

3-2001

"The University Works Because We Do": Collective Bargaining Rights for Graduate Assistants

Grant M. Hayden

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship

Recommended Citation

Grant M. Hayden, *"The University Works Because We Do": Collective Bargaining Rights for Graduate Assistants*, 69 Fordham L. Rev. 1233 (2001)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/168

This Article is brought to you for free and open access by Scholarly Commons at Hofstra Law. It has been accepted for inclusion in Hofstra Law Faculty Scholarship by an authorized administrator of Scholarly Commons at Hofstra Law. For more information, please contact lawcls@hofstra.edu.

ARTICLES

“THE UNIVERSITY WORKS BECAUSE WE DO”: COLLECTIVE BARGAINING RIGHTS FOR GRADUATE ASSISTANTS

*Grant M. Hayden**

INTRODUCTION

In the past, students who wanted a better education devoted a few years of their post-baccalaureate life toward earning a graduate degree. Now, in addition to completing the required coursework and writing, graduate students are being asked to carry an increasingly large portion of the teaching and research load at the universities they attend. In other words, in addition to their pursuit of the higher mind, graduate students are often asked to devote a substantial amount of their time as teaching or research assistants.

Modern graduate study, then, involves more than establishing an educational connection with a university—it also involves an employment relationship. With this new relationship has come all of its attendant issues, including questions of wages, hours, and the terms and conditions of employment. And, not surprisingly, many graduate assistants, like their counterparts in nearly every other occupation, have come to believe that they could secure better employment terms with their employers through collective action.

Although organizing efforts have been undertaken by graduate assistants at numerous universities,¹ these efforts have met with

*Associate Professor, Hofstra Law School. J.D., Stanford Law School; B.A., M.A., University of Kansas. I want to thank Dean Stuart Rabinowitz and the law school for their support of this project and Joanna Grossman for her careful editing. Thanks as well to Christina Suriani for her valuable research assistance.

1. They include public universities in California, New York, Florida, Michigan, New Jersey, Wisconsin, Massachusetts, Illinois, Oregon, Kansas, Indiana, North Carolina, Iowa, New Mexico, Pennsylvania, Arizona, Georgia, Maryland, Washington, and Texas, as well as at several private universities, including Yale, New York University, Temple, Purdue, Brandeis, Boston University, and George Washington University. Coalition of Graduate Employee Unions, *CGEU Union Websites* at <http://www.cgeu.org/websites.html> (last visited Jan. 9, 2001); see also Courtney Leatherman, *Graduate Students Gather to Learn “Organizing 101”*, Chron. Higher Educ., Aug. 14, 1998, at A10 (describing the organizing campaign efforts of graduate assistants). The Coalition of Graduate Employee Unions (CGEU) is one of

varying degrees of success. The graduate assistants at the University of Wisconsin secured bargaining rights over thirty years ago,² while those in the University of California system just ratified their first contract after almost two decades of legal struggles and work stoppages.³ Graduate assistants at private institutions, such as Yale, continue to campaign for full recognition by their universities.⁴ But whatever the total score between graduate assistants and the universities, it remains clear that assistants across the country are increasingly turning to collective bargaining as a way to address their employment disputes.

At private universities, the labor rights of graduate assistants are governed by the National Labor Relations Act ("NLRA").⁵ Until late last year, the National Labor Relations Board ("NLRB") had interpreted the NLRA as denying graduate teaching and research assistants the right to organize and bargain collectively.⁶ Last October, however, the NLRB sharply reversed course in affirming the NLRB Regional Director's decision to direct an election for a bargaining unit composed of graduate teaching assistants at New York University.⁷ The Board's decision may be subject to challenge and possible reversal in federal court if the university declines to bargain with the recently-certified union. In the meantime, however, graduate assistants at private universities enjoy the protections of the federal labor statute that they had long been denied.

Graduate assistants at *public* universities, in contrast, remain subject to state labor laws, in which there is little consensus or

the most valuable sources of information about the *current* state of graduate student organizations across the United States and Canada. The coalition "was formed in 1992 to support the organization of new graduate employee unions; to strengthen established unions; and to provide a forum for graduate employee unionists to meet, share information and work together toward common goals." Coalition of Graduate Employee Unions, *About CGEU* at <http://www.cgeu.org/WhatisCGEU.html> (last visited Jan 9, 2001). The coalition provides most of its information through its website, Coalition of Graduate Employee Unions, *CGEU* at <http://www.cgeu.org/index.html> (last visited Jan. 9, 2001), and an annual conference.

2. For an extended history and analysis of the formation of the first graduate assistant union at Wisconsin, see Nathan P. Feinsinger & Eleanore J. Roe, *The University of Wisconsin, Madison Campus-TAA Dispute of 1969-70: A Case Study*, 1971 Wis. L. Rev. 229, and Arlen Christenson, *Collective Bargaining in a University: The University of Wisconsin and the Teaching Assistants Association*, 1971 Wis. L. Rev. 210.

3. Tanya Schevitz, *Teaching Assistants OK Contract with UC*, S.F. Chron., May 19, 2000, at D7. The contract provided for a 9.5% pay raise and full tuition remission over three years to approximately 10,000 teaching assistants, readers, and tutors at the University of California's eight undergraduate institutions. *Id.*

4. See *infra* notes 23-37 and accompanying text.

5. 29 U.S.C. §§ 151-168 (1994).

6. See Leland Stanford Junior Univ., 214 N.L.R.B. 621 (1974). On the distinction between teaching assistants and graduate research assistants, see *infra* notes 11-15 and accompanying text.

7. 332 N.L.R.B. No. 111 (Oct. 31, 2000).

convergence on their status for the purpose of collective bargaining.⁸ The many sources of relevant law, along with a dearth of commentary on the subject, have left state courts and administrative boards with little guidance on the issue. As a result, state law on the subject is a patchwork of ill-defined legal guidelines.

Despite the prevalence of graduate assistant organizations and their significant implications for university governance and finance,⁹ a workable legal framework to analyze whether graduate assistants should be allowed to unionize under relevant federal and state law is only beginning to emerge. The principal argument against allowing graduate assistants to organize has been that their status as students deprives them of federal and state protections of their right to bargain collectively.¹⁰

This article argues that courts and administrative boards have long analyzed the status of graduate assistants within deficient frameworks that often lead to the wrong conclusions. While the *New York University* decision reflects a refreshing change, the real question raised by that opinion is not why the Board ruled the way it did, but why it took so long to do so, and why many states have yet to accord their graduate assistants full collective bargaining rights.

The article is divided into five parts. Part I briefly surveys the state of graduate assistant organizing efforts with special focus on recent efforts at one private university (Yale) and one public university (Kansas). Part II examines how faculty and medical housestaff organizations have fared at universities, and how their plight is reflective of the same difficulties that graduate assistants have encountered. Part III sets out three analytic frameworks used by administrative and judicial bodies in their attempts to determine whether graduate assistants possess collective bargaining rights. Under the first framework, the graduate assistants' right to bargain collectively depends on whether they are classified as students *or*

8. In some states, graduate assistants are explicitly eligible for collective bargaining under the law. *See, e.g.*, State Employee Labor Relations, Wis. Stat. Ann. §§ 111.81(7)(b), 111.825(2)(a)(c) (West 1997). In other states, university employees are eligible under the law, but the eligibility of graduate assistants is uncertain. *See, e.g.*, 43 Pa. Stat. Ann. §§ 1101.301(2), 1101.401 (West 1991). In Ohio, university employees are eligible, but graduate assistants and part-time faculty are explicitly excluded. Ohio Rev. Code Ann. § 4117.01(C)(11) (Anderson Supp. 1999). Finally, in many states, all public university employees are excluded from collective bargaining rights. *See, e.g.*, N.C. Gen. Stat. §§ 95-98 (1999).

9. Yale Univ., No. 34-CA-7347, 1997 N.L.R.B. LEXIS 619, at *9 (Aug. 6, 1997) ("[I]t is abundantly clear that the teaching fellows are a major resource for the University in providing undergraduate education"), *aff'd*, 1999 N.L.R.B. LEXIS 820 (Nov. 29, 1999); Alison Schneider, *Graduate Students on 30 Campuses Rally for Unions and Better Wages*, Chron. Higher Educ., Mar. 7, 1997, at A13 (noting that the Coalition of Graduate Employee Unions estimates that there are over 100,000 graduate employees in the United States who handle up to 50% of the teaching load at many universities).

10. *See Stanford Univ.*, 214 N.L.R.B. at 623.

employees. Under the second framework, the right depends on whether they are perceived as *primarily* students or employees. Finally, the third framework accepts that graduate assistants are employees; whether they have a right to bargain collectively, however, turns on whether they are the right kind of employees (the kind that deserve the protections of state or federal labor laws). Part IV discusses the principal deficiencies of the first two frameworks and argues that graduate assistants are inescapably employees of the university. The final part rebuts the policy arguments advanced in opposition to graduate student collective bargaining in the context of the third framework, and demonstrates that there are no compelling reasons to justify denying graduate assistants full collective bargaining rights.

I. OVERVIEW OF GRADUATE ASSISTANT ORGANIZATION

Graduate assistants are graduate students who work for their universities as they pursue advanced degrees. They fall into two primary categories: teaching assistants and research assistants.¹¹ Typically, teaching assistants have full responsibility either for teaching introductory classes or leading small discussion sections for larger lecture classes taught by professors in their department.¹² Research assistants aid professors in their departments with field and laboratory research.¹³ Both types of graduate positions are usually half-time appointments, up to twenty hours per week,¹⁴ though the actual number of hours spent teaching and researching varies tremendously.¹⁵

11. Joyce Villa, *Graduate Student Organizing: Examining the Issues*, CUPA J., Winter 1991, at 36. Although there are graduate students that work in other capacities—e.g., graduate curatorial assistants in university museums and graduate office assistants in university administrative departments—such students comprise a tiny fraction of the total number of graduate assistants.

12. *See id.* at 34-35. In addition to giving the actual lectures, graduate teaching assistants may be called on to select textbooks, plan syllabi, design tests, plan lectures, plan laboratory setup, compose final exams, and grade all tests and projects.

13. *See id.* at 35.

14. *Id.*

15. *See Ass'n of Graduate Student Employees v. Regents of the Univ. of Cal.*, 13 P.E.R.C. (LRP) ¶ 20,087 (Cal. Pub. Employment Relations Bd. 1989), available at 1989 P.E.R.C. (LRP) LEXIS 230, *aff'd*, 8 Cal. Rptr. 2d 275 (Cal. Ct. App. 1992). This early decision by the California Public Employment Relations Board denying the University of California, Berkeley graduate assistants the right to bargain collectively under California law has since been superceded by *Regents of the Univ. of Cal.*, 22 P.E.R.C. (LRP) ¶ 29,084 (Cal. Pub. Employment Relations Bd. 1998), available at 1998 P.E.R.C. (LRP) LEXIS 54, at *46-47 (holding that certain graduate teaching assistants, readers, and tutors at the University of California, San Diego, were "employees" and thus entitled to collective bargaining under state statute) and *Regents of the Univ. of Cal.*, 23 P.E.R.C. (LRP) ¶ 30,025 (Cal. Pub. Employment Relations Bd. 1998), available at 1998 P.E.R.C. (LRP) LEXIS 197, at *45-46 (holding that graduate student instructors, readers, tutors, and counselors at the University of California, Los Angeles, were "employees" and thus entitled to collective bargaining

Graduate assistants of all types organize for fairly standard reasons: a lack of adequate compensation coupled with few ways to effectuate change in their working conditions. On the eve of their organizing efforts, for example, graduate assistants at the University of Kansas ("KU") received just under \$8,000 for two semesters of half-time teaching, while receiving no fringe benefits, such as health care or contributions to the state's retirement fund.¹⁶ Graduate assistants' attempts at universities, such as KU, to effectuate change by petitioning school administrations and lobbying state legislators have proven unsuccessful.¹⁷ Frustrated with the lack of university and state response, graduate assistants have increasingly turned to collective action.

A. Graduate Assistants Within Faculty Collective Bargaining Units

When graduate assistants early on tried to join faculty bargaining units, they were typically excluded from bargaining opportunities extended to full-time faculty members.¹⁸ In some cases, the faculty expressly wrote graduate assistants out of their units. For instance, the representative of the faculty unit for the New York State University system signed a stipulation with the state to exclude "any

under state statute). The *Association of Graduate Student Employees*, nonetheless, remains a noteworthy case for both its historical importance and the depth of its analysis of the issues in its majority opinion, and the strong concurrence and dissent from Member Craib. 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, dissenting and concurring).

16. See Brief for Kansas Association of Public Employees at 7, Kan. Ass'n of Pub. Employees v. Kan. Bd. of Regents (Kan. P.E.R.B. 1994) (No. 75-UD-1-1992) [hereinafter "K.A.P.E. Brief"].

17. See, e.g., Diane Carroll, *KU union vote fails to sway state legislators: Teaching assistants' appeal for higher pay faces opposition*, K.C. Star, Apr. 20, 1995, at C1 [hereinafter Carroll, *KU union vote*]; Diane Carroll, *Plan to unionize teaching assistants at KU set for vote: They complain of low salaries and lack of benefits*, K.C. Star, Apr. 15, 1995, at C3 [hereinafter Carroll, *Plan to unionize*].

18. A bargaining unit is a labor union or group of people authorized to carry on collective bargaining on behalf of employees. Robert A. Gorman, *Labor Law: Unionization and Collective Bargaining* 66-70 (1976). To be an appropriate bargaining unit, the employees within the unit must have a sufficient "community of interest." *Id.* at 69. "Community of interest," however, is a vague standard. In determining whether a group of employees has a community of interest, administrative agencies and courts will look to such factors as:

(1) similarity in the scale and manner of determining earnings; (2) similarity in employment benefits, hours of work and other terms and conditions of employment; (3) similarity in the kind of work performed; (4) similarity in qualifications, skills and training of the employees; (5) frequency of contact or interchange among the employees; (6) geographic proximity; (7) continuity or integration of production processes; (8) common supervision and determination of labor-relations policy; (9) relationship to the administrative organization of the employer; (10) history of collective bargaining; (11) desires of the affected employees; (12) extent of union organization.

Id.

person who has as a primary objective study at one of the State University campuses under the supervision of a faculty [member] for the established purpose of obtaining a graduate or undergraduate degree and who performs instructional, research, or other services at a campus of the University.”¹⁹

In situations where university faculty sought to include graduate assistants in their bargaining units, the NLRB found that the graduate students shared no community of interest with faculty members and thus could not be part of their units.²⁰ In the case of Adelphi University, for example, the Board first provided an extensive catalog of the differences between faculty and graduate assistants, and concluded that:

[t]he graduate assistants are graduate students working toward their own advanced academic degrees, and their employment depends entirely on their continued status as such. They do not have faculty rank, are not listed in the University's catalogues as faculty members, have no vote at faculty meetings, are not eligible for promotion or tenure, are not covered by the University personnel plan, have no standing before the University's grievance committee, and, except for health insurance, do not participate in any of the fringe benefits available to faculty members.²¹

Then, in language that signaled the NLRB's future position on the status of independent graduate assistant organizations, the NLRB found that “the graduate teaching and research assistants . . . , although performing some faculty-related functions, *are primarily students* and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the unit.”²² Thus, for one reason or another, graduate assistants experienced little success in achieving bargaining rights through faculty unions. Faced with this opposition, graduate assistants began to turn their attention to organizing their own units.

B. *Graduate Assistants Within Their Own Collective Bargaining Units*

1. The Private University Experience: Yale

Graduate assistants, known as “teaching fellows,” first began organizing at Yale University in 1989.²³ They were led by the

19. State Univ. of N.Y., 2 P.E.R.B. ¶ 4010, at 4186 n.17 (N.Y. Pub. Employment Relations Bd. 1969). That faculty unit included part-time faculty members, as well as professional support staff. *Id.*

20. College of Pharm. Scis. in N.Y., 197 N.L.R.B. 959, 960 (1972).

21. Adelphi Univ., 195 N.L.R.B. 639, 640 (1972).

22. *Id.* (emphasis added); *accord Pharm. Scis.*, 197 N.L.R.B. at 960.

23. Yale Univ., No. 34-CA-7347, 1999 N.L.R.B. LEXIS 820, at *21 n.16 (Nov. 29, 1999). The facts surrounding the Yale graduate assistants' struggle for recognition are

Graduate Employees and Students Organization ("GESO"), which is affiliated with the Hotel Employees and Restaurant Employees International Union, AFL-CIO.²⁴ Yale, from the beginning of the organization efforts, steadfastly refused to recognize the GESO as the lawful representative of the graduate assistants, maintaining that it has an educational relationship, not an employment relationship, with its teaching fellows.²⁵

As employees of a private institution, the graduate assistants' right to organize is governed by the NLRA, which had been interpreted to expressly exclude graduate assistants from the Act's coverage.²⁶ Exclusion from the Act's coverage means that employers retain the discretion to refuse to bargain or recognize an employee organization. Consequently, the GESO *needed* recognition by the university in order to proceed.

After several years, the GESO's frustration with the university's unyielding position reached a breaking point. At the end of the 1995 fall semester, the GESO engaged in a "grade strike" in an attempt to force the university to recognize it.²⁷ The GESO decided that it would have the teaching fellows fulfill all of their duties for the fall 1995 term, but would withhold student grades until the university agreed to recognize and bargain with the organization.²⁸ When the GESO announced the grade strike to the Yale administration, the administration promptly responded by warning the graduate assistants of the "serious consequences" they faced for participating in the grade strike, including withdrawal of their positions in the following terms.²⁹ Ultimately, the strike collapsed in the face of that threatened disciplinary action.³⁰

The GESO then attempted to force the issue by filing an unfair labor practice charge with the NLRB, alleging that the threatened disciplinary action violated sections 8(a)(1) and 8(a)(3) of the NLRA.³¹ The General Counsel for the NLRB supported the GESO's

set out in David L. Gregory, *The Problematic Employment Dynamics of Student Internships*, 12 Notre Dame J.L. Ethics & Pub. Pol'y 227, 245-49 (1998). More current information on the Yale organizing drive may be found on the GESO's website, Graduate Employees and Students Organization, *GESO Publications* <http://www.yaleunions.org/geso/pubs/index.htm> (last visited Jan. 9, 2001).

24. Yale Univ., No. 34-CA-7347, 1997 N.L.R.B. LEXIS 619, at *1 (Aug. 6, 1997).

25. *Id.* at *10-11.

26. Leland Stanford Junior Univ., 214 N.L.R.B. 621, 623 (1974).

27. Yale Univ., 1999 N.L.R.B. LEXIS 820, at *45-47. The GESO also engaged in a three-day teaching strike in February 1992, but that strike was unsuccessful. *Id.* at *42-43.

28. *Id.* at *47.

29. *Id.* at *51-53.

30. *Id.* at *57-58.

31. *Id.* at *33-34. Section 8(a)(1) of the NLRA makes it an unfair labor practice for any employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157." 29 U.S.C. § 158(a)(1) (1994). Section 158(a)(1) prohibits some types of employer anti-union speech. *See, e.g.,* NLRB v. Gissel

claims, and issued a complaint in early 1997.³² A hearing was held that spring, at which Yale denied the charges in the complaint and, in addition, maintained its long-held position that the teaching fellows were not employees under the NLRA.³³

Although the administrative law judge dismissed the complaint,³⁴ the judge never addressed the question of whether the teaching assistants were employees under the NLRA.³⁵ Instead, he based his decision on the fact that, regardless of the assistants' status, the grade strike was a partial strike and thus it constituted unprotected activity under the Act.³⁶ That ruling was appealed, and the NLRB affirmed the judge's section 8(a)(3) ruling and remanded the judge's section 8(a)(1) ruling for further consideration.³⁷ In the meantime, Yale has held fast to its position and has continued to withhold recognition of any graduate assistant union.

2. The Public University Experience: Kansas

At the time the KU graduate assistants began their organizing drive, the university employed approximately 1100 graduate teaching assistants³⁸ who taught thirty percent of the classes.³⁹ The university's

Packing Co., 395 U.S. 575, 583, 589, 609 (1969) (referring to NLRB cases where employers' speech violated the Act). Section 8(a)(3) of the NLRA makes it an unfair labor practice for any employer to discourage membership in any labor organization "by discrimination in regard to hire or tenure of employment or any term or condition of employment." 29 U.S.C. § 158(a)(3) (1994). Thus, section 8(a)(3) prohibits retaliation for engaging in protected concerted activities. *See, e.g.,* *Radio Officers' Union v. NLRB*, 347 U.S. 17, 39-40 (1954).

32. *Yale Univ.*, 1999 N.L.R.B. LEXIS 820, at *34.

33. *Id.* at *34-36 nn. 2,4.

34. *Id.* at *91.

35. *Id.* at *37 n.5.

36. *Id.* at *68-75. While employees have the right to strike in an effort to improve their working conditions, *see* *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 256 (1939), they do not have the right to engage in something that falls short of a complete work stoppage (a partial strike), *see* *Honolulu Rapid Transit Co.*, 110 N.L.R.B. 1806, 1811 (1954). For a more thorough discussion of partial strikes, *see* Craig Becker, "Better Than a Strike": *Protecting New Forms of Collective Work Stoppages Under the National Labor Relations Act*, 61 U. Chi. L. Rev. 351 (1994), and Richard Mittenenthal, *Partial Strikes and National Labor Policy*, 54 Mich. L. Rev. 71 (1955).

37. *Yale Univ.*, 1999 N.L.R.B. LEXIS 820, at *5, *22-23. The decision also directed the administrative law judge to consider the question of whether the teaching fellows were employees under the NLRA, *id.* at *22, but a recent settlement of the case may prevent such a finding. Courtney Leatherman, *Yale Settles Dispute on Grade Strike by Teaching Assistants Seeking a Union*, *Chron. Higher Educ.*, Apr. 14, 2000, at A19.

38. K.A.P.E. Brief, *supra* note 16, at 5. This number does not include the over 460 graduate students employed as research assistants at the university. Letter from Virginia Nichols, Univ. of Kan. Office of Institutional Research and Planning, to Dutch Chung, *Fordham Law Review* (Jan. 22, 2001) (on file with author).

39. Heather Jameson, *KAPE Hurdles Milestone for KU GTAs*, *Kan. Ass'n of Pub. Employees J.*, Nov.-Dec. 1994, at 1.

heavy reliance on graduate teaching stemmed, most probably, from economics: the average graduate assistant teaching two classes of thirty-five students for two semesters received just \$7,938 and a partial tuition waiver, which together amounted to only one-fourth to one-fifth of a professor's salary.⁴⁰ Frustrated by decades of inadequate compensation and a general lack of responsiveness to their concerns, the graduate assistants decided to follow their counterparts across the country and form a union.⁴¹

A group of graduate assistants, originally called AEGIS, and later the Graduate Teaching Assistant Coalition ("GTAC"), began an organizing drive in the fall of 1991.⁴² The university administration, state board of regents, and state legislature were unequivocally opposed to the idea of dealing with a graduate assistant union. But unlike their Yale counterparts, the graduate assistants at Kansas did not need approval from either the school administration or state in order to proceed because their right to unionize was governed by a Kansas statute, which, on its face, covered *all* state employees.⁴³ Three years after the unionizing efforts began, after numerous delays and a full hearing, the Kansas Public Employees Relations Board ("PERB") ruled that the teaching assistants had the right to vote on forming a union.⁴⁴

That ruling, however, spurred the opposition. Upon hearing of the graduate assistants' victory before the Kansas PERB, the Chairman of the Kansas Senate Ways and Means Committee immediately threatened to cut funding for teaching assistants if they voted to organize a union.⁴⁵ The graduate assistants responded by filing an unfair labor practices complaint against the senator for discouraging them from forming an employee organization through intimidation, coercion, and threat.⁴⁶ In the fall of 1995, the teaching assistants voted to affiliate themselves with the American Federation of Teachers,⁴⁷ and by the fall of 1997, ratified a contract with the university.⁴⁸ That contract provided, among other things, a regularized appointment process, merit salary increases, university contributions for health

40. *Id.*

41. See Diane Carroll, *Teaching assistants favor union*, K.C. Star, Apr. 19, 1995, at A1 [hereinafter Carroll, *Teaching assistants*].

42. Graduate Teaching Assistant Coalition, *Best of the GTACurrent*, at <http://www.ukans.edu/~gtac/bestof.html#sec1> (last visited Jan. 9, 2001).

43. Kan. Stat. Ann. § 75-4324 (1997).

44. Diane Carroll, *Ruling permits union*, K.C. Star, Oct. 19, 1994, at C1 [hereinafter Carroll, *Ruling*]; Jameson, *supra* note 39.

45. Carroll, *KU union vote*, *supra* note 17.

46. Diane Carroll, *KU officials face complaint from teaching assistants union*, K.C. Star, Aug. 17, 1995, at C4 [hereinafter Carroll, *KU officials*].

47. Carroll, *Teaching assistants*, *supra* note 41.

48. Graduate Teaching Assistant Coalition, *Contractual Agreement of Employment*, <http://www.ukans.edu/~gtac/contract.html> (last visited Jan. 9, 2001).

insurance, and a tuition and campus fee waiver for graduate teaching assistants.⁴⁹

3. Other Public University Experiences

Graduate assistants at public universities in other states seeking to organize into their own collective bargaining units have met with mixed reaction. Some state university systems, such as Massachusetts, voluntarily established such units.⁵⁰ Other states have legislated solutions to the issue. Wisconsin, for example, obliges its universities to bargain with its graduate assistants.⁵¹ Several other states, however, have expressly excluded graduate assistants from the bargaining table.⁵² Florida, for instance, amended its statute to deny graduate assistants the right to bargain.⁵³ In its haste to pass the law, the Florida legislature failed, however, to create any record of its purpose for excluding graduate assistants from the definition of public employee.⁵⁴ Ironically, that amendment triggered a series of events that eventually solidified the right of graduate assistants in the University of Florida system to bargain collectively.⁵⁵ The amended statute excluding graduate assistants from collective bargaining was immediately challenged by Florida's graduate assistants as violating the state constitution because Florida had constitutionalized collective bargaining rights for its public employees.⁵⁶ The Florida Court of

49. *Id.* at arts. 5-7.

50. Villa, *supra* note 11, at 36. Massachusetts, however, initially resisted graduate assistant efforts to organize. Over ten years later, after a concerted effort by the students, the university recognized a unit of graduate assistants. *Id.*

51. Wis. Stat. Ann. §§ 111.81(1) & (7)(b) (West 1997).

52. Ohio's statutory grant of the right for public employees to bargain collectively, for example, provides:

"Public employee" means any person holding a position by appointment or employment in the service of a public employer . . . except: . . . (11) Students whose primary purpose is educational training, including graduate assistants or associates, residents, interns, or other students working as part-time public employees less than fifty percent of the normal year in the employee's bargaining unit

Ohio Rev. Code Ann. § 4117.01(C)(11) (Anderson 1994).

53. Fla. Stat. Ann. § 447.203(3)(i) (West 1997).

54. *United Faculty of Fla. v. Bd. of Regents*, 417 So. 2d 1055, 1057-58 (Fla. Dist. Ct. App. 1982).

55. In a 1977 decision, the Florida Court of Appeals affirmed the Florida Public Employees Relations Commission ("PERC") certification of graduate assistant units. *Board of Regents v. P.E.R.C.*, 368 So. 2d 641, 642 (Fla. Dist. Ct. App. 1979). The PERC found that graduate teaching and research assistants were employees within the meaning of the Florida statute, § 447.203(3)(i), which grants most public employees the right to bargain collectively. *Id.*

56. The Florida Constitution provides: "Right to Work.—The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization. *The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged.* Public employees shall not have the right to strike." Fla. Const. art. I, § 6 (emphasis added).

Appeals agreed with the graduate assistants and struck down the offending part of the statute because the state failed to demonstrate a compelling interest to justify its denial of collective bargaining rights to graduate assistants.⁵⁷ As a result of this decision, the rights of graduate assistants to bargain collectively are now more secure in Florida than in any other state.

Most often the universities opposed to efforts by graduate assistants to organize have challenged their status as "employees" under the NLRA or state statute. Unfortunately, neither the Act nor most state statutes explicitly address the issue. Thus, the controversy has been left to the courts and labor boards to decide. The fundamental issue facing those bodies, which Parts III through V of this paper will address, is whether graduate assistants should be afforded the right to bargain collectively. First, however, it may be useful to examine briefly the state of faculty organization and then analyze the somewhat analogous plight of medical housestaff.

II. UNIVERSITY FACULTY AND MEDICAL HOUSESTAFF ORGANIZATION

A. *University Faculty Organization*

College and university employees were among the last groups of employees to organize for the purpose of collective bargaining.⁵⁸ One reason for the delay was that most universities had extensive internal governance procedures.⁵⁹ Another possible explanation, one that haunts efforts to organize graduate assistants to this day, is that many university employees believe that union membership tarnishes their status as professionals.⁶⁰ Efforts to organize full-time faculty at private universities were further stymied by the NLRB and the courts. In 1980, for example, the Supreme Court helped set back faculty organization efforts at private universities when it affirmed the NLRB's holding that full-time faculty at private universities exercise supervisory and managerial functions and were therefore excluded from NLRA's coverage.⁶¹

57. *United Faculty of Fla. Local 1847 v. Bd. of Regents*, 417 So. 2d 1055, 1061 (Fla. Dist. Ct. App. 1982).

58. *Univ. of N.H. Chapter of the Am. Ass'n of Univ. Professors v. Haselton*, 397 F. Supp. 107, 109-10 (D.N.H. 1975).

59. *Id.* The existence of such procedures gave university employees avenues to express grievances and initiate changes. *See id.* at 110.

60. *Id.*

61. *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). Faculty members were excluded from the NLRA despite the fact that they satisfied the Act's requirement for professional status, their supervisory and managerial functions were exercised on a collective basis, and they were subject to the ultimate authority of the board of trustees. *NLRB v. Yeshiva Univ.*, 582 F.2d 686, 696 (2d Cir. 1978), *aff'd*, 444 U.S. 672 (1980); Sar A. Levitan & Frank Gallo, *Can Employee Associations Negotiate New*

Despite these structural, attitudinal, and legal setbacks, faculty continued organizing to try to obtain the benefits that had been secured by their counterparts in other employment sectors, including higher salaries, fringe benefits, and a measure of job security for their non-tenured members.⁶² Through these efforts, thirty states granted full-time faculty the right to organize and bargain collectively in their state schools by 1988.⁶³ Part-time faculty, while often excluded from bargaining units of full-time faculty because they lacked a sufficient community of interest,⁶⁴ were often allowed to maintain their own units.⁶⁵ Thus faculty, at least at public universities, have made tremendous strides in securing the right to bargain collectively.

B. Medical Housestaff Organization

Although the life of an intern or resident is unlike the life of a graduate student, the legal issues surrounding the status of housestaff in teaching hospitals are similar. Interns and residents, commonly referred to as housestaff, are medical school graduates completing the final phase of their graduate medical training with a hospital.⁶⁶ A physician's internship and residency typically lasts between one and five years and is undertaken at a teaching or research hospital unrelated to the university giving the resident's original medical education.⁶⁷ Housestaff may work well over 100 hours per week and perform most of the services of full medical doctors.⁶⁸

Much like graduate assistant positions, medical internships and residencies are considered training programs. Cases addressing the bargaining rights of housestaff often include extended discussions of the bargaining rights of student employees.⁶⁹ Although some of the specific issues affecting the organizing efforts of these two types of

Growth?, Monthly Lab. Rev., July 1989, at 17-19.

62. See Levitan & Gallo, *supra* note 61, at 13.

63. This accounted for almost 30% of all full-time faculty members. *Id.*

64. See, e.g., *Trustees of Boston Univ. v. NLRB*, 575 F.2d 301, 308 (1st Cir. 1978) (finding that part-time faculty members had "no mutuality of interest [with full-time faculty in] (1) compensation, (2) participation in University Government, (3) eligibility for tenure, and (4) working conditions").

65. See, e.g., *Univ. of San Francisco*, 265 N.L.R.B. 1221, 1224 (1982) (finding that the part-time faculty constituted a bargaining unit appropriate for bargaining purposes).

66. *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 251 (1976); see *Boston Med. Ctr. Corp.*, 162 L.R.R.M. (BNA) 1329, 1333-36 (1999) (discussing the typical progression from medical student to physician).

67. *Cedars-Sinai*, 223 N.L.R.B. at 251; see *Boston Med. Ctr.*, 162 L.R.R.M. (BNA) at 1333-36.

68. *Cedars-Sinai*, 223 N.L.R.B. at 255 (Fanning, Member, dissenting). For a catalog of some of the specific duties of different types of medical residents, see *Boston Med. Ctr.*, 162 L.R.R.M. (BNA) at 1333-36.

69. See, e.g., *Boston Med. Ctr.*, 162 L.R.R.M. (BNA) at 1343-44; *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1000-02 (1977); *Cedars-Sinai*, 223 N.L.R.B. at 253.

employees will be discussed together in the next section, a preliminary overview of the collective bargaining efforts of medical residents may be useful.

Housestaff seeking collective bargaining rights have faced many of the same obstacles as graduate assistants. The NLRB and various state public employee relations boards have split on the issue of whether housestaff have the right to bargain. Housestaff in many state and federal hospitals have been found to be employees for the purpose of collective bargaining.⁷⁰ The Michigan Supreme Court, for example, affirmed the decision of the Michigan Employee Relations Commission to certify a bargaining unit of interns and residents.⁷¹ The court found the housestaff to be both students and employees, and then held that because the relevant Michigan statute did not expressly exclude student employees, residents were employees for the purpose of collective bargaining.⁷² Additionally, the Federal Labor Relations Authority construed residents working in federal hospitals to be employees under the Federal Service Labor-Management Relations Statute.⁷³

The NLRB and many other states, however, have not been so favorably disposed to medical housestaff over the past several decades. The NLRB originally determined in *Cedars-Sinai Medical Center* and *St. Clare's Hospital* that housestaff who fall within its jurisdiction are not employees for the purposes of the NLRA.⁷⁴ In *Cedars-Sinai*, the Board held that while interns and residents at private, non-profit hospitals "possess certain employee characteristics, [they] are primarily students."⁷⁵ This decision was especially surprising in light of the fact that section 2(12) of the NLRA was specifically designed to include residents within the Act's definition of "professional employee."⁷⁶

Late last year, however, the NLRB reversed course in *Boston Medical Center* and overruled *Cedars-Sinai* and *St. Clare's Hospital*.⁷⁷

70. See, e.g., *Boston Med. Ctr.*, 162 L.R.R.M. (BNA) at 1348; *Regents of the Univ. of Cal. v. Pub. Employment Relations Bd.*, 715 P.2d 590, 599-600 (Cal. 1986); *Michigan, Regents of the Univ. of Mich. v. Employment Relations Comm'n*, 204 N.W.2d 218, 226 (Mich. 1973).

71. *Regents of the Univ. of Mich.*, 204 N.W.2d at 226.

72. *Id.* at 224-25.

73. *Long Beach Veterans Admin. Med. Ctr.*, 7 F.L.R.A. 434, 445 (1981). The somewhat circular definition of "employee" under the Federal Service Labor-Management Relations Statute § 7103(a)(2) is simply "an individual . . . employed in an agency." *Id.* at 441.

74. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1000-02 (1977); *Cedars-Sinai Med. Ctr.*, 223 N.L.R.B. 251, 253 (1976).

75. 223 N.L.R.B. at 251.

76. *Cedars-Sinai*, 223 N.L.R.B. at 257-59 (Fanning, Member, dissenting). Both the language of the statute and the legislative history of the amendment adding section 2(12) compel this conclusion. *Id.*

77. *Boston Med. Ctr. Corp.*, 162 L.R.R.M. (BNA) 1329, 1332 (1999).

The Board analyzed the problem by examining whether medical housestaff met the rather broad definition of "employee" within the NLRA.⁷⁸ The core of the opinion stepped through various indicia of employee status—such as the existence of taxable compensation, the existence of benefits, and the provision of services—in its analysis of the issue.⁷⁹ Although the Board discussed some of the factors that made the housestaff "students,"⁸⁰ that discussion, preeminent in its earlier cases, faded into the background, replaced by arguments concerning the possible policy implications of granting the housestaff full rights under the Act.⁸¹

Despite the recent change of heart by the NLRB, several states continue to exclude housestaff from their definition of "employee." Pennsylvania, for example, found that residents in its public hospitals were not employees.⁸² Florida, oddly enough, also found its residents to be "students rather than employees" because they lacked indicia of their employee status.⁸³ Thus, as with graduate assistants, there is no consensus on the legal status of housestaff for the purpose of collective bargaining. Fortunately, because courts and administrative

78. *Id.* at 1339-40.

79. *Id.* at 1340-41.

80. *Id.* at 1341.

81. *Id.* at 1332-44. For example, the Board discussed and dismissed arguments that granting bargaining rights to medical housestaff would make them less loyal to their patients, prevent them from completing their professional training, and interfere with academic freedom and the educational mission of the institution that they served. *Id.*

82. *Wills Eye Hosp. v. Pa. Labor Relations Bd.*, 328 A.2d 539, 543-44 (Pa. Commw. Ct. 1974).

83. The Florida PERC found the following facts to indicate the absence of an employment relationship between hospital and residents:

(1) appointments of residents to hospital were controlled by medical college, rather than by hospital; (2) patient care service assigned to and provided by residents was under the direct supervision and control of the medical college; (3) the medical college retained final authority to evaluate residents' professional performance and educational achievement; (4) the medical college retained final authority to discipline, advance and retain residents; (5) the medical college paid one-third of residents' stipend; (6) two-thirds portion of residents' stipend that was funded by hospital was not derived from hospital revenues, from which salaries of other hospital employees were paid, but from ad valorem taxes; (7) the amount of stipend was determined by negotiations between medical college and hospital without the participation of residents; (8) amount of stipend paid to residents had no correlation to number of hours worked or to complexity of work; and (9) residents did not share in same fringe benefits available to other hospital employees.

In re Bd. of Regents, through the Univ. of S. Fla. College, 8 F.P.E.R. ¶ 13,166 (1982). While this seems to contradict the Florida's pro-labor stance in the case of its graduate assistants, *see supra* notes 53-57 and accompanying text, the decision actually protected the residents in the short term. Because the residents had gone on strike, they would have faced substantial penalties under Florida law had the Florida PERC determined that they were employees. *In re Bd. of Regents, through the Univ. of S. Fla. College*, 8 F.P.E.R. at ¶ 13,166.

bodies have tended to take similar approaches to the issue, dealing with the certification petitions of both groups, the recent movement by the NLRB toward greater labor rights for medical housestaff bodes well for graduate assistants.

III. THREE ANALYTICAL FRAMEWORKS

A. *The Three Existing Frameworks*

The various approaches taken by administrative and judicial bodies over the last thirty years in their examinations of the status of graduate assistants and medical housestaff may be placed in three different frameworks. Those frameworks conceive of graduate students as, first, *either* students *or* employees; second, *primarily* students *or primarily* employees; or, third, employees, but not necessarily the type of employees accorded rights to engage in collective activity.

Using the first analytical framework, the NLRB in *Cedars-Sinai Medical Center*,⁸⁴ for example, found the housestaff to be “students rather than . . . employees.”⁸⁵ Within this framework, the categories “student” and “employee” are viewed as mutually exclusive. Courts and administrative bodies often use this strategy to deny bargaining rights to groups of employees who show any indication of being students.⁸⁶

To sidestep the analytical difficulty of calling graduate assistants or medical housestaff either students or employees, several administrative bodies, including the NLRB, have moved away from that first, rigid framework. In its place, they substituted a second framework, a “predominance” or “primary purpose” test, in which the student employee is categorized as either *primarily* a student or *primarily* an employee to decide whether graduate students have collective bargaining rights. The second framework balances various indicia of student and employee status to determine the status of graduate assistants. If graduate assistants are categorized as primarily employees, then they have the right to bargain collectively; if they are primarily students, they do not.

The NLRB determines the primary status of student employees by looking at their motivation for performing the services at issue.⁸⁷ Student employees who work for either an educational or a commercial employer *and* whose work is related to their education

84. 223 N.L.R.B. 251 (1976).

85. *Id.* at 253 (emphasis added).

86. *See, e.g., id.* at 253-54.

87. *Id.* at 253; *see St. Clare's Hosp.*, 229 N.L.R.B. at 1000-02.

are usually categorized as "primarily students" and thus deprived of the right to join other bargaining units or form their own unit.⁸⁸

Under the third framework, courts and administrative bodies concede that graduate assistants are employees but distinguish between two types of employees: those who have the right to bargain collectively and those who do not. The Massachusetts Labor Relations Commission, for example, uses a two-part inquiry.⁸⁹ First, it asks whether graduate assistants are in an employment relationship with their university.⁹⁰ If they are, then the Commission asks whether the relationship is of the type that gives rise to collective bargaining rights.⁹¹ The Commission ultimately used this approach to deny collective bargaining rights to the state's graduate assistants.⁹²

B. *General Limitations of the Existing Frameworks*

While the three ways of analyzing the status of graduate assistants have similar analytical foundations, each approach presents shortcomings in the way it characterizes the employment relationship between the university and graduate assistants that may, in the end, predetermine the outcome of the inquiry.

The first approach, holding "student" and "employee" as mutually exclusive categories, unduly limits the examination. Administrative and judicial bodies using this first approach look for any indications that the graduate assistants are students and then reason, ipso facto, that they are not employees.⁹³ The focus, then, is simply upon indicia of student status without any real inquiry into their dual status as employees. The problem, of course, is that the categories "student" and "employee" are not mutually exclusive. Such a distinction is certainly not supported by any statutory language in the NLRA. As Member Fanning pointed out in his dissent in *Cedars-Sinai*, "[s]ince the statutory exclusions do not mention and the policy underlying the nonstatutory exclusions does not reach 'students,' the relationship between 'student' and 'employee' cannot be said to be mutually exclusive."⁹⁴ Indeed, the NLRB, in another case, appears to have

88. *St. Clare's Hosp.*, 229 N.L.R.B. at 1001-02.

89. Bd. of Trs., Univ. of Mass., No. SCR-2096, slip op. at 28-29 (Mass. Labor Relations Comm'n Apr. 25, 1979) (Cooper, Chairman).

90. *Id.*

91. *Id.*

92. *Id.* The Commission's policy arguments for finding that graduate assistants were not the type of employees that possessed bargaining rights are discussed in Part IV. It is worth noting, however, that the university voluntarily granted recognition to a representative of a graduate assistant bargaining unit, thus mooted the Commission's decision.

93. The reverse is also true. In the case of New York, the PERB looked to indications that the group were employees, and stopped the inquiry. See Villa, *supra* note 11, at 34. Of course, that may be the only inquiry that is relevant for the purposes of determining whether a group has a right to bargain collectively.

94. 223 N.L.R.B. at 254 (Fanning, Member, dissenting).

acknowledged that the two categories are not exclusive when it categorized groups of employees according to whether they were also students at the institution that employed them.⁹⁵ The second framework has many of the same drawbacks as the first. The balancing approach taken in the second framework also limits the inquiry, but it at least more deeply examines the indicia of both student status and employee status to determine whether a graduate assistant has collective bargaining rights. Even if graduate assistants are primarily students, the second framework fails to address the implications arising from the fact that they may also be employees. As Fanning explained, "[t]he fundamental question then is *always* whether the individual before us, be that individual 'primarily a carpenter' or 'primarily a student,' is, *nevertheless*, an 'employee' under the [National Labor Relations] Act."⁹⁶

Under the third framework, the question becomes not whether graduate assistants are truly employees, but whether, for public policy reasons, they should be accorded collective bargaining rights. This third approach at least makes explicit what is only implicit in the first two approaches: that as a matter of public policy, graduate assistants may be denied the rights to organize and bargain collectively when denying such rights serves some higher purpose. This third framework, however, has some of the same problems as the first two: it merely shifts the inquiry—whether graduate assistants should have a right to bargain collectively—back a step. It does at least have the advantage of making the normative issues explicit in its analysis.

The remainder of this article will analyze the substantive issues that arise within these three frameworks. Specifically, the next part will analyze the indicia of employee and student status, and the final part will address the public policy arguments against extending collective bargaining rights to graduate assistants.

IV. GRADUATE ASSISTANTS AS EMPLOYEES AND AS STUDENTS

A. Graduate Assistants As Employees

Conventionally, an "employee" is someone who performs service for another in exchange for compensation.⁹⁷ Several administrative and judicial bodies have found that graduate assistants are

95. St. Clare's Hosp. and Health Ctr., 229 N.L.R.B. 1000, 1000-02 (1977).

96. *Cedars-Sinai*, 223 N.L.R.B. at 254 (Fanning, Member, dissenting).

97. See, e.g., *NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85, 90 (acknowledging that employees include anyone who works for another). There is some authority for restricting the ordinary definition of "employee" to exclude independent contractors and agents. See *Black's Law Dictionary* 543 (7th ed. 1999). For a more general discussion of the status of student employees, see Gregory, *supra* note 23, and Martin H. Malin, *Student Employees and Collective Bargaining*, 69 Ky. L.J. 1 (1980).

"employees" under this simple definition. The NLRB, for example, recently noted in *New York University* that:

Graduate assistants work as teachers or researchers. They perform their duties for, and under the control of, the Employer's departments or programs. Graduate assistants are paid for their work and are carried on the Employer's payroll system. The graduate assistants' relationship with the Employer is thus indistinguishable from a traditional master-servant relationship.⁹⁸

The New York PERB also found that graduate assistants were employees for the purposes of their bargaining statute, explaining that a regular and substantial employment relationship existed and that the legislature had evinced no intent to exclude graduate students.⁹⁹ Thus, receiving compensation for services rendered was enough for these administrative bodies to find employment relationships that gave rise to bargaining rights. Other, more specific aspects of graduate assistants' relationship with universities are also indicative of an employment relationship.

1. Form of Compensation

The method of payment—a salary—makes the relationship between graduate assistants and universities look like one of employment.¹⁰⁰ Several universities fighting graduate assistant organization have attempted to characterize the salary as a "stipend," a form of financial aid.¹⁰¹ However, "stipend" is merely a "buzzword" used to bolster the universities' position.¹⁰² Monies for graduate assistant salaries often

98. 332 N.L.R.B. No. 111 at 2. The Florida Court of Appeals similarly noted: They [graduate assistants] . . . perform work for the various universities operated by the board, their work is of benefit to the universities for which it is performed, the work is performed subject to the supervision and control of professors who are employees of the several universities, and the work is performed in exchange for the payment of money by the board to the graduate assistants who perform the work. *A more classic example of an employer-employee relationship can hardly be imagined.*

United Faculty of Fla. Local 1847 v. Bd. of Regents, 417 So. 2d 1055, 1058 (Fla. Dist. Ct. App. 1982) (emphasis added); see also *In re Employees of Temple Univ.*, Case no. PERA-R-99-58-3 (Penn. Pub. Rel. Bd. Oct. 17, 2000) (finding graduate assistants to be employees under state law in part because they "receive compensation from Temple in the form of stipends and tuition and book allowances and are required to perform services for Temple in exchange for that compensation").

99. *In re Communications Workers of Am./Graduate Student Employees Union*, 24 N.Y.P.E.R. (LRP) ¶ 3035 (1991), available at 1991 N.Y.P.E.R. (LRP) LEXIS 2523, at *10; see Villa, *supra* note 11, at 34.

100. *Ass'n of Graduate Student Employees v. Regents of the Univ. of Cal.*, 13 P.E.R.C. ¶ 20,087 (Cal. Pub. Employment Relations Bd. 1989), available at 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting), *aff'd*, 8 Cal. Rptr. 2d 275 (Cal. Ct. App. 1992).

101. See, e.g., *New York Univ.*, 332 N.L.R.B. No. 111; *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

102. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230

come out of the general fund for the university.¹⁰³ Payments to graduate assistants are made through regular university personnel payment channels,¹⁰⁴ and graduate students often receive the same paycheck as other state employees.¹⁰⁵

Graduate assistant salaries cannot be characterized as a form of financial aid for a number of reasons. First, graduate assistantships are not awarded on the basis of need.¹⁰⁶ Second, characterizing graduate assistant salaries as mere "aid" ignores the necessity of the services they provide to the university.¹⁰⁷ Finally, universities themselves often do not consider the salaries as financial aid. Indeed, one director of financial aid flatly stated that the compensation received by graduate teaching assistants is not considered financial aid by the financial aid department itself.¹⁰⁸ Clearly, the form of compensation for services rendered by graduate assistants is a strong indication of employee status.

2. Taxation of Compensation

Many administrative and judicial bodies have taken the taxable status of graduate student compensation as an indication of their status as employees. After years of fluctuating on the subject, the Internal Revenue Code now states that while most tuition reductions (in the form of a complete or partial tuition waiver) are not taxable,¹⁰⁹

(Craib, Member, concurring and dissenting).

103. K.A.P.E. Brief, *supra* note 16, at 8.

104. *Id.*; *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

105. K.A.P.E. Brief, *supra* note 16, at 8.

106. *See Ass'n of Graduate Student Employees*, 1989 PERC (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

107. *See id.*

108. K.A.P.E. Brief, *supra* note 16, at 10.

109. The exemption of tuition waiver from gross income is spelled out in § 117(d) of the Code: -

(d) Qualified tuition reduction.

(1) In general. Gross income shall not include any qualified tuition reduction.

(2) Qualified tuition reduction. For purposes of this subsection, the term "qualified tuition reduction" means the amount of any reduction in tuition provided to an employee of an organization described in section 170(b)(1)(A)(ii) for the education (below the graduate level) at such organization (or another organization described in section 170(b)(1)(A)(ii)

I.R.C. § 117(d) (1994).

Tuition reduction provided for an employee for education *at graduate school* is covered in § 117(d)(5):

(5) Special rules for teaching and research assistants. In the case of the education of an individual who is a graduate student at an educational organization described in 170(b)(1)(A)(ii) and who is engaged in teaching or research activities for such organization, paragraph (2) shall be applied as if it did not contain the phrase "(below the graduate level)".

salaries received as a result of the activity that qualifies a graduate assistant for tuition reduction are included in gross income.¹¹⁰ Section 117(c) states:

(c) Limitation. Subsections (a) and (d) [exempting certain types of monies from gross income] shall not apply to that portion of any amount received which represents payment for teaching, research, or other services by the student required as a condition for receiving the qualified scholarship or qualified tuition reduction.¹¹¹

Thus, the IRS considers graduate assistant salaries to be taxable, providing further indication that graduate assistants are employees.

Administrative and judicial bodies, however, have used (or failed to use) the tax status of graduate student salaries in a variety of ways. The NLRB, for example, determined that research assistants at Stanford University were not employees for the purposes of collective bargaining because their income was tax exempt at that time.¹¹² State public employee relations boards have also looked to the taxable status of graduate student income. The Oregon Employment Relations Board relied heavily on evidence that graduate employees had federal and state income tax as well as Social Security withheld from their income in its decision that they were employees.¹¹³ The Board even went so far as to define the graduate student organizing unit in language similar to the tax code cases.¹¹⁴

Other states considered the tax issue but did not find it compelling. The California PERB, for example, was not at all persuaded by the taxable nature of graduate assistant salaries, finding that graduate students were not in an employment relationship with the university despite the taxation of their compensation.¹¹⁵ The New York PERB did not even consider the argument by the graduate assistants that tax status is an indication of employee status.¹¹⁶

3. Other Factors

There are several other indications that the relationship at issue is one of employment. For example, at KU, teaching and research assistantships are often advertised as job vacancies.¹¹⁷ The postings

Id. § 117(d)(5).

110. *Id.* § 117(c).

111. *Id.*

112. Leland Stanford Junior Univ., 214 N.L.R.B. 621, 622 (1974).

113. Villa, *supra* note 11, at 38.

114. *Id.*

115. Ass'n of Graduate Student Employees v. Regents of the Univ. of Cal., 13 P.E.R.C. ¶ 20,087 (Cal. Pub. Employment Relations Bd. 1989), available at 1989 P.E.R.C. (LRP) LEXIS 230.

116. *In re Communications Workers of Am./Graduate Student Employees Union*, 24 NYPER ¶ 3035 (N.Y. Pub. Employment Relations Bd. 1991), available at 1991 NYPER (LRP) LEXIS 2523.

117. K.A.P.E. Brief, *supra* note 16, at 3; see Villa, *supra* note 11, at 37.

have legal employment footnotes, such as equal opportunity employer statements, base salary statements, and duties and requirements.¹¹⁸ Except for the lack of offered benefits, application packets are often identical to those sent to faculty.¹¹⁹ Moreover, some universities require their graduate assistants to sign employment contracts prior to commencing duties. Kansas, for instance, requires students to sign a contract outlining the "Conditions of Appointment for students employed as part-time graduate teaching assistants."¹²⁰

B. Graduate Assistants as Students

In determinations of graduate assistant status, indicia of employment status constitute only half of the analysis. Employers argue that the graduate employees are students rather than employees, or, more frequently, "primarily students." Those seeking to reject the certification of graduate assistant bargaining units have availed themselves of various arguments that point toward the academic nature of the assistants' relationship with the university. Most of these arguments, however, are less than convincing.

1. Relationship to Academic Program

Some argue that because most graduate programs require their teaching and research assistants to be continuously registered as students with the university, a graduate assistant is more student than employee.¹²¹ Like the University of California system, most universities require that their graduate assistants remain registered students in good standing.¹²² That fact, however, does not warrant the conclusion that they are more like students than employees. First, the condition of continued enrollment may be viewed as merely a job requirement. Requiring certain qualifications of an employee does not diminish his status as an employee. Indeed, in this case, a requirement of continuous enrollment really bears less of a relationship to the actual work than, say, requiring a truck driver to maintain a valid driver's license. Second, the fact that not all enrolled graduate students also teach or perform research suggests that such activities are not an intrinsic part of being a student. That is, not all students teach, but some students are employed as teachers in addition to being students.

118. K.A.P.E. Brief, *supra* note 16, at 3.

119. *Id.*

120. *See, e.g., id.* (emphasis in original).

121. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230; Villa, *supra* note 11, at 34. California's Higher Education Employer-Employee Relations Act, Cal. Gov't Code § 3562(e) (West Supp. 2000), makes this relationship part of the test of employee status.

122. *See* Villa, *supra* note 11, at 36.

Many maintain that because university departments have teaching or research requirements as part of their graduate degree programs, such activity is merely part-and-parcel of being a graduate student. At the University of California at Berkeley, for example, sixteen departments had some sort of teaching requirement for their graduate students.¹²³ Additionally, graduate research assistants are often required to do research as part of their degree program.¹²⁴

This argument is not compelling. First, most departments do not require any type of teaching by candidates for a graduate degree.¹²⁵ Moreover, those that *do* usually demand only two or possibly three semesters of teaching; many graduate students, however, often teach for four or five years to support themselves through graduate school.¹²⁶ In addition, although graduate schools often have a research requirement, the requirement does not mandate that the students be *employed* as researchers. As with teaching requirements, few departments require their students work as research assistants during their entire tenure, yet many students choose to do so for economic reasons.

Some argue that graduate assistants are primarily students because, even if employment is not required, they still receive academic credit for their work.¹²⁷ As applied to graduate teaching assistants, however, this argument is usually untrue.¹²⁸ Indeed, the Florida courts distinguished teaching assistants from medical residents precisely because the assistants did not receive academic credit for teaching.¹²⁹

123. See *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

124. Leland Stanford Junior Univ., 214 N.L.R.B. 621, 621-22 (1974).

125. See, e.g., New York Univ., 332 N.L.R.B. No. 111 (Oct. 31, 2000); Yale Univ., No. 34-CA-7347, 1997 N.L.R.B. LEXIS 619, at *5-6 (Aug. 6, 1997) ("With a few limited exceptions, service as a teaching fellow is not a degree requirement in any educational discipline."), *aff'd*, 1999 N.L.R.B. LEXIS 820 (Nov. 29, 1999); see also *In re Employees of Temple Univ.*, Case no. PERA-R-99-58-3 (Penn. Pub. Relations Bd. Oct. 17, 2000) ("[T]he Graduate Assistants perform vital teaching and research services for Temple not . . . as a required part of their educational curriculum, but by their own choice. There is no requirement that a graduate student perform work for Temple as a Graduate Assistant in order to obtain a graduate degree.") Even at the University of California, Berkeley, for example, the sixteen departments that required any sort of teaching represented only a small percentage of the departments at the university. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

126. See *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

127. *Stanford Univ.*, 214 N.L.R.B. at 622.

128. See, e.g., *In re Employees of Temple Univ.*, Case no. PERA-R-99-58-3 ("[T]he Graduate Assistants do not receive academic credit for the performance of their duties").

129. *United Faculty of Fla. Local 1847 v. Bd. of Regents*, 417 So. 2d 1055, 1059 n.3 (Fla. Dist. Ct. App. 1982).

2. Importance to Education and Career

A weaker version of the previous argument asserts that the work of graduate student employees is central to their education and thus should be categorized as educational.¹³⁰ For example, the NLRB found residents' service to be "directly related to" and an "integral part of" their education.¹³¹ But, such a position is, ultimately, without merit.

The argument's first shortcoming is that much of the work performed by graduate assistants is often not related to their dissertation or other required degree work.¹³² Work assignments, while usually in a teaching assistant's general academic area, are made according to the needs of the department, and may be completely unrelated to the assistant's specific field of interest.¹³³ Further, even if the subject is within the graduate student's area, it usually involves very basic subject matter that the student has already mastered.¹³⁴ Indeed, if anything, teaching actually hinders the academic progress of most graduate assistants by reducing their ability to take on a full academic load, thereby delaying work on their dissertations.¹³⁵ Although this argument applies with greater force to research assistants than to teaching assistants (their research is more closely related to their own academic work),¹³⁶ research assistants may also work on projects not directly related to their dissertations.¹³⁷

The weakest version of this argument maintains that graduate assistants are more students than employees because they learn something on the job.¹³⁸ Of course, learning something on the job does not make one a student instead of an employee. As pointed out by the dissent in *Cedars-Sinai*, "there is a didactic component to the

130. Villa, *supra* note 11, at 34. In California, the relationship of services to a student's educational objectives and whether those educational objectives are subordinate to the services are an express element of the test of employee status for the purpose of collective bargaining. California's Higher Education Employer-Employee Relations Act, Cal. Gov't Code § 3562(e) (West Supp. 2000); see Regents of the Univ. of Cal., 22 P.E.R.C. ¶ 29,084 (Cal. Pub. Employment Rel. Bd. 1998), available at 1998 P.E.R.C. (LRP) LEXIS 54, at *7-8, *20-32; Regents of the Univ. of Cal., 23 P.E.R.C. ¶ 30,025 (Cal. Pub. Employment Relations Bd. 1998), available at 1998 P.E.R.C. (LRP) LEXIS 197, at *8-9, *30-34.

131. St. Clare's Hosp. and Health Ctr., 229 N.L.R.B. 1000, 1002 (1977).

132. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

133. *United Faculty of Fla.*, 417 So. 2d at 1058.

134. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting); Yale Univ., No. 34-CA-7347, 1997 N.L.R.B. LEXIS 619, at *8 (Aug. 6, 1997), *aff'd*, 1999 N.L.R.B. LEXIS 820 (Nov. 29, 1999).

135. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

136. *Id.*; Villa, *supra* note 11, at 36.

137. Leland Stanford Junior Univ., 214 N.L.R.B. 621, 622 (1974).

138. See *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

work of *any* initiate, but simply because an individual is 'learning' while performing this service cannot possibly be said to mark that individual as 'primarily a student and, therefore, not an employee' for purposes of our statute."¹³⁹ Similarly, the Michigan Supreme Court concluded, "Members of all professions continue their learning throughout their careers. For example, fledgling lawyers employed by a law firm spend a great deal of time acquiring new skills, yet no one would contend that they are not employees of the law firm."¹⁴⁰

Finally, some contend that teaching is part of a graduate teaching assistant's education because it will make them more attractive in the job market.¹⁴¹ It has even been argued that this is why graduate students teach.¹⁴² Although teaching experience is a factor in obtaining a faculty position, it is not an important one. Instead, research, especially published research, is the key to advancement in almost any academic discipline.¹⁴³ At any rate, the skills that many learn on the job do not make the relationship something other than one of employment.

3. Motivation to Accept Position

Some administrative bodies maintain that graduate assistants are more like students than employees because they base their choices upon academics, not economics.¹⁴⁴ They assert that a graduate assistant's choice of graduate schools, for example, is principally based on educational factors.¹⁴⁵ Their interest in taking the positions purportedly arises primarily out of academic, not economic concerns.¹⁴⁶ The focus of the graduate student program is therefore "not on the amount of the stipend, hours, or fringe benefits, but, rather, on the educational program"¹⁴⁷

This argument fails for several reasons. A person who works as an employee is still an employee even if her principal focus is upon getting an education.¹⁴⁸ An individual may take a job for many reasons, but those reasons do not destroy her status as an employee. In addition, graduate students consider a range of factors in their decision among graduate schools, including the availability of

139. Cedars-Sinai Med. Ctr., 223 N.L.R.B. 251, 256 (1976).

140. Regents of the Univ. of Mich. v. Mich. Employment Relations Comm'n, 204 N.W.2d 218, 226 (Mich. 1973).

141. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

142. *Id.*

143. *Id.* (Craib, Member, concurring and dissenting).

144. See St. Clare's Hosp. and Health Ctr., 229 N.L.R.B. 1000, 1002 (1977); *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

145. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

146. *Id.*

147. *Id.*

148. United Faculty of Fla. Local 1847 v. Bd. of Regents, 417 So. 2d, 1055, 1059 (Fla. Dist. Ct. App. 1982).

economic support. Finally, the argument is based on the false premise that graduate students work solely to learn. In reality, graduate students decide to teach or do research because of economic considerations.¹⁴⁹

4. Limitations on Employment

There is a cluster of arguments that conclude on the basis of various limitations placed on their workload that graduate assistants are students. For example, most universities limit their graduate student appointments to half-time positions. This limitation was interpreted by the California PERB as an indication that Berkeley's graduate assistants were primarily students.¹⁵⁰ It is unclear why such limits make one less of an employee. At least in California, the half-time limit was mainly intended to boost state funding to the institution,¹⁵¹ not to protect graduate students from overworking themselves.

The California PERB further argued that limitations upon the number of terms graduate students could work in their careers, and the fact that they are transitory employees with little hope of career employment with their graduate institution, supported their contention that graduate assistants should be treated as students and not employees.¹⁵² This argument is also unconvincing. Universities may limit the number of semesters a student can teach or research, but these levels may be set to fulfill the university's needs and funding requirements, not to facilitate the studies of its graduate students.¹⁵³ In addition, term limitations are common among non-tenured academic employees.¹⁵⁴ Finally, many graduate students spend the bulk of their five to ten-year tenures as teaching or research assistants, which makes their stay less ephemeral than suggested by the California PERB.

The California PERB also used the fact that graduate assistants are only hired one year at a time as further evidence of their status as students.¹⁵⁵ Many employees, however, sign contracts for fixed terms, and still more are at-will. Ironically, the lack of multi-year contracts is one of the deficiencies that prompt graduate assistants to bargain in the first place.¹⁵⁶ This brings us directly to some of the final and least convincing arguments, based on graduate assistants' inadequate compensation and lack of authority.

149. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

150. *Id.* (Majority opinion).

151. *Id.* (Craib, Member, concurring and dissenting).

152. *Id.* (Majority opinion).

153. *Id.* (Craib, Member, concurring and dissenting).

154. *Id.* (Majority opinion).

155. *Id.*

156. This was the case at KU.

Some opponents to treating graduate assistants as employees argue that graduate assistant compensation should be characterized as a stipend because it bears no relationship to either the hours spent or the services performed.¹⁵⁷ Outside the university similar services would probably be compensated at a much higher level. The opponents argue that the compensation paid is "more in the nature of a living expense as opposed to compensation for services rendered" because "[s]tep increases are not available to the students in either the GSI [graduate student instructor] or GSR [graduate student researcher] positions, and cost-of-living increases are not automatically granted each year."¹⁵⁸ Instead of giving regular cost of living increases or setting compensation levels in relation to the value of the services performed, universities set compensation at a level to encourage graduate assistants to apply for non-university financial aid.¹⁵⁹

The opponents further argue that the lack of benefits also indicates the student status of graduate assistants.¹⁶⁰ For example, students at the University of California, Berkeley, did not receive "retirement benefits, medical or dental benefits, short-term disability insurance, paid life insurance, paid vacation, or paid sick leave."¹⁶¹ Further, graduate student employment was not subject to the university's regular layoff policy, and the student employees did not use the standard grievance procedures.¹⁶² For these reasons, the California PERB found that graduate students employed at Berkeley lacked the "indicia of employment" that were necessary to support their right to bargain collectively.¹⁶³ Similarly, the NLRB found Stanford research assistants to be students rather than employees in part because they did not receive any fringe benefits.¹⁶⁴

The absurdity of these arguments is evident. Lack of adequate compensation and benefits does not mean that graduate assistants are merely students, nor does it indicate that they are not employees; instead, it simply means that they are *undercompensated* employees. Holding that a group lacks the right to bargain collectively *because* they are grossly underpaid, and thus could not possibly be employees, is self defeating. Graduate assistants organize in order to redress these deficiencies in their compensation and benefits; it is nonsensical to deny them the right to organize on these grounds.¹⁶⁵

157. Leland Stanford Junior Univ., 214 N.L.R.B. 621, 622 (1974).

158. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

159. Villa, *supra* note 11, at 36.

160. *Stanford Univ.*, 214 N.L.R.B. at 622; *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

161. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

162. *Id.*

163. *Id.*

164. *Stanford Univ.*, 214 N.L.R.B. at 622.

165. See *United Faculty of Fla. Local 1847 v. Bd. of Regents*, 417 So. 2d 1055, 1060

A final argument advanced for the proposition that graduate assistants are merely students revolves around their purported lack of responsibility. In *Adelphi University*, for example, the NLRB found that graduate teaching assistants held little responsibility because full-time faculty, not graduate assistants, determined class content and grades.¹⁶⁶ The NLRB further observed that graduate assistants could not attend faculty meetings or be eligible for promotions and tenure.¹⁶⁷

In fact, many graduate teaching assistants now have much more responsibility than those at Adelphi University in the early 1970's. Teaching assistants at KU, for example, selected textbooks, planned syllabi, gave lectures, designed and graded all projects and examinations, and assigned a final grade.¹⁶⁸ In short, they had complete control of their class from start to finish. Selected graduate assistants also served on various university committees.¹⁶⁹ Even if one accepted the premise that graduate teaching assistants are not granted much responsibility, that would not compel the conclusion that the assistants are therefore mere students. It would simply mean that they are relatively low-level employees.

5. Conflicts

Those who view "student" and "employee" as mutually exclusive categories argue that graduate assistants are not employees because their employment duties are subordinate to their academic duties when the two come into conflict.¹⁷⁰ In truth, however, a graduate assistant's employment obligations usually take precedence. As the dissent in the California case pointed out:

The proper comparison would be to examine what would happen when a conflict arose between degree work and the duties of a GSI [graduate student instructor] who is already in that position. . . . It is . . . undisputed that, where there is a conflict between degree work and GSI duties, the GSI duties take precedence. . . .

In fact, the evidence shows that when GSIs are faced with strict deadlines for both types of work, they go to their professors (from whom they are taking classes) or their research advisors and seek an extension of time to complete their work. The deadlines for GSI work (for example, the submitting of grades) are, in contrast, viewed

(Fla. Dist. Ct. App. 1982). Of course, graduate assistants at state universities can also lobby the legislature. Lack of legislative responsiveness and school administration support, however, at least at KU, is one of the principal factors that prompted organization efforts. See Carroll, *Plan to unionize*, *supra* note 17.

166. *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972).

167. *Villa*, *supra* note 11, at 36.

168. K.A.P.E. Brief, *supra* note 16, at 7.

169. *See id.*

170. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

as immutable. . . . [This] unequivocally results in the conclusion that educational objectives of GSIs are subordinate to the services provided.¹⁷¹

Plainly, the argument that graduate assistants' role as students takes precedence over their role as employees is not compelling in light of what actually occurs when conflicts arise.

The arguments that graduate assistants are either "merely" students or "primarily" students, therefore, are seriously deficient. Some argue, though, that even if graduate assistants are employees, they should nonetheless be denied collective bargaining rights for public policy considerations. Those arguments are the subject of the final section of this article.

V. PUBLIC POLICY ARGUMENTS

Some universities and administrative bodies that oppose organizing efforts admit that graduate assistants are "employees" but argue that allowing them to bargain is contrary to public policy. The Massachusetts Labor Relations Commission, for example, used it to deny certification to a unit of graduate assistants.¹⁷² The policy arguments most often asserted are that extending bargaining rights to graduate assistants would interfere with academic freedom and policymaking of the university and disrupt faculty-student relationships.

Some federal and state judicial bodies, however, have found that public policy does not dictate denying collective bargaining rights to graduate assistants. As one federal court explained, "[w]e . . . have not been directed to, nor have we found, any expression of a national labor policy that students be wholly unregulated in either the [National Labor Relations] Act itself or its legislative history."¹⁷³ The court went on to find that the impact of collective bargaining should not determine national labor policy, but should instead be dealt with by educational policymakers.¹⁷⁴ Some state legislatures have agreed. The California legislature, for example, found collective bargaining of graduate assistants to be consistent with the educational policies of the state.¹⁷⁵ Thus, there is some recognition that judicial and administrative bodies should not address questions of public policy when deciding whether to grant bargaining rights to graduate assistants.

171. *Id.* (Craib, Member, concurring and dissenting).

172. Bd. of Trs., Univ. of Mass., No. SCR-2096, slip op. at 28-29 (Mass. Labor Relations Comm'n Apr. 25, 1979).

173. *NLRB v. Comm. of Interns and Residents*, 426 F. Supp. 438, 452 (S.D.N.Y. 1977).

174. *Id.* at 453.

175. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

A. *Bargaining over Education*

The principal public policy argument against allowing graduate assistant unions is that collective bargaining would obligate universities to bargain over educational matters.¹⁷⁶ The California PERB, for example, reasoned that because economic and educational concerns overlap, granting bargaining rights to graduate assistants would result in negotiating academic practices.¹⁷⁷ Similarly, the lead opinion in the Massachusetts decision reasoned that allowing graduate assistants to bargain over wages, hours, and conditions of employment would necessarily impact the academic, financial aid, and admissions policies of state schools.¹⁷⁸ Those opposed to graduate assistant bargaining rights argue that bargaining would inevitably affect decisions, such as the number of students admitted to graduate programs, and replace considerations of academic excellence with factors such as seniority.¹⁷⁹ The evils, according to this argument, are self-evident. Collective bargaining would directly affect academic policy, a subject traditionally within the exclusive province of the university. Further, in states such as California, granting bargaining rights to graduate assistants would violate a state statute that proscribes negotiations over educational policy.¹⁸⁰

This argument has been amplified by the argument that extending such rights somehow impinges upon academic freedom,¹⁸¹ such as the freedom of the university "to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."¹⁸² The NLRB echoed this sentiment, noting that academic "freedoms encompass not only the right to speak freely in the classrooms, but also such fundamental matters as the right to determine course length and content; to establish standards for advancement and graduation; to administer examinations; and to resolve a multitude of other administrative and educational concerns."¹⁸³ The Board resolved that "[i]f one were to conclude that the student-teacher and employee-employer relationships were in fact analogous, then it would follow that many academic freedoms would become bargainable as wages, hours, or terms and conditions of employment."¹⁸⁴

176. See Villa, *supra* note 11, at 36.

177. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230.

178. *Bd. of Trs., Univ. of Mass.*, No. SCR-2096, slip op. at 24.

179. *Id.* at 24-25.

180. Cal. Gov't Code § 3562(q)(1) (West Supp. 2000); see *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

181. *St. Clare's Hosp. and Health Ctr.*, 229 N.L.R.B. 1000, 1002 (1977).

182. *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

183. *St. Clare's Hosp.*, 229 N.L.R.B. at 1003.

184. *Id.*

These arguments of public policy are flawed for several reasons. Initially, the arguments depend upon an overly broad definition of educational policy. The definition of "educational objectives" adopted by the California PERB, for example, includes nearly every concern even remotely related to an academic discipline.¹⁸⁵ Furthermore, the same argument applies to every other union within the university system that might bargain over issues that ultimately affect matters of educational policy.¹⁸⁶ State boards, however, have been fairly liberal in allowing faculty unions, and even more so in allowing the organization of university support staff. Moreover, in most states, the absence of a strike threat for public employees means that the university need not accept bargaining proposals inconsistent with educational quality.¹⁸⁷

Finally, any adverse impact that collective bargaining may have upon educational policies truly within the university's exclusive province may be dealt with by limiting the scope of bargaining.¹⁸⁸ Certain matters of educational policy could be held out as permissive as opposed to mandatory subjects of bargaining. Several states already use this approach. Michigan, for instance, determined that the scope of bargaining can be limited if issues fall within the educational sphere, holding that "[s]ome conditions of employment may not be subject to collective bargaining because those particular facets of employment would interfere with the autonomy of the Regents."¹⁸⁹ The Michigan Employment Relations Commission went on to find that the university's ten-term teaching limit was not a mandatory subject of bargaining because it affected matters in the educational sphere, such as encouraging students to finish their degrees and directly influencing the number of students that could be funded.¹⁹⁰ Courts and administrative bodies should therefore deal with what is a proper subject of bargaining by limiting the scope of the bargaining process, not by denying bargaining rights altogether.¹⁹¹

185. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

186. *United Faculty of Fla. v. Bd. of Regents*, 417 So. 2d 1055, 1059-1061 (Fla. Dist. Ct. App. 1982).

187. *Id.* at 1059-60. Most states expressly deny public employees the right to strike. See Martin H. Malin, *Public Employees' Right to Strike: Law and Experience*, 26 Mich. J.L. Reform 313, 313 (1993).

188. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

189. *Univ. of Mich.*, 4 M.P.E.R. ¶ 22,039 (Mich. 1991).

190. *Id.*

191. One final public policy argument has been advanced by the Board of Regents for the University of Florida system, which argued that it should be protected from bargaining because it might agree to pay more than it should. Fortunately, the Florida Court of Appeals gave this argument its full due, dismissing it in one sentence, stating that "[I]f concern about higher costs were sufficient reason [to deny graduate assistants the right to bargain], collective bargaining rights could be denied to every employee" *United Faculty of Fla. v. Bd. of Regents*, 417 So. 2d 1055, 1060-1061

B. *Disruption of Student-Faculty Relationship*

The second public policy argument made against graduate assistant organizing rights is that bargaining would disrupt graduate student-faculty relations. This argument manifests itself in opposition to collective bargaining for all academic employees. Usually, proponents of this position describe the university as a delicate, easily disrupted academic community.¹⁹² Arguments specific to graduate assistants focus upon the "personal" nature of graduate education, one that is not well suited to collective action.¹⁹³ The student-teacher relationship is said to be one of mutual interests, as opposed to the conflicting interests at the core of the adversarial employment relationship.¹⁹⁴ Some further argue that the student-faculty relationship is not supposed to be equal, as it might be at the bargaining table: faculty members, by virtue of their position, obviously know more than the students they teach.¹⁹⁵

The principal flaw in this argument is that graduate assistants do not bargain with faculty—they bargain either with administrators at private universities or state regents (either directly or through university administrators) at public universities. The faculty is merely another class of employees, a class that may bargain for its own contract with the university.

A second problem with this argument is that it exaggerates the relationship between graduate *teaching* assistants and faculty. The student-mentor relationship that may exist between research assistants and their professors simply does not exist between teaching assistants and their supervisors.¹⁹⁶ Teaching assistants usually have limited contact with their supervising professor, and receive little real "supervision."¹⁹⁷

Finally, the only large scale study on the issue found that graduate assistant unions do not harm student-professor relationships.¹⁹⁸ Gordon Hewitt, an institutional research analyst at Tufts University, asked nearly 300 faculty members at five universities with collective bargaining for graduate assistants whether unions impeded their

(Fla. Dist. Ct. App. 1982).

192. See, e.g., Univ. of N.H. Chapter of the Am. Ass'n. of Univ. Professors v. Haselton, 397 F. Supp. 107 (D.N.H. 1975) (stating that the potential undermining of the relationship is a reasonable basis for the state to exclude the university employees from the benefits conferred by the state statute on other state employees).

193. St. Clare's Hosp. and Health Ctr., 229 N.L.R.B. 1000, 1002 (1977).

194. *Id.*

195. *Id.* at 1002-03.

196. *Ass'n of Graduate Student Employees*, 1989 P.E.R.C. (LRP) LEXIS 230 (Craib, Member, concurring and dissenting).

197. *Id.*

198. *Graduate-Student Unions Don't Hurt Professor-Advisee Relations, Survey Finds*, Chron. Higher Educ., Nov. 5, 1999, at A18.

ability to advise and educate graduate students.¹⁹⁹ Ninety percent of the faculty members said that it did not impede their ability to advise graduate students, and ninety-two percent said that unions did not make it more difficult to instruct graduate students.²⁰⁰ Thus, the argument that collective bargaining will somehow disrupt the delicate student-teacher relationship is not supported.

CONCLUSION

The arguments against allowing graduate teaching and research assistants to organize into collective bargaining units are not compelling. Graduate assistants possess all the classic indicia of employees. The three approaches used by administrative agencies and courts to assess whether graduate assistants should be allowed collective bargaining rights focus upon the irrelevant question of whether graduate assistants are students or employees for the purpose of collective bargaining. Graduate assistants are, of course, *both* students *and* employees and, as employees, they should be granted the right to bargain collectively. The arguments for classifying graduate assistants as solely students are either non sequiturs (graduate assistants receive no fringe benefits) or patently false (graduate teaching is crucial to an academic career). Finally, the public policy arguments against the certification of units of graduate assistants are seriously flawed. Plainly, when graduate assistants organize to remedy their employment situation, they should be accorded full rights at the bargaining table.

199. *Id.* The five universities were the State University of New York at Buffalo and the Universities of Florida, Massachusetts, Michigan, and Oregon. *Id.*

200. *Id.*