

# COLLECTIVE BARGAINING IN HIGHER EDUCATION

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## I. INTERNAL AND EXTERNAL MODES OF REPRESENTATION

THE public sector of higher education is expanding rapidly, while the private sector is not. As a result, both the number and proportion of faculty members employed by public colleges and universities are increasing.<sup>1</sup> It is clear that the current debate about collective bargaining for public servants is of profound importance to higher education. Until recently, this problem had been of no practical concern. In the 1930's, when labor unions generally were flourishing under the New Deal, the American Federation of Teachers (AFT) drew enough sympathizers in colleges and universities to form locals on many campuses.<sup>2</sup> Some of these may have been rallying points for reform; but few if any sought recognition as collective bargaining representatives, and none achieved such status. In the past decade, however, the successes of the AFT in metropolitan school systems permitted a reinvigoration of its college department. The concurrent proliferation of new post-secondary public institutions, especially community colleges, offered a fertile field for growth. These two-year institutions were often tied to the public schools, staffed by veterans of public school bargaining, frequently autocratic in administration, and strained by rapid expansion. Thus, they allowed a significant scope of union organization. Many public four-year colleges oriented to teacher training exhibited similar characteristics. Finally, as this Symposium illustrates, recent legislation in major states has given new encouragement to collective bargaining for public employees.

Given these generally favorable influences, it is surprising that collective bargaining through an exclusive agent has not become more widely established in higher education. Even the most fervent proponent of organization, the AFT, probably did not have more

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1. AMERICAN COUNCIL ON EDUCATION, A FACT BOOK ON HIGHER EDUCATION 8125 (1968).

2. For a useful and authoritative summary of AFT positions in higher education, see Kugler, *The Union Speaks for Itself*, 49 EDUCATIONAL RECORD 414 (1968).

than a dozen college contracts in effect at the end of 1968.<sup>3</sup> Of the contracts in existence, most were in Michigan and New York, and at community colleges. The most important units in terms of size were located in the Chicago City College, which has eight two-year campuses, and among part-time and temporary teachers in the City University of New York, which consists of seventeen separate graduate, four-year, and two-year campuses.<sup>4</sup> Overall, by the generous estimate of its chief spokesman, the AFT had "well over 15,000 faculty members on over 100 campuses."<sup>5</sup>

The American Federation of Teachers has had to make its way in higher education against what its officers must consider the traditional obstacles to recruitment of bargaining units—apathy, timidity, and outright hostility. It has also faced other professional organizations whose policies are sometimes complementary and sometimes adverse to collective bargaining. For example, when the AFT made a vigorous but unsuccessful attempt to organize the eighteen California state college faculties in 1966 and 1967, there were four other organizations to which faculty members belonged and which took positions in the controversy: the Association of California State College Professors, composed of faculty members only, which somewhat equivocally offered itself as a rival candidate for representative status; the California College and University Faculty Association, associated with the California Teachers Association; the California State Employees Association, in which membership is open to all state employees, and which, like the preceding organization, favored the development of internal bargaining arrangements through the Faculty Senate; and the American Association of University Professors (AAUP), which also was opposed to exclusive representation by an external organization.<sup>6</sup>

Another example of local opposition to collective bargaining on the trade union model occurred in the recent City University of New

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3. It had, however, won a major victory in December of 1968 through an election to determine the representation of 6,000 part-time and temporary faculty members in the City University of New York, and at the same time it had suffered a major defeat in a separate election for the 5,000 full-time faculty of C.U.N.Y., N.Y. Times, Dec. 7, 1968, at 56, col. 1.

4. There is one contract at a federal institution, the U.S. Merchant Marine Academy, and, also uniquely, one in which an American Association of University Professors chapter is the representative, at Belleville Junior College, in Illinois.

5. Kugler, *supra* note 2, at 414. The *New York Times* reported that the AFT has approximately 10,000 members in 70 locals. N.Y. Times, Nov. 24, 1968, at 86, col. 1.

6. See Larsen, "Collective Bargaining" *Issues in the California State Colleges*, 53 A.A.U.P. BULL. 217 (1967). The results of a poll of AAUP members on this issue is reported in 53 A.A.U.P. BULL. 350 (1967). At this point, it must be reiterated that the author as President of the AAUP is both officially and privately a supporter of its policies.

York election. There an organization of faculty members, the Legislative Conference, had been active since 1938, chiefly in advancing faculty interests before the several state agencies that have some voice in the City University's affairs.<sup>7</sup> The Legislative Conference initiated the representation proceeding that led to the election, partly, it seems, to forestall the AFT, and partly because of an independent judgment that without formally conferred statutory status it could no longer function effectively in its dealings with officials who seem unable to comprehend the legitimacy of any less orthodox arrangements. A split decision resulted; the Legislative Conference was the majority choice of the faculty members eligible for tenure, but the AFT was chosen by the temporary and part-time teachers who were not on the university's tenure ladder. The other choice offered in the elections, "neither representative," finished a poor third.<sup>8</sup>

It is unnecessary to offer further examples of multiple organizations in other systems and states. There are doubtless other oddities similar to the long-established Legislative Conference. Moreover, the California pattern is not uncommon, with the AAUP, the AFT, a faculty association of the particular institution, the state affiliate of the National Education Association, and the state organization of civil service employees all welcoming the allegiance of faculty members, who may—and often do—belong to two or more of them, depending on the strength of their joining and dues-paying proclivities.

In this welter of organizational commitments, the academic may be infrequently confronted with questions of bargaining representation. In the national arena, the only well-developed positions are those of the AFT and the AAUP. The AFT follows the general pattern of American unionism as embodied in the National Labor Relations Act (NLRA)<sup>9</sup> and state counterparts governing private and (increasingly) public employment. That is, it asserts that designating an organization independent of the institution as the exclusive representative of all the professional employees of the institution is normal and inevitable. It accepts a management-employee relationship between governing boards and administrations on the one hand and faculties on the other. It expects to bargain for and achieve through collective contracts uniform conditions of employment, through which it aspires to increase salaries and decrease workloads. With respect to the special characteristics of academic life, it supports academic freedom, early tenure, and the authority of the

7. See Brown, *Representation of Economic Interests: Report of a Conference*, 51 A.A.U.P. BULL. 374, 375 (1965).

8. See note 3 *supra*.

9. 29 U.S.C. §§ 151-68 (1964).

faculty *qua* faculty in such matters as curriculum development and the determination of scholastic standards. Emphasizing the autonomy of its locals, it also makes a point of "the strong community support engendered by being part of the organized labor movement."<sup>10</sup>

The AAUP, on the other hand, generally rejects exclusive representation by unions or any other external agencies because it has a different view of the proper organization of a university and of the faculty's place in that organization. Central to the AAUP's position is its commitment to "the proposition that faculty members in higher education are officers of their colleges and universities. They are not merely employees. They have direct professional obligations to their students, their colleagues, and their disciplines . . ." <sup>11</sup> This principle is more than an article of faith; it is a reflection of the practice prevailing in well-ordered institutions, and it is implicit in a current authoritative *Statement on Government of Colleges and Universities*, jointly formulated in 1966 by the American Association of University Professors, the American Council on Education, and the Association of Governing Boards of Universities and Colleges.<sup>12</sup> Stressing shared responsibility and joint action, the 1966 *Statement* declares that the faculty should participate in such decisions as the following:

- (1) major changes in the size or composition of the student body;
- (2) basic decisions regarding buildings and other facilities to be used in the educational work of the institution;
- (3) selection of a new president, and of academic deans and other chief academic officers.<sup>13</sup>

These and other instances of shared authority are joined with the faculty's "primary responsibility for such fundamental areas as curriculum, subject matter and methods of instruction, research, faculty status, and those aspects of student life which relate to the educational process."<sup>14</sup>

An expert's observations on the *Statement* further illuminate the kind of faculty role that it envisages. The General Secretary of the AAUP, after mentioning some examples of shared authority, observes:

10. Kugler, *supra* note 2, at 417.

11. Special Joint Committee on Representation, Bargaining, and Sanctions, *Faculty Participation in Strikes*, 54 A.A.U.P. BULL. 155, 157 (1968). The AAUP, founded in 1915, has approximately 90,000 members in 1,150 chapters.

12. The *Statement* has been reprinted in several educational publications, e.g., 52 A.A.U.P. BULL. 375 (1966), and is available in pamphlet form from the AAUP's Washington Office.

13. 52 A.A.U.P. BULL. 375, 376-77 (1966).

14. 52 A.A.U.P. BULL. 375, 378 (1966) (emphasis added).

One . . . provision . . . calls for more extended comment, because its spirit infuses the entire statement. The president's "leadership role is supported by delegated authority from the board and faculty." In strictly legal terms, all institutional authority may be in the hands of the board; but it has been commonly assumed that the board delegates authority to the president, and the president in turn may delegate certain parts of it to the faculty. The statement rejects that view of academic life. The faculty's authority, it is clear, rests not upon presidential understanding or largesse, but upon the faculty's right, as the institution's foremost professional body, to exercise the preeminent authority in all matters directly related to the institution's professional work.<sup>15</sup>

If such a conception of faculty power is realized, there is little need for the faculty to resort to a bargaining model that assumes the centralization of operating and policy decisions in management. To a very considerable extent, the 1966 *Statement* sees the faculty as a part of management.<sup>16</sup>

Even when the enviable "management" status exists, its presence does not mean that bargaining for economic gains is unnecessary. Clearly, those who provide public funds for higher education are faced with competing claims for limited resources, and are not likely to shower benefits on faculties unless faculty groups act on the maxim that the squeaking wheel gets greased. The AAUP position is that faculties organized for self-government can and should communicate their concerns to governmental ears:

The Association recommends that faculty members, in decisions relating to the protection of their economic interests, should participate through structures of self-government within the institution, with the faculty participating either directly or through faculty-elected councils or senates. As integral parts of the institution, such councils or senates can effectively represent the faculty without taking on the adversary and sometimes arbitrary attitudes of an outside representative.

Faculties in publicly supported institutions, after achieving what they can by themselves, will increasingly need to join hands with their colleagues on other campuses in order to deal with governing and coordinating boards that have broad jurisdiction, with executive agencies, with the legislatures, and with the national government.<sup>17</sup>

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15. Davis, *Unions and Higher Education: Another View*, 49 THE EDUCATIONAL RECORD 139 (1968), reprinted in 54 A.A.U.P. BULL. 317, 320 (1968).

16. See AAUP, Michigan's Public Employment Act and the State's Colleges 81-82 (1967) (statement of Prof. Clyde Summers).

17. AAUP *Statement of Policy on Representation of Economic Interests*, April 27, 1968, reprinted in 54 A.A.U.P. BULL. 152, 152-53 (1968).

The upshot of the line of argument here presented is not that exclusive representation by an external agency for collective bargaining is unworkable; it is rather that such representation is incompatible with the professional goals of faculty members in higher education.

The obvious rejoinder is to deny that the ideals of professional interdependence and autonomy are attainable. Thus an AFT spokesman asserts, "we must recognize that professors are not officers of an institution on appointment, but professional employees."<sup>18</sup> An overworked teacher of English composition in a community college, meeting six sections in day and evening classes, required in effect to punch a time clock for daily office hours, disenfranchised from any influence over policies set by lofty and remote state boards and presidents, might reject even the adjective "professional." There are too many like him, but he represents only part of reality. And, we currently lack the materials to make a comprehensive survey of good and bad practices in faculty-administration relations, other opinions are available. To take a notable example, McGeorge Bundy, President of the Ford Foundation and former Dean of the Harvard Faculty of Arts and Sciences, has analyzed the current status of "Faculty Power":

The growth of faculty responsibility and power in academic matters is obvious to all who see the daily give-and-take of academic bargaining. In the last twenty-five years the balance of power has shifted dramatically. Before the Second World War there were only a few places where tradition, excellence, and administrative restraint had combined to give the faculty great strength. Now that strength has been conferred on the academic profession as a whole by the massive authority of the law of supply and demand. The economic force of this law had been matched by a new level of social and political prestige for men of learning as a class.<sup>19</sup>

Even though Mr. Bundy is speaking of universities (and, one would have to add, not of all universities) he is describing a substantial portion of the profession. Clearly, there are many institutions where the model of shared authority has been attained; there are many more where it is attainable; and, unfortunately, there are many where it is not foreseeable. It is the first thesis of this Article that the advantages of an internal framework of representation make it worthwhile to strive for its realization.

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18. Kugler, *supra* note 2, at 415.

19. Bundy, *Faculty Power*, THE ATLANTIC MONTHLY, Sept. 1968, at 41-42.

## II. THE EFFECT OF LAWS GOVERNING PUBLIC EMPLOYEE BARGAINING

### A. *The Nature of the Bargaining Groups Recognized*

Whatever the ideal relationship between authority and bargaining arrangements may be, we can postulate that faculty members, like anyone else, should have considerable freedom of choice in the agency and manner by which they will be represented. Here the law can have something to say, as it has for other employed professionals and most of the labor force. Invoking the law brings us to the second thesis of this Article—a more even-handed one, which simply declares that a legal framework for bargaining should not throw its weight toward support of one form of representation rather than another. Some recent statutes that legitimize and encourage public employee bargaining are clearly not even-handed when they are applied to higher education. They assume the primacy of the trade-union model and ignore the unique characteristics of the academic community.

If, in the absence of statutory authorization, there is uncertainty about the propriety of collective bargaining in any form for public employees, then the statute takes on special importance. Provisions that are simply protective or permissive in the context of private sector relationships may in the public sphere be interpreted as establishing undeviating commands, and thus may inhibit consensual variations. This possibility becomes acute when formal proceedings are initiated. The phenomenon can be illustrated by the example of a hypothetical public institution with a university senate composed predominantly of faculty members, but containing some administrators. Its expenses for maintaining a secretariat and other functions are borne by the university. The practice is for a committee of the senate to consult with university officers about salaries and other financial considerations, and for both faculty and administrative spokesmen to urge the institution's needs before the appropriate legislative committees. Such an arrangement would be entirely compatible with the outlook of the 1966 *Statement on Government of Colleges and Universities*.<sup>20</sup> If a statute is enacted that permits employee organizations to petition a state board for certification as bargaining representatives, and an election is scheduled to be held, what happens to the existing arrangements?

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20. See note 12 *supra*.

A similar issue is pending before the Public Employment Relations Board in New York State under the Taylor Law,<sup>21</sup> concerning the university-wide Senate of the State University of New York. While the hypothetical situation above does not purport to describe the past activities of the S.U.N.Y. Senate, that body's leadership does wish to have the Senate included among the choices that the faculty will have in the election. The statute speaks of "employee organizations" as eligible for certification, and the statutory definition states that "[t]he term 'employee organization' means an organization of any kind having as its primary purpose the improvement of terms and conditions of employment of public employees."<sup>22</sup> "Of any kind" is comprehensive enough to include the Senate, but what is its "primary purpose"? Did the statute's draftsmen mean to draw a very narrow definition, or a broad one? The keystone of the Taylor Law is the declaration that "[p]ublic employees shall have the right to form, join and participate in, or to refrain from forming, joining, or participating in, any employee organization of their own choosing."<sup>23</sup> It is hard to imagine "joining" the Senate, let alone refraining from joining it. But since it is an elected body, faculty members "participate" in it about as much as union members do in their unions.

There are also at least two subsidiary questions on which the statute provides no direct guidance. Can a senate represent the faculty in bargaining when it includes members from "management," that is, from the administration? If this is an obstacle, it can be surmounted by reconstituting the senate so that it is purely a "faculty senate." But what about the senate's use of university facilities and its support from university funds? Are these debilitating blandishments, or simply a public recognition of the useful functions performed by the senate? The AAUP *Statement on Representation of Economic Interests* declares that a "faculty elected council or senate . . . can have the requisite autonomy and independence of the administration to carry out its functions."<sup>24</sup> Whether it does have sufficient autonomy is a question of fact that the faculty should be able to decide for itself; the decision should not be made for the faculty by an administrative agency. In the author's view, public support for a

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21. N.Y. Civ. Serv. Law §§ 200-12 (McKinney Supp. 1968). [The present version of this law, as amended by a bill passed on March 4, 1969 (effective April 1, 1969), appears in GOVERNMENT EMPLOYEE RELATIONS REPORT, No. 288, at F-1 (March 17, 1969).]

22. *Id.* § 201(6).

23. *Id.* § 202.

24. 54 A.A.U.P. BULL. 153 (1968).

faculty senate, without distinction between its bargaining and other functions, is just as much a proper cost of the university's operation as is support for the administration or for the state labor relations board. But it must be admitted that a state legislator might not take this view of an appropriation that would be used in part to extract even greater appropriations for faculty salaries.

Either by forethought or by happy accident, the New Jersey statute of 1968<sup>25</sup> avoids many of these difficulties by creating a less restrictive definition of the bargaining agent. It provides that public employees may select a "representative" for negotiations, and defines "representative" as including "any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them."<sup>26</sup>

### B. *The Subject Matter of Bargaining*

Another cluster of problems crops up when a statute, in the conventional language, describes the appropriate subjects of bargaining as simply "terms and conditions of employment." Some statutes contain limitations on the scope of bargainable issues, but neither the limitations nor the generalization meets the special problem of a university faculty. That problem, stripped to its essentials, is to prevent the pervasive and traditional areas of faculty academic authority from being absorbed into the newly created collective bargaining process. Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but it is quite likely to occur.<sup>27</sup> Thus, an expert task force of the American Association for Higher Education, in a calm appraisal of the pros and cons of industrial-style collective bargaining for higher education, concluded that an academic agency such as a faculty senate

25. New Jersey Employer-Employees Relations Act, N.J. STAT. ANN. §§ 34:13A-1 to -11 (Supp. 1968), *amending* N.J. STAT. ANN. §§ 34:13A-1 to -13 (1959).

26. *Id.* § 34:13A-3(e) (Supp. 1968).

27. Robert A. Gorman, *Statutory Responses to Collective Bargaining in Institutions of Higher Learning*, March 4, 1968 (unpublished memorandum located in the offices of the AAUP).

would probably "atrophy" in the shadow of an external bargaining agent.<sup>28</sup> If the faculty considers such an outcome undesirable, it is possible to argue that the bargaining agent, whether external or internal, is after all under the faculty's control—a majority can in due course repudiate it and choose a new one. But this may be easier prescribed than accomplished.

### C. *The Problem of Exclusive Bargaining Agents*

Much of the unease that the statutory pattern arouses in some quarters is traceable to the grant of exclusivity that usually accompanies certification of a bargaining agent. The notion that the agent preferred by the majority represents everyone is so entrenched in American labor relations law that it seems futile to challenge it. It typifies strength through solidarity, majority rule, and other supposed virtues. The fact that advanced Western European countries permit workers to be represented by agents that are really of their own choosing, even if the result is that more than one union deals with the employer, apparently carries little weight.<sup>29</sup> It must be conceded that some of the opposition to exclusivity of representation in higher education comes from faculty organizations like the AAUP; they certainly fear loss of their own access to university officials to discuss issues of professional interest. However, they also have a more disinterested concern that exclusivity will combine with a broad range of bargainable issues to exclude the faculty's internal agencies from any meaningful role in governance.

A related concern has to do with the faculty member's freedom, under otherwise exclusive arrangements, to pursue an individual grievance without having to seek and accept representation by the bargaining agency. This is an exceedingly vexing issue in labor relations generally. The AAUP, which with diffidence encourages its chapters to offer themselves as bargaining representatives if the circumstances seem to demand an external agency, is not at all diffident in its opposition to exclusivity; it urges any of its components that may achieve representative status "[t]o create an orderly and clearly defined procedure within the faculty governmental structure for prompt consideration of problems and grievances of faculty members, to which procedure any individual or *group* shall have full

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28. AMERICAN ASSOCIATION FOR HIGHER EDUCATION, FACULTY PARTICIPATION IN ACADEMIC GOVERNANCE 3 (1967).

29. BROWN, *Representation of Economic Interests: Report of a Conference*, 51 A.A.U.P. BULL. 375-76 (1965).

access."<sup>30</sup> The pressure to channel everything through the bargaining agent is mitigated, in public employment, by the notion that the citizen's right to petition his government directly cannot be closed off either by statute or by contract.<sup>31</sup> In higher education, moreover, the independent professional status of the faculty member provides another ground for asserting his freedom to advance some of his interests independently of the collective undertaking. But this line of argument invites an ideological collision with demands for uniformity of treatment. The AFT, for example, favors uniform salary schedules and deprecates "academic entrepreneurs who hop to other institutions that are ready to pirate them away with the lure of *individual* betterment."<sup>32</sup>

When new legislation or alterations in existing statutes are proposed, attention should be given to some of the problems that have been surveyed above, particularly to the need for clarifying the eligibility of faculty senates and other internal bodies to act as bargaining representatives. The impetus for such provisions, if there is to be any, will have to come from professional organizations, since professors, numerous as they have become, are only a small part of the public service establishment. Other general rules that do not deal adequately with the special circumstances of academic life are difficult and impractical to correct in the legislative process; the legislature is understandably more responsive to the interests of organized labor. When discretion is conferred on an administrative agency,<sup>33</sup> of course, a fuller opportunity exists to develop the case for internal controls.

### III. THE APPROPRIATE UNIT PROBLEM

One subject over which an administrative body of government ordinarily has power is the determination of the appropriate bargaining unit. The dimensions of this problem in higher education are not unlike those in other occupations. First there is the need to define the common interests that justify creation of a separate unit. University professors will usually claim that "members of the faculty" form an appropriate unit, but who are members of the faculty? In

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30. *AAUP Statement of Policy on Representation of Economic Interests*, April 27, 1968, reprinted in 54 *A.A.U.P. BULL.* 152, 154 (1968) (emphasis added).

31. Gorman, *supra* note 27.

32. Kugler, *supra* note 2, at 417 (emphasis, presumably pejorative, is in the original).

33. In New York, for example, the Public Employment Relations Board has the important power to decide issues of exclusivity. *N.Y. CIV. SERV. LAW* § 207 (McKinney Supp. 1968).

the City University of New York case, as previously noted, the New York Public Employment Relations Board established two units by drawing a line between those positions in which the occupants were eligible for academic tenure and those in which they were not.<sup>34</sup> Not surprisingly, there were marginal categories that were hard to classify. Some of those who lie beyond the margin may be most in need of protection, particularly teaching assistants who are said to be exploited because of their lowly status as graduate students, or auxiliary professionals such as librarians and computer specialists who do not have the protection of academic tenure, but who may in other respects have faculty status in their institution. Should institutional practice be controlling, or should general standards be sought? The boundaries of the academic community are hardly self-defining.

The other dimensions of the appropriate unit problem are essentially geographical and functional. An excellent example of these difficulties is the pending case of the State University of New York, a capacious organism which includes every variety of four-year, graduate, and professional school, and which has jurisdiction—albeit shared with local groups—over dozens of community colleges. Apart from the especially awkward position of the community colleges, the hard question is whether a single unit is appropriate. It would appear to be, on first impression, since there is a single board of trustees and a central administration which—perhaps of most importance—makes a single bid for appropriations to the New York legislature. But this is not self-evident either, and the appropriate-unit problem has been the occasion for extended hearings.

There will always be some matters that are beyond statutory or administrative adjustment, and in this area the respect that is paid to academic mores can be enhanced or diminished in the bargaining process itself. Recall that the AAUP, if acting as an external bargaining agent, stresses the importance of maintaining a channel through which any faculty member or group can pursue individual grievances.<sup>35</sup> Beyond this, an administration and a bargaining representative who were of like minds on principles of shared power could contract, within the expansive limits of the phrase “terms and conditions of employment,” to withdraw all sorts of academic issues from unilateral control of either administration or bargaining representative, and to reserve them for prescribed internal procedures with

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34. See text accompanying notes 7 and 8 *supra*.

35. See text accompanying note 30 *supra*.

full faculty participation.<sup>36</sup> In this way, ideals of academic government could become the third-party beneficiaries of collective bargaining agreements that might otherwise threaten them.

#### IV. STRIKES BY FACULTIES OF PUBLIC UNIVERSITIES

The problem of strikes in relation to collective bargaining in public higher education has been left to the end of this Article, not because the issue is climactic, but rather for the opposite reason. For one thing, the AFT and the AAUP, the two national voices which often diverge on collective bargaining matters, are in harmony on the proposition that legal prohibitions of faculty work stoppages in either public or private institutions are unwarranted. In the words of an AAUP Committee Report,

[p]ublic servants directly concerned with public health and safety—the classic examples are police and firemen—may have to endure restraints on their freedom to refuse their services. While we place a lofty value on higher education, we do not believe that its interruption by a strike affects the public health and safety. If declarations of national emergency or other overriding public policies generally limited freedom to withhold services, we should not ask for nor expect discrimination in favor of teachers. But, along with the many other public functionaries whose continuous services are not vital to the community, teachers in public institutions of higher education should not have their liberties automatically restricted simply because (to the extent that they are employees) a governmental agency is their employer.<sup>37</sup>

But with respect to the *propriety* of faculty strikes, dissonance persists. The AFT spokesman apparently regards strikes as a painful but unavoidable cost of “free unions,” which “imply the right to withhold services as a protest against grave unprofessional conditions.”<sup>38</sup> The content of “grave unprofessional conditions” is prudently left undefined, but from the record it would presumably embrace a broader range of economic complaints than would move the AAUP to such action. As recently as 1966—the year of the AFT strike at St. John’s University against conditions that were grossly unprofessional by anyone’s definition—the Executive Committee of the AAUP declared that the Association “has never looked upon the strike as an appropriate mechanism for resolving academic contro-

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36. Gorman, *supra* note 27.

37. Special Joint Committee, *supra* note 11, at 158.

38. Kugler, *supra* note 2, at 417.

versies or violations of academic principles and standards."<sup>39</sup> That position has been undergoing re-examination; there is pending for adoption as AAUP policy a statement that recalls the special privileges and responsibilities of faculty members and characterizes the strike as inappropriate "for the resolution of most conflicts within higher education."<sup>40</sup> The proposed statement goes on to declare:

Situations may arise affecting a college or university which so flagrantly violate academic freedom (of students as well as of faculty) or the principles of academic government, and which are so resistant to rational methods of discussions, persuasion, and conciliation, that faculty members may feel impelled to express their condemnation by withholding their services, either individually or in concert with others. It should be assumed that faculty members will exercise their right to strike only if they believe that another component of the institution (or a controlling agency of government, such as a legislature or governor) is inflexibly bent on a course which undermines an essential element of the educational process.<sup>41</sup>

The accompanying AAUP committee report, after speculating that a faculty might be so underpaid and overloaded as to undermine the educational process, "emphatically reject[s] the industrial pattern which holds the strike in routine reserve for use whenever economic negotiations reach an impasse."<sup>42</sup>

There have been too few strikes in higher education, public or private, to permit useful analysis of their etiology or pathology. Nor can one predict with any confidence what will or should happen when a strike is unsuccessful and the striking faculty members are replaced or dismissed. With respect to the painful possibility of sanctions against striking faculty, the only thing that the AAUP's deliberation has produced is an admonition that due process must be afforded.<sup>43</sup>

#### V. THE FUTURE OF COLLECTIVE BARGAINING IN HIGHER EDUCATION

About a year ago, the American Council on Education made a survey of expectations of people in higher education about trends to 1980. The respondents were also asked to express their approval or disapproval of what they foresaw. In reply to a question on the prevalence of collective bargaining by college and university faculties,

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39. Special Joint Committee, *supra* note 11, at 156.

40. Special Joint Committee, *supra* note 11, at 157.

41. *Id.*

42. *Id.* at 158.

43. *Id.* at 157-58.

forty per cent of the administrators said that they expected it to become commonplace, and ninety per cent stated that they did not like the prospect.<sup>44</sup> The reasons for the responses were not solicited (it was a very long questionnaire), and they are not easy to divine. The dislike of collective bargaining may have some principled basis, or it may simply represent apprehensiveness about something new and therefore presumably arduous. If some respondents thought that collective bargaining would result in more formidable expectations to be satisfied, they should heed the views of Chancellor Mitchell of the University of Denver. Fresh from a career in publishing, Mr. Mitchell was astounded (and dismayed) by the pressure for organized faculty power. "If I were a faculty member," he said, "I would trade any union contract I ever signed for the present unwritten contract under which faculty are employed at a university and feel I had inherited enormous amounts of flexibility . . . . One comes quickly to the conclusion that it is hard to beat the present deal."<sup>45</sup> As for the prediction that collective bargaining will burgeon, did the presidents and vice-presidents mistake the wave of the past for the wave of the future? Do they think that, despite the stasis of unionism in commerce and industry, its dynamism will revive among public employees in higher education, particularly in the lower reaches of higher education?

In the present disordered state of the world and the universities, one does not have to be unusually pessimistic to expect a general hardening of lines of communication and action. Instead of the spirit of cooperation and open communication that infuses the 1966 *Statement on Government of Colleges and Universities*, one can foresee each component of the university becoming distant, withdrawn, adversary. Perhaps wrongly, collective bargaining—with its connotation of dealing at arm's length—may be viewed as the style best adapted to periods of truce in a 'Thirty Years' War.

It seems equally likely, unless a new equilibrium with some resemblance to the old reappears, that the current instability may lead to new groupings and new contests for power to control decisions in higher education. The emergence of a third force—that of organized and activist students—is disrupting the bipolar world in which faculty on the one hand, and administration plus governing board on the other, were dominant and other groups—alumni,

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44. AMERICAN COUNCIL ON EDUCATION, *THE FUTURE ACADEMIC COMMUNITY: CONTINUITY AND CHANGE* 140 (1968).

45. Mitchell, *The Curious World of University Tenure*, COMPACT, Aug. 1968, at 31, 33.

parents, students, officials—had satellite roles. This is not the place, nor am I qualified, to explore these large trends. One can only suggest that faculty members may have to look to their allegiances. Will they prefer to move closer to the students? To the administration? To close ranks with their fellows? Will they have a choice? It may be that something not now known will displace both the cooperative model and the bargaining model in the politics of higher education. This would be cause for some regret; both models have their merits and both are rooted in experience, yet neither has been fully developed nor widely embraced.