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The term "campus common law" has turned up in United State Supreme Court opinions, state court decisions, and collective bargaining contracts, but has seldom received any definition. Rather, courts have used analogy to collective bargaining cases involving past practice and negotiators have included it in contracts as a catch-all to prevent sins of omission from destroying the fruits of their labors. The term, like the English common law, defies explicit description because of its diffuse origins, but the analogies of labor cases and the past practices of institutions of higher education do indicate some of the parameters of this elusive but powerful term.

Roth and Sindermann

The United States Supreme Court in *Board of Regents v. Roth* and *Perry v. Sindermann* found that "common law" of a particular campus to be of great significance[1]. In both cases the proof of its substance or of its existence supporting the claim of the discharged faculty could have materially altered the duties of the administration.

The facts in both cases influenced the results. Wisconsin State University, Oshkosh hired David Roth in 1968 as assistant professor of political science. His employment contract consisted of a letter of appointment which stated that he was hired for a fixed term of one year and that regulations governing tenure were governed by state statute. In compliance with board of regents rules on nonretention, the university president gave Roth timely notice of nonretention. He gave Roth no reason for nonretention and no opportunity to challenge the decision. Professor Sindermann was a professor of government and social science at Odessa Junior College, Texas for four years before his termination. Each of the successive years he was employed on a one-year contract when his 1968-69 contract expired (alleging in a press release that he had defied his superiors).

Both terminated faculty members argued that they had an expectancy of employment giving them a property interest under the fourteenth amendment. Roth argued that the pattern of rehiring of year-to-year professors gave

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[1] Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709, 33 L. Ed. 2d. 548, 561 (1972). Perry v. Sindermann, 408 U.S. 593, 601. 92 S.Ct. 2694, 33 L. Ed. 2d. 570, 580 (1972).

him an expectancy of re-employment based on a "common law" of re-employment. Sindermann relied upon the language of the faculty guidebook and the guidelines of a state policymaking body. The guidebook stated that Odessa had no tenure system, but that the administration of the college wished the faculty to feel that they had "permanent tenure" contingent upon satisfactory teaching and a cooperative attitude. Further, Sindermann claimed reliance upon the Guidelines of the Coordinating Board of Texas College and University System. The Guidelines contained language which indicated that a probationary period should not exceed seven years. Sindermann had served six years in the Texas system before joining the Odessa faculty.

The Court dismissed Roth's claim in a footnote, but discussed Sindermann's at comparative length. In *Roth* the Supreme Court simply followed the District Court's finding of fact that there was nothing approaching a common law of re-employment "so strong as to require University officials to give the respondent a statement of reasons and a hearing on their decision not to rehire him." In *Sindermann* the Court found alternative grounds for finding the existence of de facto tenure. First, a teacher could have a property interest in re-employment implied in his contract. Such a person might be able to show from the "circumstances of service and 'other relevant facts' that he had a legitimate claim of entitlement to job tenure." Second, a particular university may have a "common law" that certain employees shall have the equivalent of tenure. This was particularly true at Odessa which had "no explicit tenure system" but which "may have created such a system in practice".

The Court carefully qualified the *Sindermann* language with a footnote. The Court did not hold that Sindermann had such a legitimate claim. Such property interests, the Court stated, were created by "rules or understandings that stem from an independent source such as state law". However, the Court did remand indicating that proof of such a property interest would entitle Sindermann to a hearing at which time he could challenge the grounds for his nonretention.

The Two Realms of Common Law

The Court in *Sindermann* indicated two conflicting sources for common law giving rise to a sufficient property interest. First, the "common law" of a particular campus was analogized to the "common law of a particular industry or a particular plant".[2] This common law was supplementary to collective bargaining agreements and in labor law parlance is known as past practice. Such past practice when firmly established can override an explicit term of a collective bargaining contract. Second, the "common law" of a particular university can be created "in practice" based on "the policies and practices of the institution". These practices, the court inferred following the aforementioned footnote, could obligate college officials to state the grounds for nonretention and hold a hearing *if* such practices were the law of Texas.

The two realms raise several questions of significance for future litigation and collective bargaining contracts in higher education.

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[2] Steelworkers v. Warrior and Gulf Co., 363 U.S. 574, 579, 80 S.Ct. 1347, 4 L. Ed. 2d. 1409, 1415 (1960).

1. When would a federal court intervene?
2. To what extent does the past practice version of common law define faculty rights and duties?
3. Can the common law of a particular university override the rules of a university?
4. Can the common law of a particular university control when in conflict with state statute?
5. Can a collective bargaining contract incorporate by reference the common law of a particular campus and/or any other campus and/or of higher education? If so, with what effect?

Federal Court Intervention

The *Roth* opinion outlined the general areas of federal intervention. When there is a protected fourteenth amendment interest whether of property or of liberty, the federal courts are obligated to intervene. If the state made a charge damaging the reputation of the faculty member in the community, there would be a fourteenth amendment right to a hearing to clear the faculty member's good name. Similarly, any stigma foreclosing future employment opportunities would give rise to a right to a hearing. Where the State infringes the first amendment, the faculty member has a right to a hearing. These criteria have found some definition in previous cases.

The federal courts have traditionally guarded faculty first amendment speech and association rights. Among the areas of federal interest have been loyalty programs infringing extramural speech and association rights,[3] participation in constitutionally protected political activities,[4] legislative inquiry into classroom speech,[5] and fitness inquiries involving outside associational activities.[6] These first amendment questions have involved procedural due process as well as the basic constitutional issues. Similarly, when issues of academic freedom have been presented, the courts have tended to emphasize procedural regularity rather than review the substantive basis for educational decisions.[7] Interestingly in *Roth,* when the jury delivered its verdict for damages on November 9, 1973, it found for the plaintiff in the sum of $5,246.00 compensatory damages and $750 punitive damages against the Vice President of Academic Affairs, $500 punitive damages against the Dean, and $200 punitive damages against a member of the departmental tenure committee. The jury believed that Roth's first amendment rights had been violated.[8]

Absent a violation of first amendment rights, state courts have been more willing to protect faculty particularly where state tenure statutes exist.[9] Here tenuring, dismissal, demotion, and disciplinary actions find procedural rules

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[3] Shelton v. Tucker, 364 U.S. 479 (1960). Beilan v. Board of Public Education, 357 U.S. 399 (1958). Whitehill v. Elkins, 389 U.S. 54 (1967).

[4] Johnson v. Branch, 364 F. 2d. 177 (4th Cir. 1966), *cert. denied,* 385 U.S. 1003 (1967).

[5] Sweezy v. New Hampshire, 354 U.S. 234 (1957).

[6] Shelton, *supra,* n. 3.

[7] *Note—Academic Freedom,* 81 HARVARD LAW REVIEW, 1045, 1051 (1968).

[8] Roth v. Regents Verdict, 69-C-24 (1973).

[9] *Supra,* n. 7, 1086–91.

that courts enforce. Here also the doctrines of equitable estoppel can be applied to remedy a procedural wrong. Key to the application of such doctrines, however, is the existence of tenure statutes.

In sum, the federal courts intervene most frequently where first amendment or procedural due process issues exist. State courts look to tenure statutes for guidance in *Roth* and *Sindermann* situations. The cases to date involve positive law or a denial of first amendment rights. The federal courts are least likely to intervene where there is no procedural violation and only an educational policy choice is in question.[10]

Past Practice as Common Law

The *Sindermann* opinion adopted language used by the court in *Steelworkers v. Warrior and Gulf Co.*[11] which in turn drew upon a 1959 article by Archibald Cox. The *Steelworker* Court saw the collective agreement involved covering the whole employment relationship which called into being what it termed a "new common law—the common law of a particular industry or of a particular plant".[12] Cox, in his *Harvard Law Review* article, gave more specific indicia of the content of this "new common law". He said that:

> Within the sphere of collective bargaining, the institutional characteristics and governmental nature of the collective bargaining process demand a common law of the shop which implements and furnishes the context of the agreement. We must assume that intelligent negotiators acknowledge so plain a need unless they stated a contrary rule in plain words.[13]

However, the governing criteria were not "judge-made principles of the common law but the practices, assumptions, understandings, and aspirations of the going industrial concern".[14] Past practice was the most significant. Cox pointed to cases where firmly established practice took precedence "even over the plain meaning of words".[15]

Past practice, according to Cox, is the most important of the elements of this common law. The labor arbitration reports bear out this contention and provide useful definitional parameters. Past practice to be firmly established must be a "practice" which is promulgated by management, known of by labor, and accepted by both.[16] The existence of such a practice can be deduced from the conduct of the parties as well as from documents. However, the conduct relied upon must be unequivocal and the terms of the practice must be definite, certain, and intentional.[17] Conduct evidencing labor acceptance of

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[10] *Supra*, n. 7, 1051-55. *Also see* Mr. Justice Douglas' dissent in Marco De Funis v. Odegaard, 416 U.S. 312, 40 L. Ed. 2d. 164, 174 (1974).

[11] Steelworkers v. Warrior, 363 U.S. 574 (1960).

[12] *Id.* at 579.

[13] Cox, *Reflections Upon Labor Arbitration*, 72 HARVARD LAW REVIEW 1482, 1499 (1959).

[14] *Id.* at 1500.

[15] *Id.*

[16] *California Cotton Mills Co.*, 14 Lab. Arb. 377 (1950).

[17] *Gibson Refrigerator Co.*, 17 Lab. Arb. 313 (1951).

a practice can include a change in position adopting the practice coupled with a failure to object to it.[18] Further, past practice must be readily ascertainable over a reasonable period of time as a fixed practice accepted by both parties.[19] This does not include instances where special arrangements were made by the parties for particular situations.[20] Moreover, the past practice must involve bilateral participation and not be in the form of a gratuity.[21]

Common Law Created in Practice

Adopting a position opposite Cox's on common law, that it is governed by judge-made principles, we find a different approach on its origins. Rather than characterizing it as a management created, labor accepted, and continuously adhered to practice, the judge-made theory relies upon a community creating a common law in practice. It is controlling as among members of that community generally and can become controlling on a jurisdiction-wide basis when either recognized by a legislature or a court. In the American experience this was particularly true of the common law of miners.[22] The Supreme Court in *Sparrow v. Strong*[23] found the common law of miners to have the force of positive law. Chief Justice Chase found that the conference of territorial status by Congress gave an "implied sanction"[24] for the mining law which preceded the establishing of Nevada Territory thus giving the Court jurisdiction. Common law, like English common law, came from associational experience. This defied the positive law theorists and recognized that law as practices originated in communities and not solely from sovereigns. Behaviorally-oriented researchers have come to believe that this conceptualization better fits the 20th century situation than any positive law theory.[25]

For the workings of an institution of higher learning this conceptualization has much behavioral validity. Traditions, procedures within departments, the dispensation of faculty perquisites, and the like seldom are generated solely by management. Rather, disciplinary concentrations, departments, or schools exercise a degree of autonomy sufficient to establish procedural and substantive rules upon which faculty have come to rely. Whether management is aware of these rules or whether knowledge makes any difference is another matter we will take up below.

With these two conceptual approaches in mind, we return to their definitional impact upon faculty rights and duties. Adopting the Cox formula,

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[18] *California Cotton Mills,* 14 Lab. Arb. 377, 379.

[19] *Celanese Corporation of America,* 24 Lab. Arb. 168 (1954). *Prudential Ins. Co. of America,* 28 Lab. Arb. 505 (1957).

[20] *U.S. Rubber Co.,* 28 Lab. Arb. 704 (1947).

[21] *Falstaff Brewing Corp. and Brewery Workers, Local 62,* 53 Lab. Arb. 405 (1968).

[22] Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240 (1878). SHINN, MINING CAMPS (1885). *Also see* Bakken, *English Common Law in the Rocky Mountain West,* 11 ARIZONA AND THE WEST 109 (1969).

[23] 70 U.S. 97 (1865).

[24] *Id.* at 104.

[25] *See* MACAULAY, LAW AND THE BALANCE OF POWER (1966). FRIEDMAN and MACAULAY, LAW AND THE BEHAVIORAL SCIENCES, 145-396 (1969).

university rules and regulations define faculty status. This also is the *Sindermann* language: "rules and understandings, promulgated and fostered by state officials".[26] Whether this would extend to departmental or school committees would depend upon a state law analysis of the extent of delegable authority and general agency principles. On a common law theory, proof of clear, unequivocal, and adhered to rules promulgated by bodies such as departmental committees and relied upon by faculty could control where the university has no policy, rule, or understanding. As among faculty just as miners in a mining district the rules of the group prevail where not contrary to state or federal law.

Common Law Overriding University Rules

Where past practice is firmly established, there is little question that it overrides the plain meaning of a university rule to the contrary. Of course, the necessary proofs must be established. This burden includes persuasion of a "clear pattern of past practice"[27] as well as the tests mentioned above. Further, the past practice must be applied uniformly; be announced to all affected, contain clear standards, and be system-wide in application.[28] If the faculty can demonstrate this past practice, the rule must fall for disuse and as contrary to past practice. Again Cox, the *Sindermann* Court, and the labor arbitration reports are quite clear. Past practice when firmly established takes precedence even over the plain-meaning of the words. These were, of course, to Cox the words of a collective bargaining contract; but to the *Sindermann* Court they were rules promulgated by state officials which had the force of Texas law.[29] But this is merely the situation where the university's management has a rule and has promulgated a contrary rule and is operating as if the latter controls with faculty reliance thereupon. Or is it? The *Sindermann* Court dealt with a university policy and an administrative agency rule. The result is a burden of proof on respondent to demonstrate that the past practice implied an ad hoc tenure system contrary to the plain words "Odessa College has no tenure system". But, Sindermann argued that his reliance went beyond the college guidebook to an administrative agency statement entitled "Policy Paper 1". Possibly reliance must be upon more than a college rule where claimant cannot by clear and convincing evidence establish a clear and consistent past practice or such reliance is an alternative ground sufficient to establish a property interest.

The alternative position is simpler. While a common law rule may control

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[26] *Sindermann*, 408 U.S. at 602.

[27] *Texas—U.S. Chemical Co.*, 27 Lab. Arb. 793 (1956).

[28] *Prudential Ins. Co. of America*, 28 Lab. Arb. 505 (1957).

[29] "We do not now hold the respondent has any such legitimate claim of entitlement to job tenure. For 'property interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . .' (citing Roth). If it is the law of Texas that a teacher in the respondent's position has no contractual or other claim to job tenure, the respondent's claim would be defeated." *Sindermann*, 408 U.S. at 602.

among members of a community, a University rule to the contrary clearly pre-empts the field.[30] Further, a university without a contrary rule in affirmatively acting contrary to the common law rule obviates its effect. This situation conjures up the situation of dispensation of perquisites where the university distributes monies to departments for research fellowships to be distributed to faculty on the basis of merit. So reads the rule. The department has distributed the monies on a rotating seniority basis since anyone can remember, but has always solicited a perfunctory research proposal from the departmental faculty. A newly hired assistant professor fails to get the word, applies, and is aggrieved to the extent of protest and finally a lawsuit (not unknown in these litigatious days). The department claims autonomy, past practice, and university acquiescence in such practice. The faculty member claims a denial of equal protection, a willful violation of university rules, and a piece of the pie. What result? Plaintiff wins on the rule. But where there is no rule, the plaintiff must rely upon university actions to prevent seniority distribution where the university has knowledge, or the presumption of departmental autonomy in this function should prevail. The result would be the same under a past practice theory where the university had not promulgated nor had knowledge of the contrary practice. However, query whether without a rule or knowledge the same result would prevail. Then the past practice would be established by labor, not management; management would only have tacitly participated, and there is nothing clear or unequivocal about management's relation to the dispensation. The conception would not be easily applied. The common law theory, in sum, assumes that faculty governance at the lowest levels absent university rules or understandings to the contrary is controlling. Not so with past practice.

Common Law Conflict with State Statute

Generally, any conflict on the face of common law and statute must be resolved in favor of the statute. Frequently in the 19th century courts found English common law reception statutes void in part as the common law of a locality controlled over the English law adopted.[31] However, in the 20th century this situation would be a rare occurrence. Rather, the problem of the 20th century is with judicial deference to the legislature and legislative deference to the university in rule-making power. The Supreme Court's sense of judicial self-restraint to avoid meddling in the day-to-day affairs of higher education has been forcefully asserted.[32] Where the conflict is not so apparent, the courts still have their powers of construction and interpretation available to avoid what amounts to a state constitutional question.

Incorporation in Contracts

Incorporation exists at three basic levels each having peculiar problems of their own. First, the incorporation of the common law of the campus involved

[30] *See* Pennsylvania v. Nelson, 350 U.S. 497, 765 S.Ct. 477, 100 L. Ed. 640 (1956).
[31] Bakken, *supra,* note 22.
[32] Epperson v. Arkansas, 393 U.S. 97, 89 S.Ct. 266, 21 L. Ed. 2d. 228 (1968).

in a collective bargaining contract is part of the contract whether the language of incorporation exists or not. The Cox position and the labor arbitration cases cited above make this quite clear. Second, the incorporation of the campus common law of another campus and third, the incorporation of "the developing 'common law' in higher education"[33] are either unworkable or unenforceable.

A collective bargaining contract which incorporated the campus common law of another campus invites litigation. First, where past practice is incorporated without reference and it is in conflict with the common law of another campus, the former should prevail on several theories. The intent of the parties unless explicitly expressed is not to exclude past practice. Even if there was such language, it is arguable that any particular practice is not suited to the campus involved and hence unintended. Finally, employing conflict of law rules where there is conflict, the lack of local contacts or interests could defeat the other campus rule. Another obvious problem is definition. It is hard enough to define the common law of any campus let alone one infused into a bargain by reference.

This brings us to the ultimate catch-all: "the developing 'common law' in higher education". If this is past practice as *Sindermann* infers and the parameters of labor law adequately define, it will take more than a Blackstone to give this terminology any flesh. Moreover, for every rule in California or New York higher education there is probably an exception in Alabama or North Carolina campus common law.

Conclusion

Campus common law is a part of faculty contracts whether of the appointment letter nature or of collective bargaining. It is limited to the past practice of the university, which means university rules promulgated by the administration and not the faculty acting as faculty, control the extent of the common law. Despite the language of "common law" more familiar to the academic world, the meaning of the term has been defined by organized labor's combat with corporate management. Unless faculty have strong claims of agency status in their rule-making, their world of perquisite dispensation must yield to management rules to the contrary.

Possibly in collective bargaining contracts an incorporation clause needs to be inserted "campus common law including the rules and understandings of faculty bodies not only charged with rule-making powers but also those making rules upon which faculty have reliance interests".

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[33] The language "the developing 'common law' in higher education" was incorporated into the collective bargaining contract of Northern Michigan University. DURYEA, FISK AND ASSOCIATES, FACULTY UNIONS AND COLLECTIVE BARGAINING 85 (1973).