presence at the airport was not merely a gesture of friendly concern toward me. More important, it was an expression of understanding of and support for the effort that I--and many others--had been making to nurture and protect the University. For me there was no peril; I was leaving for competent medical care to deal with a transient illness, then to return to the secure bosom of a great American University. Those who filed by were Ghanaians; they were remaining, subject to such pressures, perils, and hardships as an insecure and increasingly repressive Government might bring to bear. This final experience sealed firmly my deep affection for and good will toward Ghana and its people.
INDIANA UNIVERSITY: THE FINAL CHAPTER

I turn here to a somewhat expanded account of the final phase of my experience at Indiana University, supplementing that provided in the principal text.

Elvis Stahr, the President who had invited me to come to Indiana, had resigned. His successor, Joe Sutton, an amiable and able man while in a subordinate role, rapidly disintegrated at the top and within a year had died. I had advised against the immediate appointment of John Ryan, one of the University's Vice-Presidents, as Sutton's successor. I did not know Ryan well and, at that time, had no firm assessment of his lack of suitability for the office. I did believe, however, that a national search with the participation of all segments of the University community was desirable. This view did not prevail (in fact, only Wilfred Bain, Dean of the School of Music, joined me in it), Ryan was appointed, and the policy differences I had with the University administration were sharpened.

As is probably clear from much I have said earlier, part of the gulf that developed between me and the central administration of Indiana University resulted from conflicts in administrative style or political expression having, prima facie, little or nothing to do with the general student protest syndrome. In the prevailing climate, however, such a segregation of causal factors is difficult and probably unrealistic. Perhaps I should conclude this comment with a brief description of two episodes, among many, at Indiana University that illustrate the differences that made inevitable the termination of my deanship.

The spring of 1970 was unusually tense, and on one occasion student activists announced that they would apply a tight picket line to close the University. An unofficial meeting of concerned faculty members from many parts of the University was arranged in the evening before the closure was to occur. My own view, which varied little over time, was that the closure could be avoided if the administration made certain gestures toward student concerns, largely involving efforts to start a substantive dialogue. I was one of a small group charged at the meeting to seek a response from the administration. We finally made contact, some time after midnight, with Chancellor Byrum Carter at his home, but he projected an image of total futility -- there was nothing he could do.
Around 7:00 a.m., I was at Bryan Administration Building; students were assembling to begin the picketing; I wandered about chatting with students. It was soon obvious to me that the student leaders were receptive to a meeting that might help to avoid confrontation. They readily accepted my offer to try to contact the President and the Chancellor in an effort to arrange a meeting.

As I walked with a small group of student leaders toward the Law School where I hoped to reach the administrative officers by phone, I heard voices close behind us and discovered there a chap I didn’t know. When I asked who he was and what he was about, he told me he was with Campus Security and that the President and Chancellor were not in their offices and could only be reached on his "walkie-talkie" radio which was contributing the noises I had been hearing. I told him we were going to my office and asked his to contact the President and Chancellor and ask them to call me. When they called, I reported my assessment of the situation and urged them to agree to sit down with a group of student leaders to explore the possibility of some approach that could avoid unnecessary conflict and disruption. They finally agreed to do so.

Later in the morning the meeting occurred. Aside from a brief introductory comment on the background of the meeting, I stayed out of the discussions. The talking went remarkably well. The President and Chancellor agreed to meet that afternoon with all students who wanted to come for a discussion; the students did not immediately call off their demonstration, but it was clear that was the likely outcome if the atmosphere of the morning meeting could be continued in the afternoon.

I had just returned to my office shortly after noon and had sent out for a sandwich when someone came in to say that I should return immediately to Bryan Hall, where police details had arrived, and a violent clash seemed likely. I hastened to Bryan to find University police in riot gear deployed on the campus side of the building, and both City police and the Sheriff's riot squad facing angry students on the other, the street, side. I could not learn then, nor have I been able to learn since, who had the extraordinarily bad judgment to call in the police when the problem seemed on its way to solution.

The scene on the street side of Bryan could not have been more threatening. City police cars were parked in front of Bryan with their flashers active and several students, already arrested, sitting in them. I spotted Jack Hooker, the maverick Republican who was then Mayor of Bloomington, whom I knew and respected. I said "Jack, your officers and these cars are an extreme provocation. I don’t think they are needed, and if you will pull them out, I’m fairly confident we can calm down this crowd." Hooker didn’t agree immediately, but I thought his reac-
I then saw the Sheriff and started toward him to make the same pitch. As I struggled through the crowd, I noticed that I had picked up an escort, one of the largest young men I had ever seen. When I turned to him quizzically, he said, "I hope you don't mind if I go with you. You're the one person I don't want to see conked on the head." I didn't have any expectation of being "conked," but I had no objection to his company. The Sheriff responded to my plea to move his squad out only with some petulant grousing that the students should leave first.

It turned out that no violence erupted, the police units departed, and a group of faculty assisted in persuading students to disperse. In that group was Henry Remak, the only central administrative officer of the University who made any appearance among the students prior to the afternoon meeting. That meeting went well, largely because of the conduct of Joe Sutton, who received close to a standing ovation when he quipped (probably in response to a student gibe that administrators always said they had no power), "A lot of Presidents tell you their hands are tied, that they have no power. I want you to know I have a lot of power." He didn't agree to use it for any specific action that I can recall, but, as I had anticipated, open dialogue brought an end to the attempted closure on this occasion.

As a vivid exception to the description I have given of the central administration of Indiana University, Henry Remak deserves a special tribute. Henry, a very senior Professor in the Department of German, was part of that remarkable flow that, to Germany's loss, brought richness to America. He had become Vice Chancellor for Academic Affairs, consistently displayed an ability to avoid letting differences of view on policy erode relationships of civility and friendship and, unlike other senior members of the administration, he acted courageously and without the "bunker mentality" that student protest usually engendered. In meetings of the Faculty Council, the principal legislative organ of the University faculty, Henry and I sometimes disagreed, and I used to say with a laugh that when Henry and I finished a budget conference the floor of the room was spattered with blood. But Henry was a true "university man" or, better yet, a "man of a true university." He understood that differences of view need have no negative personal consequences, that the ethos of a university community is rock-solid civility, and that there is no acceptable alternative to calm courage in a crisis. Henry and I have remained warm friends over the years.

As I said in the main text, in the spring of 1971, I accepted an invitation of the University of Nairobi to spend the 1971-72 academic year there as Fulbright Professor. Marilou and I had hardly reached Vermont, where we were to spend the summer
before leaving for Kenya, when it was clear that absence would not ease the stresses or restore any real viability to my role as Dean. Dr. Ryan and his staff took actions in conflict with decisions we had reached earlier on the basis of conventional negotiation, for example, on salary levels for some members of my Faculty. I raised strong objections, both ad hoc and systemic, but they were rejected. I emphasized yet again that, while I was entirely willing to render at any time an accounting of my stewardship of the Law School, I was not prepared to accept from the central administration micro-management or the refusal to honor agreements reached relative to the Law School. In the light of later developments, the conclusion is compelling that a strategy had been adopted for making my resignation from the deanship inevitable, preferably when I was away from Bloomington.

As I indicated in the main text, shortly after reaching Nairobi, I received from President Ryan a letter that either terminated my deanship or requested my resignation. On receiving it, I submitted my resignation.

When the development on my status was reported in Bloomington, several hundred students, faculty and staff, most from the Law School, put on a protest march to the central administration building. The gesture was heart-warming, though it was clear

37. The announcement of my resignation brought many letters expressing regret and good wishes. Among them was the following from Keith Parker, in 1970 the President of the University student body, with whom in 1970 I shared an all-night discussion of the nature of a university and the problems of identifying someone to speak for it:

"I want to express my gratitude for the aid, the advice, and the friendship that you extended to our student government administration, and to me personally. It was very important for us to know that through the madness that emanated from Bryan and Memorial Halls, we at least knew that there was a fair person in the Law School.

"I remember a meeting we had in our office late one Sunday night during the Cambodian strike. Your presence at a meeting of that nature showed the human concern that we were always able to find in you, especially when it was so absent in so many other people. We always felt that we could depend on you to give us clear and honest advice.

"Now I am a medical student at the University of Minnesota, and my politics are being overcome by Anatomy and Biochemistry, but I did want to thank you, Dean Harvey, because you were very beautiful to us."
to all, I'm sure, that it was only gesture. My deanship was not functional in the University context at that time; the need was to move ahead.

The editors of the law-student newsletter wrote to me asking for a statement to the student body and I responded as follows:

"I want to convey to all students my gratitude for their many expressions of confidence and good will, as well as my strong support for their determination that my resignation not in any way impede the strong, continuing development of the School.

"I wish very much that my resignation might have been submitted in other circumstances. That was not possible, and I now regard it as a closed chapter. After consultation with my colleagues there, I have concluded that full public disclosure of the background of my resignation would not be in the interest of the School. Its welfare remains the guiding consideration for me, as I am sure it does for all students.

"While I don't wish to comment on the operative reasons, I do feel that it would be appropriate to try to lay to rest some of the ill-founded speculation that has appeared in the newspapers. Permitting that speculation to continue could only result, I believe, in unnecessary damage to the School.

"It has been suggested that one of the important factors was conflict with and condemnation from the Indiana Bar Association. In my judgment, any contention that the Bar of the State has opposed developments in the School in recent years is quite untrue and is grievously unfair to many fine Indiana lawyers who have given us strong and enthusiastic support. These lawyers include many of our own alumni, as well as graduates of other schools. It bears emphasis that on few issues, if any, does the State Bar speak with one voice and, insofar as I am aware, on developments in our School it has not undertaken to speak as an association at all. Since I have been in the State, I have participated in the affairs of the State Bar Association and have enjoyed warm, supportive relations with a great many of its members, including virtually all of its leadership over recent years.

(footnote continued):

I especially valued this letter because it focused on what I always tried to give to students during this difficult period, not agreement with all their views and demands, but openness and honesty.
"The individual members of the Association cover a wide spectrum of viewpoints. Of those who have given attention to developments in the School, I am sure there are some who on various grounds are critical, and I have no disposition to question their entitlement to their views. I have tried diligently to determine the basis of critical reactions, when reports have reached me, and in most cases the reports of lawyer hostility to the School have proved illusory. Of course, this is not true in all cases and where actual disagreements have been discovered, I have had to conclude that perspectives on what constitutes high-quality legal education were simply in conflict. Indeed, any law school that is pressing for reform and improvement will be in conflict with some segment of its lawyer constituency. I would emphasize, however, that for every lawyer I have been able to identify as a detractor or critic, I could name several who in many ways have indicated their enthusiasm and support.

"The newspapers have also speculated that I felt aggrieved by the level of support being provided by the University to the Indianapolis Law School. As I have written to Dean Foust of the School, nothing could be further from the truth. I know very little about the budgetary support for Indianapolis, and, as my own decision was precipitated, that factor never crossed my mind. I came to Indiana as Dean of both Schools. One of my first acts as Dean was to recommend to the President and Trustees that the School in Indianapolis be granted autonomy within the University so as to permit its faculty under its own leadership to press for development and improvement as it saw fit. My consistent view has been, and I have urged it at every available opportunity, that all legal education is under-financed, that Indianapolis was no exception, and that it was in the interest of the University and our own School, as well as the Indianapolis School, that it be granted increased support. I would urge, therefore, that any speculation that my own decision was related to a rivalry with Indianapolis be put aside.

"The third reported reason -- that there were 'personality conflicts' between me and the administration of the University -- is more difficult to comment upon and I want to deal with only one aspect. It would be foolhardy to deny that over the past three years important differences of view have arisen. Indeed, several of those are a matter of public record. At least from my viewpoint, however, none of these fell into the trivial category of 'personality conflicts.' It has never seemed to me necessary that those with whom I dealt in a professional capacity be people with whom I might like to go fishing, and surely the view that issues of University policy can in any sense depend on personality reactions ought not to survive puberty. I have tried to
stake out my position on substantive matters related to the na­
ture of a university, the commitment to quality, the role of
responsible administration, and the rights and duties of
citizens, particularly lawyers, whatever position they might
hold in a university. None of these factors, I believe, rests on
personality considerations.

"The students in the School are fully entitled, I believe,
to express their views on the quality of the legal education
want and, indeed, to play a significant role in assuring that
the quality they want be preserved and increased. I hope the
students will direct all their energies toward those ends. The
inscription on the National Archives says, "All that is past is
prologue." As a motto that is far above the average, and I would
recommend it to all our students. My deanship is now a closed
chapter; it should be permitted to rest where it is. There is no
gain to the School in re-trying old causes. There is gain in
reaffirming our commitments to first-rate legal education at In-
diana and in supporting the faculty as it moves into considera-
tion of a new dean. I hope our present students, as well as our
alumni, will find appropriate ways of participating with the
faculty in this process.

"At the purely personal level, my plans are to return to
Bloomington in March, and I look forward to seeing all of you.
Beyond that I have made no plans."

Quite predictably, this bland statement elicited a variety
of reactions. Some criticized me for failing to make the state-
ment a ringing denunciation of the repressive forces inside and
outside of the University thought to have been responsible for
my demise. At the other pole were those who would have preferred
no explanation at all to the student body. I totally disagreed
with both polar views. I thought I owed some explanation to our
students, and beyond them, to many in the University who had
welcomed such support as I could give them and were concerned,
both for me personally, and for causes we had supported togeth-
er. I hoped also that there might be some benefit in trying to
dispose of some of the speculation about operative factors that
had no factual basis at all and might be corrosive of intra-
University relationships on a continuing basis. Hindsight has
only increased my doubts, however, that the tepid statement I
sent back from Nairobi paid any dividends.