

HOSPITAL RESIDENTS AND INTERNS: INCONSISTENT TREATMENT UNDER FEDERAL LAW

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I. INTRODUCTION

In 1976, when organizational activity among housestaff¹ for the purpose of collective bargaining was at its peak,² the National Labor Relations Board (hereinafter NLRB) determined that hospital residents and interns were not "employees" within the meaning of the National Labor Relations Act (hereinafter NLRA)³ and, therefore, not entitled to the protection of the Act.⁴ In reaching this decision, the Board all but ignored long-standing common law on hospital vicarious liability⁵ and took a position directly contrary to that maintained by the Department of the Treasury.⁶

Subsequent court decisions concerning interns' and residents' exclusion of their stipends from federal income taxation under section 117 of the Internal Revenue Code⁷ have held that housestaff are, in essence, "employees" and are not entitled to the exclusion.⁸ In so holding, these courts have, in turn, disregarded the NLRB decisions. A recent circuit court decision has confused the issue further by characterizing the tax determination as one of fact, to be determined on a case

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1. Hospital residents and interns are commonly referred to as "housestaff" or "house officers."

2. See Grace, *House-Staff Officers: Collective Bargaining in the Health Care System*, 2 J. LEGAL MED. 415, 415-23 (1981).

3. 29 U.S.C. §§ 151-169 (1982).

4. Cedars-Sinai Medical Center, 223 N.L.R.B. 251, 253 (1976).

5. Of particular interest is *Lawhorne v. Harlan*, 200 S.E.2d 569 (Va. 1973), involving the sovereign immunity of a state hospital and its operatives in a malpractice suit. After concluding that a state agency is immune from actions in tort and that this immunity extends to an employee of such an agency, the court held that the intern involved was "a salaried employee of the hospital." *Id.* at 571.

6. See *infra* note 76 and accompanying text.

7. See *infra* note 43.

8. See, e.g., *Cooney v. United States*, 630 F.2d 438 (6th Cir. 1980); *Rockswold v. United States*, 620 F.2d 166 (8th Cir. 1980); *Meek v. United States*, 608 F.2d 368 (9th Cir. 1979); *Johnson v. United States*, 507 F. Supp. 663 (D. Minn. 1981); *Burstein v. United States*, 622 F.2d 529 (Ct. Cl. 1980).

by case basis.⁹ Residents and interns are caught in the middle: for income tax purposes they are employees, for labor law purposes they are not.

This Article analyzes this apparent inconsistency. The author recognizes that these classifications are merely legal labels used for different purposes and reached through different tests, but nevertheless concludes that inconsistency actually exists in both the results obtained and the methodologies used. Specifically, to say that interns and residents receive their stipends primarily as compensation for services rendered is inconsistent with the claim that the primary purpose of the housestaff-hospital relationship is educational. This Article concludes that, despite extensive criticism,¹⁰ the NLRB ruling is essentially correct. The ruling reflects a reasonable interpretation of the NLRA, is supported by Board precedent, and apparently fulfills the expectations of residents and interns. The standard used in the tax cases, however, is either incorrect or has been misapplied¹¹ and, therefore, should be reconsidered so as to remove the inconsistency.

9. *Mizell v. United States*, 663 F.2d 772 (8th Cir. 1981), *reh'g denied*, 669 F.2d 552 (1982). *See Leathers v. United States*, 471 F.2d 856 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973).

10. *See Grace*, *supra* note 2; Malin, *Student Employees and Collective Bargaining*, 69 KY. L.J. 1 (1980); Comment, *Hospital House Staff—NLRB Did Not Exceed Its Statutory Authority in Holding that House Staff Are Not Employees Within the Meaning of the NLRA*—Physicians National House Staff Association v. Fanning, 56 NOTRE DAME LAW. 314, 315 n.11 (1980); Note, *Medical Housestaff: Scholars or Working Stiffs? The Pending PERB Decision*, 12 PAC. L.J. 1127 (1981); Note, *Student-Workers or Working Students? A Fatal Question for Collective Bargaining of Hospital Housestaff*, 38 U. PITT. L. REV. 762 (1977) [hereinafter cited as Note, *Student Workers or Working Students?*]; Note, *Labor Problems of Interns and Residents: The Aftermath of Cedars-Sinai*, 11 U.S.F.L. REV. 694 (1977) [hereinafter cited as Note, *Labor Problems*].

11. This Article makes only passing references to the characterization of housestaff as employees for vicarious liability and workers' compensation purposes. This is largely because these determinations are governed by state law and, as such, are less troublesome if facially inconsistent with federal tax and labor law.

The job status of apprentice medical-related personnel is highly problematic and usually must be determined not only on a case-by-case basis but also with special regard to relevant statutory provisions. Though possibly and seemingly incongruous, a lab technician trainee could be considered a student for some purposes and an employee for others.

Wright v. Wilson Memorial Hosp., 226 S.E.2d 225, 226 (N.C. Ct. App. 1976) (workers' compensation case commenting on recent NLRB decision). *Cf. Pearson v. Harris*, 439 So. 2d 399, 341-42 (Fla. Dist. Ct. App. 1984) (suggesting that the difference between "employee" under the workers' compensation law and "employee" under common law is "largely academic"). This Article includes a limited discussion of state labor law to supply contrast to the NLRB decisions.

II. BACKGROUND

Before proceeding, it is necessary to explain what internships and residencies are. Both are clinical training programs beginning after receipt of a medical degree. Internships are traditionally the first year of postgraduate training, usually in general medicine or surgery.¹² In most states, completion of an internship is a requirement for licensing.¹³ Residencies are more specialized training programs, traditionally beginning after an internship and lasting an additional one to five years. Completion of a residency is a requirement for certification in a specialty or subspecialty.¹⁴

Medical school graduates are paired with internship and residency programs by the National Intern and Resident Matching Program. Graduating medical students list, in order of preference, the positions for which they have applied, and hospitals similarly rank their student applicants. Both the students and the hospitals submit their lists to the Program and agree to be bound by the matching results.¹⁵

Interns and residents have a variety of responsibilities. They take medical histories, perform physical examinations, diagnose illnesses, devise therapies, and prescribe pharmaceuticals. Housestaff also participate in rounds and assist in surgical procedures. Their educational activities include teaching rounds, laboratory instruction, seminars, and lectures.¹⁶

Hospitals often require their housestaff to work more than one

12. In 1975, the American Medical Association abolished the term "internship" and began classifying all postgraduate clinical training programs as residencies. Tucker, *Federal Income Taxation of Scholarships and Fellowships: A Practical Analysis*, 8 IND. L. REV. 749, 780 n.129 (1975). This Article will maintain the distinction to differentiate between those who are licensed to practice medicine and those who are not.

13. Note, *Labor Problems*, *supra* note 10, at 696-97.

14. AMERICAN MEDICAL ASSOCIATION, 1984-1985 DIRECTORY OF RESIDENCY TRAINING PROGRAMS 7 [hereinafter cited as DIRECTORY OF PROGRAMS]. Certification, the process by which a specialty board recognizes an individual physician as having met certain predetermined qualifications relating to a medical specialty, should not be confused with licensure, which is the process by which an agency of state government grants permission to an individual physician to practice medicine within that state.

Although certification is not compulsory, almost all physicians specialize and almost all students graduating from medical school seek specialty certification. Havighurst & King, *Private Credentialing of Health Care Personnel: An Antitrust Perspective—Part One*, 9 AM. J.L. & MED. 131, 139-40 (1983).

15. Cedars-Sinai Medical Center, 223 N.L.R.B. at 252. See DIRECTORY OF PROGRAMS, *supra* note 14, at 7-15; Liston & Fetgatter, *The General Essentials of Accredited Residencies in Graduate Medical Education*, 247 J. A.M.A. 3002 (1982).

16. Cedars-Sinai Medical Center, 223 N.L.R.B. at 252. See JOINT COMMISSION ON ACCREDITATION OF HOSPITALS, ACCREDITATION MANUAL FOR HOSPITALS 22, 56, 64, 86, 105, 132, 183 (1983).

hundred hours per week,¹⁷ much of which is without supervision. Nevertheless, housestaff do not have the autonomy of staff physicians; their decisions, particularly those relating to diagnosis and treatment, often are subject to approval and, when necessary, housestaff are closely observed.

Housestaff receive an annual stipend, usually between \$15,000 and \$25,000, which increases yearly and which is determined neither by the nature or extent of the services rendered nor by financial need. In addition, most housestaff receive a variety of fringe benefits. These often include medical care, paid vacations, uniforms and laundry service, meals while on duty, and malpractice insurance.¹⁸

III. THE LEGAL STANDARDS

A. Labor Law

In 1974, Congress deleted the statutory exemption of nonprofit hospitals from the coverage of the NLRA.¹⁹ The budding unionization movement among housestaff gained momentum, and in 1975, following a series of housestaff strikes, the Physicians National House Staff Association changed its structure to that of a registered labor organization.²⁰

As part of this movement, the Cedars-Sinai Housestaff Association sought recognition as a labor organization for the purpose of collective bargaining. When the Cedars-Sinai Medical Center challenged the union's representation petition, the NLRB decided to hear the case along with others involving the unionization of the health care industry.²¹

The Board recognized that housestaff receive many benefits characteristic of employees, but nevertheless concluded that they were primarily students and, therefore, not "employees" under the NLRA.²²

17. The poll of interns and residents taken for this Article at various hospitals in the Boston area indicates that, although the time requirements decrease as housestaff proceed through the years of their training, the average house officer works 101 hours per week. For a more detailed discussion of the poll, see *infra* notes 105-08 and accompanying text.

18. Cedars-Sinai Medical Center, 223 N.L.R.B. at 252.

19. Pub. L. No. 93-360, 88 Stat. 395 (1974).

20. Grace, *supra* note 2, at 420-23.

21. Cedars-Sinai Medical Center, 223 N.L.R.B. at 251.

22. *Id.* at 253. The NLRA defines "employee" in a rather tautological way: "The term 'employee' shall include any employee" 29 U.S.C. § 152(3) (1982). This does not provide much guidance for the NLRB, which must resort to policy considerations when deciding who is an "employee" under the Act. The primary purpose test is an attempt to do just this and, in general, would appear to do a reasonable job. The test identifies those persons whose interests are most likely to be identical to those of their employer. Such persons are not likely to get into the type of labor disputes that the NLRA was intended to prevent.

Placing great emphasis on its "primary purpose" test,²³ the Board determined that housestaff participation in the clinical programs was not for the purpose of earning a living, but to pursue the training necessary for the practice of medicine.²⁴ It found that the programs themselves were designed to allow students to develop the judgment and proficiency necessary to practice medicine, and not for the purpose of meeting the hospital's staffing requirements.²⁵ The Board also emphasized that the housestaff rarely remained with the Medical Center after completion of their programs, and noted that the stipend payments were more in the nature of a living allowance than compensation for services rendered.²⁶

The Board acknowledged that student and employee are not mutually exclusive positions; housestaff could be, and were, both. It rested its decision, however, on the "fundamental difference between an educational and an employment relationship."²⁷ This rather cryptic point was clarified a year later in *St. Clare's Hospital & Health Center*.²⁸

In *St. Clare's*, the Board explained that the *Cedars-Sinai* decision was not about the health care industry, but about students in general.²⁹ It went on to classify Board precedent regarding students into four categories: 1) students employed by commercial employers in a capacity unrelated to their course of study; 2) students employed by their educational institutions in a capacity unrelated to their course of study; 3) students employed by commercial employers in a capacity that is related to their course of study; and 4) students employed by their educational institutions in a capacity directly related to their course of study.³⁰

Students in category 2 or 4—the latter of importance to housestaff³¹—were traditionally, and would continue to be, excluded from bargaining units with nonstudent employees and denied, by the Board, the right to a separate unit.³² As in *Cedars-Sinai*, the Board reasoned

23. *Cedars-Sinai Medical Center*, 223 N.L.R.B. at 253.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.*

28. 229 N.L.R.B. 1000 (1977). Prior to *St. Clare's*, the NLRB had uniformly followed *Cedars-Sinai* without much discussion of the particular facts in each case. See *Deaconess Hosp.*, 226 N.L.R.B. 1143 (1976); *Wayne State Univ.*, 226 N.L.R.B. 1062 (1976); *Kansas City Gen. Hosp. & Medical Center*, 225 N.L.R.B. 108 (1976); *Barnes Hosp.*, 224 N.L.R.B. 552 (1976); *Buffalo Gen. Hosp.*, 224 N.L.R.B. 76 (1976); *University of Chicago*, 223 N.L.R.B. 1032 (1976).

29. *St. Clare's Hosp. & Health Center*, 229 N.L.R.B. at 1000.

30. *Id.* at 1000-02.

31. *Id.* at 1002.

32. *Id.* at 1001-02. The NLRB has held that graduate students who serve as teaching assistants "are primarily students and do not share a sufficient community of interest with the regular faculty to warrant their inclusion in the [faculty bargaining]

that such students' employment is incidental to their primary interest of acquiring an education, and that such a transitory relationship does not warrant the protection of the NLRA.³³ In addition, the Board concluded that services performed by students in the last category actually are part of the educational program. Thus, according to the Board, students and their educational institutions have mutual interests—which are predominantly academic, not economic—in the services being rendered. Such a mutuality of interests is foreign to the normal employment relationship and not readily adaptable to the collective bargaining process.³⁴

unit." *Adelphi Univ.*, 195 N.L.R.B. 639, 640 (1972); *College of Pharmaceutical Sciences*, 197 N.L.R.B. 959, 960 (1972). These cases later were interpreted to mean that such students are not even "employees" within the meaning of the NLRA.

[T]hese research assistants are like the graduate teaching and research assistants who we found were primarily students in *Adelphi University* . . .

We find, therefore, that the research assistants in the physics department are primarily students, and we conclude that they are not employees within the meaning of Section 2(2) [sic (should refer to § 2(3))] of the Act.

Leland Stanford Jr. Univ., 214 N.L.R.B. 621, 623 (1974). See *Clark County Mental Health Center*, 225 N.L.R.B. 780 (1976).

33. *St. Clare's Hosp. & Health Center*, 229 N.L.R.B. at 1001.

"Until *Cedars-Sinai*, expectation of continued employment has not been a factor in denying collective bargaining rights to persons working on a full time basis." Note, *Student-Workers or Working Students?*, *supra* note 10, at 780. See *Mount Sinai Hosp.*, 233 N.L.R.B. 507 (1977) (students included in bargaining unit despite history of leaving employer after graduation); *Beecher Ancillary Services, Inc.*, 225 N.L.R.B. 642 (1976) (student-trainees included in unit despite record of departures because such departures were not by virtue of "graduation"). But see *Pawating Hosp. Ass'n*, 222 N.L.R.B. 672 (1976) (students excluded because they rarely remain with employer as permanent employees); *The Macke Co.*, 211 N.L.R.B. 90 (1974) (students excluded in part because they did not expect to remain after graduation); *Parkwood IGA Foodliner*, 210 N.L.R.B. 349 (1974) (high school students included in the bargaining unit because there was no evidence to indicate that their employment would terminate upon completion of school program); *Cornell Univ.*, 202 N.L.R.B. 290 (1973) (students excluded in part because they had no expectation of remaining permanently and their employment was incidental to their academic objectives); *Arrow Specialities, Inc.*, 177 N.L.R.B. 306 (1969) (student excluded because he did not intend to remain with employer after graduation).

The Board evidently believes that expectation of continued employment, while "appropriately highlighted in the university context, where the secondary nature of students' employment interest and their limited job tenure can readily be presumed, is not as important a consideration in the commercial context." *Shady Oaks*, 229 N.L.R.B. 54, 55 n.1 (1977). But see *Advanced Mining Group*, 260 N.L.R.B. 486 (1982) (temporary employees excluded from bargaining unit because they had no reasonable expectancy of recall).

Compare these NLRB decisions with *Martin v. Roosevelt Hosp.*, 426 F.2d 155 (2d Cir. 1970) (hospital resident had a sufficient expectation of continued employment to not be considered a temporary employee and, therefore, was entitled to be reemployed under 38 U.S.C. § 2021, governing veterans reemployment rights).

34. *St. Clare's Hosp. & Health Center*, 229 N.L.R.B. at 1002.

This conclusion is supported by the fact that many housestaff organizations focus on and strike over the quality of patient care, rather than the amount of their stipends or their working conditions.³⁵ Nevertheless, the NLRB's decisions in *Cedars-Sinai* and *St. Clare's* have received extensive criticism.³⁶

As it stands now, if the primary purpose of students in their employment be educational, they will not be protected by the NLRA. While this test ostensibly is subjective, the NLRB applies it to housestaff without dwelling on the facts of the particular case.³⁷ It essentially has become a rule of law.³⁸ Furthermore, because of the nature of the Board's decisions, housestaff are unable to appeal from them.³⁹ Finally, states are preempted from applying their own labor-law protections to residents and interns at private hospitals.⁴⁰

35. See *A New Tactic for House Staffs: Bargain for Better Patient Care*, 14 MED. WORLD NEWS, Sept. 7, 1973, at 20. In his *Cedars-Sinai* dissent, Member Fanning admitted that "there is some support for the proposition that the primary interest of the housestaff's representational aims is the improvement of patient care." 223 N.L.R.B. at 257. See also Grace, *supra* note 2, at 418-19; Note, *Student-Workers or Working Students?*, *supra* note 10, at 782-83; *Interns Stage Four-Day Strike at San Francisco Hospital*, HOSP., Feb. 16, 1971, at 128.

Of course, the quality of patient care may be closely tied to working conditions when, for example, nurse staffing is concerned. Furthermore, some have argued that the ability of housestaff to bargain may be essential to basic medical care. See Note, *Student-Workers or Working Students?*, *supra* note 10, at 785.

36. See *supra* note 10. Perhaps the strongest criticism has come from Member Fanning, in his *Cedars-Sinai* dissent. In particular, he criticized the Board's use of the primary purpose test. He advocated the use of common-law principles to determine the status of residents and interns, noting that a hospital is vicariously liable for the malpractice of its housestaff under the doctrine of respondeat superior and that state and federal income taxes are withheld from housestaff's stipends. 223 N.L.R.B. at 255. Further, Fanning observed that the Department of the Treasury, with the support of most of the case law, has adamantly maintained that housestaff are not entitled to a fellowship grant exclusion. *Id.* at 255 n.17.

37. See *Samaritan Health Services*, 238 N.L.R.B. 629 (1978). See also *supra* note 28.

38. See *St. Clare's Hosp. & Health Center*, 229 N.L.R.B. at 1004. Presumably, nothing prohibits a hospital from voluntarily recognizing and bargaining with an organization of housestaff.

39. While 29 U.S.C. § 160(f) (1982) does provide that a party may have judicial review if "aggrieved by a final order" of the Board, decisions in representation proceedings are not "final orders." *A.F.L. v. NLRB*, 308 U.S. 401 (1940). This rule has been specifically applied in representation proceedings involving housestaff. *Physicians Nat'l House Staff Ass'n v. Fanning*, 642 F.2d 492 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 917 (1981). For an analysis of this case, see Comment, *supra* note 10.

40. *NLRB v. Committee of Interns & Residents*, 566 F.2d 810 (2d Cir. 1977), *cert. denied*, 435 U.S. 904 (1978). For earlier discussions of the preemption issue, see *NLRB v. Committee of Interns & Residents*, 426 F. Supp. 438 (S.D.N.Y. 1977); *St. Clare's Hosp. & Health Center*, 229 N.L.R.B. at 1005-09 (Fanning dissenting); *Kansas City Gen. Hosp.*, 225 N.L.R.B. 108 (1976). See also Malin, *supra* note 10, at 20-22; Note, *Labor Problems*, *supra* note 10, at 705-12.

B. *Scholarship and Fellowship Grants*

The tax issue of concern here arises from the 1954 recodification of the federal income tax. Prior to 1954, scholarship and fellowship grants could be excluded from gross income only if they could be categorized as gifts.⁴¹ The controlling factor in this determination was the subjective intent of the grantor; thus, in each case a separate finding was necessary. In order to simplify this process, which often generated inconsistent results, and to avoid the necessity of case-by-case determination,⁴² Congress enacted section 117 of the Internal Revenue Code.⁴³

41. See Blaney, *Residents' Stipends: To Exclude or Not to Exclude*, 1 B.U.J. TAX L. 167, 167 (1983); Stuart, *Tax Status of Scholarship and Fellowship Grants: Frustration of Legislative Purpose and Approaches to Obtain the Exclusion Granted by Congress*, 25 EMORY L.J. 357, 358-59 (1976); Tucker, *supra* note 12, at 749.

42. See H.R. Rep. No. 1337, 83d Cong., 2d Sess. 16, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4025, 4173; S. Rep. No. 1622, 83d Cong., 2d Sess. 17, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4621, 4823. See also *Bingler v. Johnson*, 394 U.S. 741, 753 (1969); Stuart, *supra* note 41, at 358-60. For a concise historical background of the § 117 legislation, see Blaney, *supra* note 41, at 167-70.

43. The relevant part of the section reads as follows:

§ 117 Scholarships and fellowship grants

(a) General Rule

In the case of an individual, gross income does not include—

(1) Any amount received—

(A) as a scholarship at an educational organization described in section 170(b)(1)(A)(ii), or

(B) as a fellowship grant, including the value of contributed services and accommodations; and

(2) any amount received to cover expenses for—

(A) travel,

(B) research,

(C) clerical help, or

(D) equipment,

which are incident to such a scholarship or to a fellowship grant, but only to the extent that the amount is so expended by the recipient.

(b) Limitations.

(1) Individuals who are candidates for degrees

In the case of an individual who is a candidate for a degree at an educational organization described in section 170(b)(1)(A)(ii), subsection (a) shall not apply to that portion of any amount received which represents payment for teaching, research, or other services in the nature of part-time employment required as a condition to receiving the scholarship or the fellowship grant. If teaching, research, or other services are required of all candidates (whether or not recipients of scholarships or fellowship grants) for a particular degree as a condition to receiving such degree, such teaching, research, or other services shall not be regarded as part-time employment within the meaning of this paragraph.

(2) Individuals who are not candidates for degrees

In the case of an individual who is not a candidate for a degree at

Under section 117, educational grants are divided into two groups: those given to degree candidates and those given to individuals who are not degree candidates.⁴⁴ Grants received by degree candidates may not be excluded if they represent payment for part-time employment—unless the services are required of all candidates as a condition to receiving the degree.⁴⁵ Individuals who are not candidates for a de-

an educational organization described in section 170(b)(1)(A)(ii), subsection (a) shall apply only if the condition in subparagraph (A) is satisfied and then only within the limitations provided in subparagraph (B).

(A) Conditions for exclusion.

The grantor of a scholarship or fellowship grant is—

- (i) an organization described in section 501(c)(3) which is exempt from tax under section 501(a),
- (ii) a foreign government,
- (iii) an international organization, or a binational or multinational education and cultural foundation or commission created or continued pursuant to the Mutual Educational and Cultural Exchange Act of 1961, or
- (iv) the United States, or an instrumentality or agency thereof, or a State, or a possession of the United States, or any political subdivision thereof, or the District of Columbia.

(B) Extent of exclusion.

The amount of the scholarship or fellowship grant excluded under subsection (a)(1) in any taxable year shall be limited to an amount equal to \$300 times the number of months for which the recipient received amounts under the scholarship or fellowship grant during such taxable year, except that no exclusion shall be allowed under subsection (a) after the recipient has been entitled to exclude under this section for a period of 36 months (whether or not consecutive) amounts received as a scholarship or fellowship grant while not a candidate for a degree at an educational organization described in section 170(b)(1)(A)(ii).

I.R.C. § 117(a)-(b) (1982).

44. *Id.* § 117(b)(1)-(2) (1976). This distinction apparently carries over to the distinction between scholarships and fellowship grants. Treas. Reg. § 1.117-3(a), (c) (1960).

45. I.R.C. § 117(b)(1) (1982). A recent General Counsel's Memorandum has, however, placed an additional limitation on the exclusion of degree candidates' scholarships from income. This memorandum disregards the plain language of the statute and indicates that the IRS will treat such scholarships as income—unless only *some* of the degree candidates receive payment for performing services that are required for their degree. 21 TAX NOTES 1157 (Dec. 7, 1983). *Cf.* *Brubakken v. Commissioner*, 67 T.C. 249, 260 (1976) (suggesting that for payments to be excludable, they must be rendered to the degree granting institution, even when required for the conferral of the degree).

gree⁴⁶ have no statutory bar to excluding grants received in part as compensation for services. Their exclusion is, however, limited to grants of not more than \$300 per month received from governments or tax-exempt organizations for a maximum of thirty-six months.⁴⁷ Thus, section 117 ostensibly abrogates the gift analysis and allows exclusion of at least some compensatory payments, thereby increasing the effectiveness of grants by allowing recipients to retain amounts that otherwise would be paid in taxes.⁴⁸ Avoiding the gift analysis is very important for housestaff because their training "necessarily involves the performance of service."⁴⁹

The Treasury regulations, however, in defining scholarship and fellowship grants, exclude from both definitions any amount that "represents either compensation for past, present, or future employment services or represents payment for services which are subject to the direction or supervision of the grantor."⁵⁰ Thus, the enactment of section 117 and the promulgation of the regulations changed only the terminology used to express the income exclusion. Instead of determining whether an educational grant possesses the characteristics of a gift, courts now must decide whether it represents compensation for services.⁵¹

The only Supreme Court decision to interpret section 117 and the accompanying regulations is *Bingler v. Johnson*.⁵² In *Bingler*, three employees of Westinghouse Electric Corporation received a percentage of their salaries while on leaves of absence to write their doctoral dissertations. In order to receive the payments, each employee's dissertation topic had to be approved by Westinghouse and had to have some rele-

46. Housestaff generally are not considered to be degree candidates. *Cooney v. United States*, 630 F.2d 438, 440 (6th Cir. 1980); *Tobin v. United States*, 323 F. Supp. 239, 241 (S.D. Tex. 1971); *Wertzberger v. United States*, 315 F. Supp. 34, 35 (W.D. Mo. 1970); *Wroblewski v. Bingler*, 161 F. Supp. 901, 903 (W.D. Pa. 1958). *But see* *Rosenthal v. Commissioner*, 63 T.C. 454, 460-61 (1975).

47. I.R.C. § 117(b)(2) (1982). For a discussion of earlier versions of this limitation during the legislative process, see Blaney, *supra* note 41, at 167-68.

48. Comment, *Medical Residents and Section 117—Time for a Closer Examination*, 25 St. Louis U.L.J. 117, 122 (1981).

49. Stuart, *supra* note 41, at 382.

50. Treas. Reg. § 1.117-4(c)(1) (1956). Treasury regulations generally have the force and effect of law. *See* 4 B. BITTKER, *FEDERAL TAXATION OF INCOME, ESTATES AND GIFTS* ¶ 110.4.2. (1981).

51. Tucker, *supra* note 11, at 752. The Treasury regulations purport to make § 117 override § 74(b) (prizes and awards) and § 102 (gifts). Therefore, to the extent that a scholarship or fellowship grant exceeds the limitations of § 117 and and Treas. Reg. § 1.117-2 (1964), it is includable in gross income and may not be excluded as a prize, award, or gift. Treas. Reg. § 1.117-1(a) (1956). *See* Rev. Rul. 72-168, 1972-1 C.B. 37 (gift exclusion does not apply to educational grants); Rev. Rul. 72-163, 1972-1 C.B. 26 (exclusion of prizes does not apply to educational grants).

52. 394 U.S. 741 (1969).

vance to the employee's work. Furthermore, each employee was required to sign an agreement obligating him to return to Westinghouse and remain there for two years following the completion of his dissertation.⁵³

The Court in *Bingler* upheld the validity of the section 117 regulations, concluding that "bargained-for payments, given only as a 'quo' in return for the *quid* of services rendered—whether past, present, or future—should not be excludable from income."⁵⁴ To constitute a scholarship or fellowship grant, money must be given "as relatively disinterested, 'no-strings' educational grants with no requirement of any substantial *quid pro quo* from the recipients."⁵⁵ Accordingly, the Court reinstated the jury's finding that the stipend was taxable income.⁵⁶

Prior to *Bingler*, decisions concerning housestaff stipends treated them as compensation for services rendered and, therefore, not excludable, if the principle function of the hospital was to provide patient care and the housestaff performed services necessary to that end.⁵⁷ The stipends would not be taxed only if the hospital were primarily a teaching hospital that selected patients from other hospitals on the basis of their potential value to the training programs, and had sufficient staff so that the services of the interns and residents were not necessary for patient care.⁵⁸

Cases subsequent to *Bingler*, however, have made it clear that the proper consideration is the primary purpose of the payments—as opposed to the primary purpose of the granting hospital.⁵⁹ "[T]he pay-

53. *Id.* at 743-44.

54. *Id.* at 757 (emphasis in original). Note, however, that this case involved degree candidates required to perform services for the grantor (Westinghouse) that were not required by the degree-granting institution as a condition of graduation. Thus, the statute itself, and not merely the regulations, prohibited exclusion of the payments received. Nevertheless, the Court rejected the argument that the regulations undermine the statute's mechanical test, under which amounts received by degree candidates for services required as a condition to receiving a degree may be excluded. *Id.* at 748-52. This suggests that the regulations are valid even beyond the extent to which they are supported by the statutory language. Indeed, *Bingler* is widely cited for the proposition that Treasury regulations must not be invalidated unless "unreasonable and plainly inconsistent" with the Code. *Id.* at 750.

55. *Id.* at 751.

56. *Id.* at 758.

57. See, e.g., *Woddail v. Commissioner*, 321 F.2d 721 (10th Cir. 1963); *Proskey v. Commissioner*, 51 T.C. 918 (1969).

58. *Wroblewski v. Bingler*, 161 F. Supp. at 905.

59. *Hembree v. United States*, 464 F.2d 1262, 1264 (4th Cir. 1972), followed in *Mizell v. United States*, 663 F.2d 772, 773 n.1 (8th Cir. 1981), *Meek v. United States*, 608 F.2d 368, 372 (9th Cir. 1979), *Parr v. United States*, 469 F.2d 1156, 1157-59 (5th Cir. 1972), *Burstein v. United States*, 622 F.2d 529, 534 n.4 (Ct. Cl. 1980).

Some articles have categorized the cases concerning § 117 into different groups, each imposing its own test. See, e.g., *Stuart, supra* note 41, at 365-76 (distinguishing between a "primary purpose" test, a "compensation" test, and a "control" test). These

ments must be made for the primary purpose of furthering the education and training of the recipient, and, additionally, the amount provided for such purpose shall not represent compensation or payment for services."⁶⁰

In an effort to discover the true purpose of the payments, courts will look to a variety of factors: whether the services performed are necessary to the operation of the hospital, the degree of supervision over the performance of the services, whether the intern or resident has agreed not to engage in private practice during the program or has a commitment to remain after its completion, whether the stipend is based on financial need, whether yearly increases are contemplated, whether taxes are withheld, and whether fringe benefits normally incidental to employment are provided.⁶¹

Thus, while this test, like the NLRB's, ostensibly is subjective, courts will look primarily to objective evidence of purpose, often disregarding even the characterization of the payments on the hospital's

articles fail to explain how the primary purpose test, as redefined in *Hembree*, differs from the compensation test: both seek to exclude from the coverage of § 117 payments made for services rendered. "Although the language and fact emphasis [in *Hembree*] seem different from the preceding cases, the foundation of the case is the *Bingler* quid pro quo determination." Note, *Taxation: The Section 117 Exclusion and Medical Residents—To Exclude or Not to Exclude*, 27 OKLA. L. REV. 115, 120 (1974). Furthermore, even if there had been relevant differences among the tests, the support for the compensation test, which emanated solely from pre-*Bingler* cases, is now gone. Similarly, the control test, if indeed a separate test, has been abandoned after *Bingler*. See Comment, *supra* note 48 at 124-30 (distinguishing between the primary purpose test and a "substantial quid pro quo" test but acknowledging that results are generally the same under both).

60. *Hembree v. United States*, 464 F.2d at 1265. See *Parr v. United States*, 469 F.2d at 1159. Note, however, the circular nature of this test. "If the primary purpose of the payments is to further the recipient's education or training, how can the payments made for *that* purpose simultaneously be payments for compensation?" Comment, *supra* note 48, at 129 (emphasis in original).

61. See *Meek v. United States*, 608 F.2d at 372-73; *Leathers v. United States*, 471 F.2d 856, 860-61 nn.6-13 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Comment, *supra* note 48, at 133-39.

Given the focus of the inquiry on the purpose of the stipend, query how much weight should be given to fringe benefits usually associated with an employment relationship, or anything else housestaff may receive. Such other benefits may be given for a purpose unrelated to the purpose of the stipend. Cf. *Yarlott v. Commissioner*, 717 F.2d 439 (8th Cir. 1983); *Burstein v. United States*, 622 F.2d 529 (Ct. Cl. 1980). Both of these cases held that amounts received by housestaff are not divisible into compensatory and noncompensatory parts.

As to the withholding of income taxes, courts should recognize that hospitals are subject to severe penalties if they fail to withhold taxes from people later found to be employees. For this reason, hospitals generally withhold taxes from housestaff to protect themselves. See Comment, *supra* note 48, at 138-39. Accordingly, "this factor will always be loaded against" housestaff, and should not be given any weight. *Id.* at 139.

books.⁶² Unlike the NLRB's test, however, and despite efforts of some courts to apply the doctrine of stare decisis—which is of questionable application to a factual issue⁶³—the tax issue remains a factual one to be determined separately in each case.⁶⁴ Consequently, this test yields inconsistent results⁶⁵ because sufficient evidence to support a jury determination almost always will exist, and because fact findings tend to vary even when the relevant characteristics of the internship and residency programs do not.⁶⁶

Perhaps the only thing that is certain about the exclusion of housestaff stipends from federal income taxation is that the matter has not been definitively settled by Congress or the courts. The results of a survey taken by a medical journal in 1971 indicate that twenty-nine percent of hospital residents claim the section 117 exclusion.⁶⁷ Most of their returns go unchallenged,⁶⁸ either because no audit is made or because of policy differences among the local Internal Revenue Service Offices.⁶⁹ If the exclusion is challenged, a tax battle can be waged at

62. *Burstein v. United States*, 622 F.2d at 532; Comment, *supra* note 48, at 124-25.

63. Comment, *supra* note 48, at 120-21.

64. *Mizell v. United States*, 663 F.2d 772 (8th Cir. 1981); *Ehrhart v. Commissioner*, 470 F.2d 940 (1st Cir. 1973); *Leathers v. United States*, 471 F.2d 856 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973). *Cf. Meek v. United States*, 608 F.2d 368 (9th Cir. 1979) (court affirmed district court's use of summary judgement against taxpayer).

We do not attempt to dictate a per se rule holding that all advanced medical personnel are employees and that all payments to them are subject to taxation. However, we sympathize with the District Court's lamentation that these facts, or facts nearly identical, have been litigated so often that one may wonder whether this is wise or what good it can do.

Parr v. United States, 469 F.2d at 1159.

65. A comparison of the following cases will demonstrate this inconsistency: *Field v. Commissioner*, 680 F.2d 510, 511-12 (7th Cir. 1982); *Mizell v. United States*, 663 F.2d at 776; *Cooney v. United States*, 630 F.2d at 440-41; *Burstein v. United States*, 622 F.2d at 532-33; *Rockswold v. United States*, 620 F.2d 166, 167-68 (8th Cir. 1980); *Meek v. United States*, 608 F.2d at 369-70; *Leathers v. United States*, 471 F.2d at 861-62; *Parr v. United States*, 469 F.2d at 1157; *Hembree v. United States*, 464 F.2d at 1263; *Johnson v. United States*, 507 F. Supp. 663, 664-66 (D. Minn. 1981); *Wertberger v. United States*, 315 F. Supp. at 35-36.

66. The Eighth Circuit arguably has become little more than a rubber stamp for inconsistent factfinders. *See Duffey v. Commissioner*, 677 F.2d 38, 39 (8th Cir. 1982); *Mizell v. United States*, 663 F.2d at 777; *Rockswold v. United States*, 620 F.2d at 169; *Leathers v. United States*, 471 F.2d at 862-63; *Quast v. United States*, 428 F.2d 750, 754 (8th Cir. 1970). *See also Ward v. Commissioner*, 449 F.2d 766, 768 (8th Cir. 1971) ("No useful purpose would be served by additional discussion of applicable principles of law.").

67. *Another Look at that \$3600 Fellowship Exclusion*, HOSP. PHYSICIAN, July 1971, at 42.

68. *Id.*

69. *Tucker*, *supra* note 12, at 786. *See Alexander v. Commissioner*, 36 T.C.M.

minimal expense.⁷⁰ Consequently, residents and interns are not reluctant to litigate the issue,⁷¹ even though they have been successful in only a handful of cases.⁷²

IV. ANALYSIS

A. Consistency

Many commentators have noted the tension between the NLRB decisions and the section 117 cases,⁷³ but none really has analyzed the relationship between the two areas of law to determine if an inconsistency actually exists. Perhaps this is because any such inconsistency would be buried in the legal standards of the two areas—standards that purport to measure different things.⁷⁴ Labor law measures the primary purpose of housestaff in their relationship with their hospitals, while tax law attempts to determine the primary purpose of the stipends paid to them. This makes some sense; one would expect that tax law would be primarily concerned with the payments and that labor law would concentrate on the relationships. Moreover, as a practical matter, educational purpose is not inconsistent with payment for services.⁷⁵

(CCH) 673, 675 (1977) (concerning inconsistent enforcement of § 117 by IRS auditors).

70. Note, *supra* note 59, at 122. As a tactical matter it may be better, at least in the Eighth Circuit, to pay the entire tax due and litigate outside the Tax Court in order to get to a jury. *Id.* at 121 & n.48; Comment, *supra* note 48, at 156.

71. Tucker, *supra* note 12, at 786. For a list of representative cases, see Blaney, *supra* note 41, at 174-78 nn.55-57; Stuart, *supra* note 41, at 380 n.165.

72. Mizell v. United States, 663 F.2d 772 (8th Cir. 1981); Leathers v. United States, 471 F.2d 856 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); Pappas v. United States, 67-1 U.S. Tax Cas. (CCH) ¶ 9386 (E.D. Ark. 1967); Wroblewski v. Bingler, 161 F. Supp. 901 (W.D. Pa. 1958); Bailey v. Commissioner, 60 T.C. 447 (1973); Bieberdorf v. Commissioner, 60 T.C. 114 (1973).

For cases involving victorious taxpayers who were not housestaff, see Krupin v. United States, 439 F. Supp. 440 (E.D. Mo. 1977) (licensed ophthalmologist); Shuff v. United States, 331 F. Supp. 807 (W.D. Va. 1971) (graduate student of hospital administration); Vaccaro v. Commissioner, 58 T.C. 721 (1972) (graduate student); Steiman v. Commissioner, 56 T.C. 1350 (1971) (Ph.D candidate); Peiss v. Commissioner, 40 T.C. 78 (1963) (professor); Wells v. Commissioner, 40 T.C. 40 (1963) (Ph.D candidate); Bhalla v. Commissioner, 35 T.C. 13 (1960) (Ph.D candidate). Several of these cases preceded *Bingler*.

73. See, e.g., Note, *Labor Problems*, *supra* note 10, at 712-15; Note, *Student-Workers or Working Students?*, *supra* note 10, at 777 n.77; Comment, *Exclusion of Hospital Housestaff from Public Employee Collective Bargaining in Pennsylvania*—Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center, 11 SUFFOLK U.L. REV. 1172, 1184-85 (1977); *Recent Decisions*, 15 DUQ. L. REV. 349, 356-57 (1976-77). See also Cedars-Sinai Medical Center, 223 N.L.R.B. 251, 255 n.17 (1976) (Fanning dissenting).

74. Even the labels used are not the same. While the labor law decisions revolve around an interpretation of the word "employee," the tax decisions do not.

75. Consider those students in category 3, those employed by a commercial em-

But even if the results be not inconsistent, the methodologies are. In particular, the emphasis in both standards on *primary* purpose makes consistency problematic. If the primary purpose of the payments be compensatory, then the relationship between the grantor and the grantee is probably sufficiently employment-like, a sufficient divergence of interest probably exists, to warrant normal NLRA protection. Indeed, one of the factors relied upon by the NLRB was its belief that the stipend payments were not compensation for services rendered.⁷⁶ This belief is plainly inconsistent with the great weight of existing tax law.

The consistency problem is exacerbated by the fact that, with both standards, purpose is determined with reference to many of the same objective criteria. In particular, both tests examine the existence or absence of a requirement to stay at the hospital after completion of the internship or residency,⁷⁷ the extent to which housestaff are necessary

ployer in a capacity related to their course of study. *See supra* text accompanying note 30. Under federal labor law, apprentices generally are included in bargaining units with journeymen craftsmen. *See* UTD Corp., 165 N.L.R.B. 346 (1967); Sand's Electric, 155 N.L.R.B. 39 (1965); General Motors Corp., 133 N.L.R.B. 1063 (1961); General Electric Co., 131 N.L.R.B. 100 (1961); Royal McBee Corp., 127 N.L.R.B. 896 (1960); Bethlehem Steel Co., 95 N.L.R.B. 952 (1952). This is because of their strong community of interest with journeymen, emanating from the expectation that they eventually will become journeymen with their current employer. *United Aircraft Corp. v. NLRB*, 333 F.2d 819, 822 (1964).

None of these cases confronted the issue of whether apprentices are "employees" under the NLRA.

76. *Cedars-Sinai Medical Center*, 223 N.L.R.B. at 253. It is unclear whether tax courts should pay any deference to this finding. In addition to the Board's lack of expertise in tax matters—which makes one wonder why the Board made a statement that departed from the great weight of tax authority—administrative law suggests that both agencies should make their own determination. *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), in which an employee covered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (1982), also was protected by a collective bargaining agreement that required just cause for discharge and prohibited discharge on the basis of race. The Supreme Court held that, even though an arbitrator found no contract violation in the discharge of the employee, the employee was entitled to a trial de novo on the issue of race discrimination in a Title VII action. Of course, a sharp distinction must be drawn between deference to a privately chosen arbitrator, who is not to construe law and whose proceedings may lack evidentiary guarantees, and deference to a second federal agency. The Court did, however, allow the arbitrator's decision to be admitted into evidence in the Title VII action. *See also Commissioner v. Idaho Power Co.*, 418 U.S. 1 (1974), in which the Court held that state and federal agency-imposed accounting requirements did not dictate tax consequences. The requirements were, however, to be accorded some significance.

77. *Mizell v. United States*, 663 F.2d 772, 776-77 (8th Cir. 1981); *Meek v. United States*, 608 F.2d 368, 372-73 (9th Cir. 1979); *Leathers v. United States*, 471 F.2d 856, 860 & n.6 (8th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); *Cedars-Sinai Medical Center*, 223 N.L.R.B. at 253.

to the hospital's staffing requirements,⁷⁸ and the fixed nature of the stipends.⁷⁹

In short, the treatment of housestaff under section 117 is inconsistent with the way in which they are treated under federal labor law. Whether this inconsistency raises issues of *res judicata*, collateral estoppel, and substantive due process is beyond the scope of this Article. Nevertheless, the inconsistency can be used as a measure of the mishandling of the law in these areas. Specifically, if section 117 were interpreted properly, there would be little inconsistency between these two areas of federal law.

B. Labor Law

Although this Article agrees with the general thrust of the *Cedars-Sinai* and *St. Clare's* decisions, they are not undeserving of criticism. One aspect of the decisions that is particularly worthy of criticism is the characterization of housestaff as nonemployees under the NLRA.⁸⁰ Prior to *Cedars-Sinai*, the Board excluded students who worked for their educational institution from bargaining units with other employees and denied them representation in a separate unit.⁸¹ Although the effect of this treatment was to leave such students with little protection by the NLRA, it did not deny them the label of "employee." In *Cedars-Sinai*, the Board declared that housestaff are not even entitled to the label of "employee," resulting in further denial of NLRA protection,⁸² and thereby set itself up for lengthy litigation concerning state

78. *Mizell v. United States*, 663 F.2d at 773; *Cooney v. United States*, 630 F.2d 438, 441 (6th Cir. 1980); *Meek v. United States*, 608 F.2d at 372-73; *Leathers v. United States*, 472 F.2d at 861; *Parr v. United States*, 469 F.2d 1156, 1157 (5th Cir. 1972); *Hembree v. United States*, 464 F.2d 1262, 1264-65 (4th Cir. 1972); *Cedars-Sinai Medical Center*, 223 N.L.R.B. at 253.

79. *Cooney v. United States*, 630 F.2d at 441 (not based on financial need); *Meek v. United States*, 608 F.2d at 373 (did not depend on financial need); *Burstein v. United States*, 622 F.2d 529, 538 (Ct. Cl. 1980) (not based on academic standing or financial need); *Cedars-Sinai Medical Center*, 223 N.L.R.B. at 253 (stipends did not vary with nature or extent of services rendered).

80. See *supra* text accompanying note 22.

81. See *supra* notes 32-33.

82. Denying workers the label "employees" may be significantly worse than merely denying them organizational and representational rights. This was illustrated in *NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170 (1981), which concerned the proper definition of "confidential employee" and whether such people are "employees" at all under the NLRA. Traditionally, confidential employees, while still "employees" under the NLRA, were excluded from bargaining units with other employees and denied representation in a separate unit. *Id.* at 178-79 & n.10. In *Hendricks*, the Court was faced with the dismissal of an employee who had petitioned her employer to reinstate a fellow employee who had been injured in an industrial accident. This type of petition constitutes concerted activity for which employees are protected by the NLRA. See *Youngstown Osteopathic Hosp. Ass'n*, 224 N.L.R.B. 574

law preemption. It was not surprising that housestaff argued that, if they were not "employees" under the NLRA, the Act did not preempt state labor laws and the protections they afforded.⁸³

Another, perhaps more basic, criticism of these decisions concerns *St. Clare's* categorization of students into four different groups.⁸⁴ Although this classification does have the benefit of imposing clear guidelines—something at which the tax decisions sorely fail—it does so at the cost of overgeneralization.

The focus of the representation issue, according to *Cedars-Sinai*, is the relationship between the housestaff and the hospital, or more generally, between the students and the school. Since this is the case, one would expect that the relationship itself would be analyzed. If it be primarily educational in nature, if there be a mutuality of educational interest, organizational and representational rights should be withheld.⁸⁵ Once such a decision is made regarding a particular type of student,⁸⁶ for example, housestaff or cafeteria workers at a particular university, it could be applied mechanically to all such students without duplicating the analysis or risking the clarity of the rule. But little seems to be gained by the Board's approach of forcing a group of students into one of the four categories and then blindly applying the appropriate rule. Equity would be better served if an analysis were made of the individual's employment relationship with his school.⁸⁷

(1976). Thus, even if the employee in *Hendricks* were a confidential employee and, therefore, denied collective-bargaining rights, as long as she retained the status of employee, her dismissal because of the petition would violate the NLRA.

The *Hendricks* Court declined to decide whether confidential employees are employees under the NLRA because it found the employee in question not to have been a confidential employee. 454 U.S. at 185 n.19. But Justice Powell, concurring in part and dissenting in part, and joined by three other Justices, argued that it makes no sense to exclude confidential employees from the collective bargaining process and not exclude them from the coverage of the NLRA as a whole. *Id.* at 197-99.

Whether housestaff should properly receive the NLRA protections not pertaining to collective bargaining is an issue that will probably appear rarely, if ever. But if all students in category 4 (those employed by their educational institution in a capacity related to their course of study) are to be considered "nonemployees"—as distinguished from those in category 2 (those employed by their educational institution in a capacity unrelated to their course of study), who are merely denied collective bargaining rights, *see supra* notes 30-34 and accompanying text—then the potential relevance of this distinction will be greatly enhanced.

83. *See supra* note 40 and accompanying text.

84. *See supra* text accompanying note 30.

85. *See St. Clare's Hosp. & Health Center*, 229 N.L.R.B. 1000, 1002 (1977).

86. *See The Macke Co.*, 211 N.L.R.B. 90 (1974); *Cornell Univ.*, 202 N.L.R.B. 290 (1973).

87. Undoubtedly, a law professor could manufacture a hypothetical illustration in which the students fit firmly into category 2 or 4, yet have the type of relationship with their school that even the Board would agree warrants NLRA protection. This is particularly possible if the Board's underlying assumption, that students who work for

This criticism may be somewhat unfounded. After all, in *Cedars-Sinai* the Board did analyze the particular house officer's situation. *St. Clare's* merely could have been an explanation of the prior decision. Perhaps the Board never intended to abandon the individual analysis advocated here. Indeed, even if the Board intended to abandon the analysis of individual employment relationships, it is unclear that the change would result in different treatment for housestaff.

Housestaff have been treated differently under some state labor laws.⁸⁸ Although states are prohibited from applying their law to residents and interns at private hospitals,⁸⁹ the NLRA is not applicable to states in their capacities as employers;⁹⁰ therefore, the NLRA's preemption does not extend to public employees. Several states have taken this opportunity to review the status of housestaff under state labor law. While these cases are based on statutes other than the NLRA, they provide an interesting counterpoint to the federal cases.

The first of these cases was *Regents of the University of Michigan v. Michigan Employment Relations Commission*,⁹¹ in which the Michigan Supreme Court held that housestaff were "employees" under the state public employee relations act. Although the case preceded *Cedars-Sinai*, it remains interesting in two respects. First, in searching for evidence to support the commission's findings, the court specifically noted that "[d]octors are not eligible for the [section 117] exclusion."⁹² Second, although housestaff were awarded the protection of state labor law, limitations were imposed. The court restricted the scope of bargaining to those subjects outside the educational sphere.⁹³ Thus, the court recognized and acted upon, although perhaps in a more

their educational institution have no plans to continue their employment after graduation, proves false for a particular type or group of student workers.

88. See *infra* notes 91-97 and accompanying text. But see *infra* notes 98-104 and accompanying text.

89. See *supra* note 40 and accompanying text.

90. 29 U.S.C. § 152(2) (1982).

91. 204 N.W.2d 218 (Mich. 1973). This case arose when the Michigan Employment Relations Commission ruled that housestaff were employees and came under the state act, and the court of appeals reversed, holding that, as a matter of law, housestaff could not be categorized as employees. *Regents of the Univ. of Mich. v. Michigan Employment Relations Comm'n*, 195 N.W.2d 875 (Mich. Ct. App. 1972). The supreme court was primarily concerned with whether the court of appeals had exceeded the appropriate standard of review.

92. 204 N.W.2d at 225 (quoting 195 N.W.2d at 880 (McGregor, J., dissenting)). Whether the existing tax cases called for such an absolute statement is doubtful. See *supra* note 72.

93. 204 N.W.2d at 224. For example, while housestaff could bargain about the "salary" they receive, they could not bargain to discontinue a particular aspect of their work, e.g., pathology. If the regents believed a certain number of hours devoted to a certain type of work was a necessary part of interns' and residents' education, the court and state labor law would not interfere. *Id.*

moderate way, the many concerns later expressed by the NLRB.

Two subsequent state decisions squarely rejected the *Cedars-Sinai* approach.⁹⁴ One rejected the notion that the internship and residency programs were designed to allow the student to develop. Instead it found that the delivery of health care was the primary impetus behind the development of the programs.⁹⁵ The other decision, while recognizing that housestaff are simultaneously students and employees, found nothing in the expressed purpose of the state act that indicated intent to exclude students from its provisions.⁹⁶ In fact, neither decision appears to have accepted the Board's conclusion that there is anything about the relationship between housestaff and their hospital that makes it inappropriate for collective bargaining. Interestingly, these two decisions also relied on the inability of housestaff to take advantage of the section 117 exclusion.⁹⁷

On the other hand, in *Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center*,⁹⁸ the Supreme Court of Pennsylvania adopted the rationale of *Cedars-Sinai*. First, it found that, while housestaff were "clothed with the indicia of employee status, the true nature of their reason for being at [the hospital] negates their employee status."⁹⁹ It further found that because housestaff were not primarily seeking monetary gain, but were attempting to fulfill educational requirements, the true bargained-for exchange normally associated with an employment relationship was not present.¹⁰⁰ It concluded by holding that the spirit of the state act would not be served by applying it to housestaff because they were not attempting to establish a continuous relationship with the hospital.¹⁰¹

One of the most interesting aspects of the Pennsylvania case is the lower court decision that preceded it.¹⁰² This decision preceded *Cedars-Sinai*, but still held that housestaff were students, not employees. After noting the controversy surrounding the applicability of the section 117

94. *House Officers Ass'n v. University of Neb. Medical Center*, 255 N.W.2d 258 (Neb. 1977); *City of Cambridge*, 2 M.L.C. 1450 (Mass. Lab. Rel. Comm'n 1976).

95. *City of Cambridge*, 2 M.L.C. at 1458-59.

96. *House Officers Ass'n v. University of Neb. Medical Center*, 255 N.W.2d at 261-62.

97. *Id.* at 261; *City of Cambridge*, 2 M.L.C. at 1461-62.

98. 369 A.2d 711 (Pa. 1977). The case involved housestaff at two institutions: one private, one public. The court first found that federal law preempted application of state law to housestaff at the private hospital. It then went on to analyze state law for application to the housestaff at the public institution. *Id.* at 713.

99. *Id.* at 714.

100. *Id.*

101. *Id.* at 715.

102. *Wills Eye Hosp. v. Pennsylvania Labor Relations Bd.*, 328 A.2d 539 (Pa. Commw. Ct. 1974), *aff'd, sub nom. Philadelphia Ass'n of Interns & Residents v. Albert Einstein Medical Center*, 369 A.2d 711 (Pa. 1977).

exclusion,¹⁰³ the lower court applied substantially the same standard later adopted by the NLRB. The court commented on housestaff's short-lived employment relationship, and then emphasized that the "primary purpose for the affiliation was to continue medical education[,] not to render service to the hospital."¹⁰⁴

The conclusions reached in these Pennsylvania decisions and the corresponding observations by the NLRB are supported by the results of a poll of interns and residents taken for the preparation of this Article.¹⁰⁵ Of the interns and residents polled, approximately ninety-five percent said that the quality of the training offered was a major factor in their decision to accept a particular residency.¹⁰⁶ Conversely, only three percent indicated that the amount of their stipend was a major factor in their decision, and approximately sixty-nine percent responded that it was not a factor at all.¹⁰⁷ When asked about their relationship with the staff physicians under whom they work, approximately sixty-two percent classified it as a teacher/student relationship while only thirteen percent considered it most like an employer/employee relationship.¹⁰⁸

The results of this poll, and the tendency of housestaff to bargain over patient care when given the opportunity to bargain collectively,¹⁰⁹ tend to indicate that the primary purpose of interns and residents in training programs is indeed an educational one. Furthermore, the NLRB's decision to utilize the primary purpose test and exclude housestaff from the coverage of the NLRA has received some congressional support.

In 1976, Representative Frank Thompson introduced a bill to amend section 2(12) of the NLRA. The bill would have included housestaff within the definition of professional employees,¹¹⁰ bringing

103. *Wills Eye Hosp.*, 328 A.2d at 542.

104. *Id.* at 543.

105. The poll was conducted of interns and residents at various Boston hospitals during the winter of 1982-83. The 12 question survey was prepared with the assistance of John Immerwahr, Professor of Philosophy at Villanova University and Special Projects Consultant of the Public Agenda Foundation. One hundred surveys were distributed at regular housestaff meetings and there was a 100% response. While methodological limitations prevent the conclusion that the results of this poll are statistically significant, efforts were made to minimize the risk of error.

106. Two percent said it was a minor factor; three percent said it was not a factor at all.

107. An additional 28% classified the amount of their stipend as only a minor factor. Thus, the NLRB apparently was correct when it said in *Cedars-Sinai* that applicants do not "attach any great significance to the amount of the stipend." 223 N.L.R.B. at 253.

108. Most of the remaining responses described the interaction as most like that between two colleagues.

109. See *supra* note 35.

110. H.R. 15,842, 94th Cong., 2d Sess., 122 CONG. REC. 35,386 (1976).

them within the protection of the NLRA. After several years of debate, however, the House of Representatives rejected the bill.¹¹¹ While it is always difficult to infer legislative intent from inaction, consideration and rejection of this bill by Congress is highly indicative of its approval of the NLRB's decisions.

C. Tax Law

Congressional approval of the decisions applying section 117 to housestaff is much more difficult to find. The section appears to allow the exclusion for nondegree candidates regardless of whether they receive payments as compensation for services.¹¹² It restricts the source of the grant and the amount of the exclusion, but only the regulations deny the exclusion of grants that represent payment for services.¹¹³ To this extent, the regulations apparently undermine congressional intent and should be invalidated. Nevertheless, *Bingler* implicitly upheld the limitations of the regulations.¹¹⁴

Bingler is not, however, devoid of support for the proposition that section 117 largely has been misapplied to housestaff. *Bingler* requires only that "bargained-for payments, given as a 'quo' in return for the *quid* of services rendered" must not be excluded from income.¹¹⁵ But bargaining is peculiarly absent between hospitals and housestaff. Stipend payments are not subject to negotiation¹¹⁶ and the system through which housestaff are matched with hospitals apparently removes most other footholds for negotiation. Even the decision to refrain from participation in a residency is essentially foreclosed because completion of an internship and a residency remains a prerequisite to active private practice.¹¹⁷

In general, housestaff have "far from the typical bargained-for employment relationship."¹¹⁸ Indeed, given the NLRB decisions that deny housestaff the right to bargain collectively, it seems anomalous to assert that bargaining is still present. Without some element of bargaining, or at a minimum some element of exchange, there really can

111. 125 CONG. REC. 33,951-52 (1979). See Grace, *supra* note 2, at 429-30.

112. See *supra* text accompanying notes 44-47. "The failure of Congress to enact a limitation on exclusions where services are performed [by nondegree candidates], similar to that applicable in the case of degree candidates, indicates that Congress felt the monetary limitation was sufficient." Blaney, *supra* note 41, at 191.

113. See *supra* note 50 and accompanying text.

114. See *supra* note 54.

115. 394 U.S. at 757. See *id.* at 755 n.28. The "bargained-for" requirement has been applied in other contexts as well. See *United States v. Chicago, Burlington & Quincy R.R.*, 412 U.S. 401 (1973) (depreciation allowance disallowed for assets acquired through government subsidies).

116. *Parr v. United States*, 469 U.S. at 1157.

117. See *Ezekial v. Winkley*, 142 Cal. Rptr. 418 (1977).

118. Stuart, *supra* note 41, at 383.

be no quid *pro quo*, no compensation *for* services rendered.

All interns and residents perform services that inure to the benefit of their hospitals,¹¹⁹ just as most graduate students perform some teaching functions that aid their institutions. It seems unlikely, however, given the congressional intent to have a clear rule that explicitly allows at least some compensatory payments to be excluded from income,¹²⁰ that the incidental benefit to the grantor of these services should foreclose application of section 117. This is not to say that the primary purpose test is itself wrong—although that argument has been made¹²¹—but merely that it has been misapplied. This can be demonstrated in two respects. First, a good argument can be made that housestaff do not really receive compensation for the services they render. The stipends paid them actually may be less than what would be required under the federal minimum wage,¹²² and, at least in some states, interns, who are not licensed to practice medicine, are prohibited from receiving compensation for the performance of medical services. Moreover, a historical analysis of internship and residencies suggests that the stipends are not compensatory.¹²³ The results of the poll con-

119. Cf. *Wrobleski v. Bingler*, 161 F. Supp. 901 (W.D. Pa. 1958), discussed *supra* in text accompanying note 59.

120. I.R.C. § 117(b)(1) (1982).

121. "The primary purpose test does not appear in the Internal Revenue Code, and the legislative history to support the adoption of a restriction of this nature is scant." Tucker, *supra* note 12, at 753. A bill that would have added a primary purpose test to the section was rejected by Congress. S. REP. NO. 2207, 87th Cong., 1st Sess. (1961).

Another argument against the primary purpose test emanates from *Commissioner v. Duberstein*, 363 U.S. 278 (1960), which defined (or refused to define) "gift" for income tax purposes. There the Court relied heavily on the intent of the grantor—using something akin to a primary purpose test—and considered the issue a factual determination to be made on a case-by-case basis. Courts in § 117 cases, particularly in *Mizell v. United States*, 663 F.2d 772 (8th Cir. 1981), basically have duplicated this test. If these courts are imposing what is essentially a gift standard under § 117, then they are perhaps undermining the congressional intent to not only avoid case-by-case determinations, but also to provide a mechanism for excluding certain educational grants in addition to those excluded by I.R.C. § 102. Cf. *Treas. Reg. § 1.117-1(a)* (1956), discussed *supra* note 51.

122. A house officer working an average of 100 hours per week, *see supra* note 17, and receiving time and a half for overtime, would have to receive a stipend of almost \$24,000 per year to receive minimum wage. Thus, it is not surprising that the NLRB and some authors have characterized housestaff stipends as being more like subsistence allowances than salaries. *See Stuart, supra* note 41, at 383. *But cf. Jamieson v. Commissioner*, 51 T.C. 635 (1969) (payments below normal market wages indicate benefit to the grantor and thus the payments are compensatory and not excludable).

123. Originally, housestaff were required to live in the hospital, hence the origin of the term "resident." *Mizell v. United States*, 663 F.2d at 776. They were provided with free room and board but were paid no money. Stipends were welcomed as an innovative substitute for room and board so that housestaff could live outside the hospi-

ducted for this Article support this suggestion.¹²⁴ In short, any benefit conferred on hospitals by virtue of the services housestaff perform is really coincidental to the housestaff's benefit from receiving the stipends.¹²⁵

Second, proper application of *Bingler* need not emphasize any benefit (however great) the grantor receives from the services rendered as an actual part of the educational program.¹²⁶ Rather, the thrust of *Bingler* seems to be on the grant's connection to the taxpayer's prior work for the grantor and on the taxpayer's commitment to return to such work upon completion of the program.¹²⁷ Only "those grants which are merely payments of a salary during a period while the recipient is on leave from his regular job,"¹²⁸ are to be denied the section 117 exclusion. But housestaff are not on such a leave. They have no past employ-

tal. While the stipends are clearly income within the broad definition of I.R.C. § 61—as would be even the in-kind payments of room and board—their origin indicates that they are living allowances and not compensation for services.

124. Only 31% of those polled considered their stipend to be primarily compensation for services rendered. Although the primary purpose test concerns the grantor's purpose in making the payments and not the grantee's purpose in accepting them, the housestaff perspective on the nature of their stipends should not be deemed irrelevant.

125. Furthermore, housestaff are often paid with funds provided by federal agencies. While these funds are channeled through the hospitals, their designated use is for the financial assistance of housestaff. Comment, *supra* note 48, at 130-31. Therefore, the federal government's express noncompensatory purpose arguably mandates that the payments not be treated as compensation under § 117. *But see* Dietz v. Commissioner, 62 T.C. 578 (1974) (rejecting this argument).

126. *Bingler* placed no emphasis on the value to Westinghouse of the taxpayers' research.

127. 394 U.S. at 743, 747. *See* Leathers v. United States, 471 F.2d at 860 n.6. *Cf.* Evans v. Commissioner, 34 T.C. 720 (1960), in which the Tax Court ruled in favor of the taxpayer, a registered nurse who had received a grant from the Tennessee Department of Mental Health. The grant was conditioned on the taxpayer's agreement to work for the Department after completion of her studies. This result is unsupportable, *see* Stuart, *supra* note 41, at 372-73, and may well have lost its vitality after *Bingler*. Indeed, since *Bingler*, the § 117 exclusion "has been held inapplicable in every case in which the taxpayer had entered into an agreement to render future services to the grantor." Comment, *supra* note 48, at 132-33. *See id.* at 133 n.119; *see also* I.R.C. § 117(c) (1982), which now would apply if such a conditioned grant were from the federal government.

128. 394 U.S. at 754 (citing S. REP. NO. 1622 at 17). Previously, the Fifth Circuit had said:

In the case of a person granted leave from his regular employment to study while the employer continues to pay him his regular salary, [§ 117] would tax these payments when the education is in effect employee training sponsored by the grantor and undertaken by the employee as part of his employment.

Ussery v. United States, 296 F.2d 582, 586 (5th Cir. 1961). *See* *Smith v. Commissioner*, 60 T.C. 279 (1973); H.R. REP. NO. 1337, 83d Cong., 2d Sess. 16-17, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4025, 4773; S. REP. NO. 1622, 83d Cong., 2d Sess. 17-18, *reprinted in* 1954 U.S. CODE CONG. & AD. NEWS 4621, 4823.

ment relationship with or future commitment to their grantors. Any benefit that their grantors receive comes only as a by-product of the educational training itself.

This distinction should be maintained. Indeed, it can be said to flow from the language of section 117, which facially deals with what effect should be given to any benefit the grantor derives from the services performed pursuant to the educational program.¹²⁹ In this respect the section strikes a balance that should not be disturbed. Thus, even if *Bingler* is correct in holding that not all payments which meet the requirements of the section deserve to be labeled educational grants,¹³⁰ and even if some payments actually emanate from a bargained arrangement and, therefore, do not warrant exclusion, such a conclusion should be limited to only those grants that are based—at least in part—on past work or a future commitment.

By emphasizing only the noncurrent benefits grantors receive and by discounting the importance of services rendered as part of the educational program, the analysis under section 117 becomes more consistent with the NLRB decisions. The NLRB's division of students into four groups and denial of NLRA protection for those in groups 2 and 4¹³¹ was based largely on the Board's presumption that these students' employment relationships with their schools would not continue beyond completion of their educational programs.¹³² Only when students have a commitment to continue working, or when their employment began sufficiently before the start of their educational programs to indicate that the employment is not merely incidental to their academic objectives, will the Board accord them employee status. The Board's decision also rested on its conclusion that the services performed by students in category 4 really are part of the educational program, and as such indicate a mutuality of interest between the school and the students with which the NLRA was not designed to deal.¹³³

Thus, under the analysis suggested here as a better interpretation of both section 117 and the *Bingler* decision, housestaff, and indeed all students, will be treated consistently under federal tax and labor law.

129. See *supra* note 113 and text accompanying notes 44-47. See also I.R.C. § 117(b)(1) (1982). Cf. I.R.C. § 74(b) (1982), which excludes from gross income amounts received as prizes and awards in recognition of certain achievements. If the recipient were required to render future services in order to receive the prize or award, the exclusion would be denied. Nevertheless, any part of the benefit that the grantor receives from the achievements that form the basis for the prize or award can be excluded from income under § 74(b).

130. The grant in *Bingler* failed, however, to meet the requirements of § 117. See *supra* note 54.

131. See *supra* notes 29-32 and accompanying text.

132. See *supra* note 33 and accompanying text.

133. See *supra* note 34 and accompanying text.

V. CONCLUSION

This Article has attempted to illustrate and analyze the inconsistency between the federal labor and tax law treatment of hospital residents and interns. It has endeavored to show that the labor law decisions, while not perfect, do take a traditional and common-sense approach to the collective bargaining rights of housestaff. On the other hand, the tax decisions are based on regulations that are inconsistent with the Internal Revenue Code, and on *Bingler v. Johnson*, a Supreme Court decision that unnecessarily approved the regulations.¹³⁴

This Article also has attempted to show that the inconsistency, both in methodology and in result, can be rectified if tax courts would abandon the regulations and interpret the Internal Revenue Code in the way Congress intended. It is hoped that this Article may convince the tax courts to do just that, and thereby contribute to the alleviation of the wrong to which housestaff have been subjected.

134. See *supra* note 54.

