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The Review of Higher Education, Volume 10, Number 4, Summer 1987, pp. 295-318 (Article)

Published by Johns Hopkins University Press
DOI: https://doi.org/10.1353/rhe.1987.0011

The Review of Higher Education
Summer 1987, Volume 10 No. 4
Pages 295–318

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Thomas Bonner referred in 1986 to the "unintended revolution" in higher education over the last forty years. Using 1940 as his base for comparison, he develops a history of the quantum changes that have affected every element of higher education in the intervening years. "As a result," he says, "America's system of higher education today . . . is as different from that of 1940 as our present colleges and universities are different from those of the developing countries of Asia and Africa" (1986, 44).

Coincidentally, it was in 1940 that the American Association of University Professors (AAUP) and the Association of American Colleges (AAC) produced the Statement of Principles on Academic Freedom and Tenure (AAUP 1977). The statement was clearly a product of circumstance as much as of principle. In 1940, the academic community was emerging from the Great Depression in which economic insecurity had bedeviled the profession (Wriston 1940) and in which the growing fear of fascism and communism endangered intellectual freedom (Flint 1935; Hook 1939). Anticipation of war recalled the threats to academic freedom that had led to the AAUP's founding in 1915 (Wright 1941).

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1940 was also the year of Bertrand Russell's celebrated dismissal from the City University of New York. No sooner had the joint concept of academic freedom and tenure been accepted by the academic community than Justice McGeehan of the New York County Supreme Court pointed out that its exercise was subsidiary to the protection of "public health, safety, and morals"—and Professor Russell was considered a threat in the climate of the times (*Kay v. Board* 1940). Although academic freedom was an unquestioned value, people with influence had reservations about implementing a universal standard of tenure, and as a result its acceptance was probably less than truly universal across the profession (Wriston 1940, 343).

As uneasy as the birth of a common-law standard for academic freedom and tenure may have been, it was a triumph for the academic profession, which had been working for many years to formulate principles and procedures by which to protect its basic values (Joughin 1969, 4). However, nearly a half-century later, it is curious to contemplate the vastly expanded and strengthened array of colleges and universities. The 1940 statement regulating and adjudicating faculty status and employment seems a virtual artifact. Today's issues are infinitely more complex than those being addressed in the simpler institutions of 1940; the characteristics of colleges or universities and their faculties are infinitely more diverse; and the involvement of governmental authorities, private contracts and agreements, and collective bargaining agents is so pervasive that the entire context of academic employment relations has changed beyond recognition from the 1930s and 1940s.

It is more than a curious footnote, however, that the AAUP no longer plays as central a role as it did in simpler times. Membership has decreased from a high of 90,000 in 1971 to 52,000 in 1986 (Watkins and Jacobson 1986; Garbarino 1975, 88). It has been criticized for becoming preoccupied with collective bargaining at the expense of its traditional role as the guardian of academic freedom for the whole profession (Monaghan 1987). The future role of the AAUP is far less certain than is the inescapable impression that there is presently no effective national arbiter of the common law standards of the academic profession.

This brings me to my central question: Is there an effective common law governing the professional employment relations of academics? If so, what are its roots, its current contours, its security and stability; and who can best articulate, defend, and advance the standards of a living common-law autonomy for higher education?

If there is no effective common-law autonomy for higher education, what has led to the unfulfilled promise of the 1940 statements, and how might the profession address the need for a common law of professional relations and institutional autonomy?

I have chosen in this paper to explore the developments in public, civil, and constitutional law that lead me to conclude: (1) that courts remain highly receptive to the development, maintenance, and enforcement of a professional common law; (2) that if such a common law does not now govern the disposition of important cases, it is because legislation, litigation, collective bargaining, and various public policy commitments have imposed on the autonomy of professional relations; (3) that no effective national agreement exists on the core assumptions and rules that might stand as a bulwark against civil authority's intervention into academic affairs; and (4) that good cause exists to recommend a different strategy for advancing and protecting the terms and conditions of policies affecting academic autonomy. Specifically, I will conclude that the common-law approach is in precarious condition but may be revitalized by dispute resolution procedures, private agreement, the legal defense of corporate autonomy, and a reexamination of the status of academic freedom by a national commission.

The "Common Law" of the Profession

In 1973, Matthew Finkin, then associate counsel of the AAUP, published an important paper outlining emerging conditions favorable to judicial recognition of an academic common law. These conditions, he said, "hold the promise of effecting a jointure of the common law [of contracts] with a body of [common professional] practice . . . capable of maturing into a law of academic status" (1973, p. 602). Finkin was exploring and anticipating the impact of the famous *Perry v. Sindermann* (1972) decision that turned on the court's citation of *Steelworkers v. Warrior & Gulf Co.* (1962). Ten years before *Sindermann,* the *Steelworkers* case had articulated the standard of a common law established by long practice and common understandings in a given factory or even in a nationwide industry (p. 579). In *Sindermann,* the court held that: "A teacher . . . who has held his position for a number of years, might be able to show from the circumstances of this service—and from other relevant facts—that he has a legitimate claim of entitlement to job tenure" (1972, 602).

The Court pointed out that a "common law"—as in *Steelworkers*—might exist in "a particular university" and as such would create tenure rights for faculty. The Court found that these conditions did exist in Sindermann's case and his claim to tenure needed to be interpreted in that light (1962, 602).

Finkin contended that such common law rights could "comprise a portion of the bundle of rights conferred upon consummation of a contract of academic appointment (1973, 594). He referred to this concept as a "law of academic status" (p. 575) and drew on a similar concept presented in a 1959 paper by Byse and Joughin to contend

that courts should recognize "long-established usage" in protecting this acquired status (p. 215).

Finkin's advocacy of a common law for the profession was both timely and appealing in the wake of the Supreme Court's apparent invitation to such a concept, but it may not—in retrospect—have been the best time to seek common, nation-wide definitions and practices. There was at this time a virtual explosion of faculty interest in collective bargaining and substantially expanded legislative interest in higher education. Faculty members were resorting increasingly to litigation to resolve employment disputes. Conditions made it both legally and practically difficult to recognize "industry-wide" norms, and impeded the development of a truly *common* law.

Seven years later, in 1980, Finkin analyzed disparate court opinions that often failed to acknowledge a common-law basis for academic employment relations. He noted that litigation and collective bargaining threatened and—simultaneously—resulted from "an erosion in the national character of the academic profession" (p. 1190). He proposed a national commission to supplant Committee A of the AAUP composed of faculty *and* delegates from the institutional community which would substitute a single "respected academic judiciary for a multitude of state courts of highly variable quality" (p. 1197). Plainly, Finkin had concluded that the vitality and integrity of the common law was severely threatened and that only a dramatic new initiative representing coalescence on the scale of the 1925 and 1940 joint statements on academic freedom by the AAUP and the AAC could regain support for nationally consistent norms of academic freedom and tenure.

Judicial Treatment of Academic Common Law

Finkin did not see courts as unwilling to recognize a common law in academic employment. He was more concerned about growing contentiousness and the potential atomization of definitions and practices to a purely local level—a logical outcome of both litigation and collective bargaining (p. 1187).[1] In fact, it is quite possible to show that the courts are *highly receptive* to the special character of colleges and universities and that their decisions have left wide latitude for self-regulation. Courts are also ready to accept the reali-

[1] *"In sum, the determination of institutional rules purely by the interplay of highly politicized local bargaining forces, the intense 'contractualization' of those rules, and the 'contract focus' of faculty and administrators . . . combine to create an atmosphere in which the threshold question posed in faculty-administration disputes concerns less what the academic community has thought is right than what the letter of the rule requires. . . . Consequently, the heightened politicization and the shift to accelerated legalism that seems to accompany collective bargaining may, if grossly exaggerated, be antithetical to academic values?" (Finkin 1980, 1187).*

ties of more fractious times and look to more secular models and precedents to resolve key cases. My goal in the following section is to establish the important place courts hold for common law rights in academic institutions.

The key case is probably *Perry v. Sindermann* (1972). Justice Potter Stewart's opinion established that a system of common law may create *de facto* tenure rights. Following the *Steelworkers* precedent, the opinion implied that there could be an "industry-wide" common practice as well (p. 602). The *Perry* majority opinion may have been the high-water mark in the decades-old quest for legitimacy of the common law in academic life, but it was far from the last word in judicial recognition of a place that such a common law might attain.

Judicial Abstention

It is widely recognized that courts prefer to leave sensitive academic judgments to the academic community. *Connelly v. University of Vermont* established in 1965 that the substance of academic judgments was outside the sphere of judges' competence, even if the conditions of due process required in reaching and enforcing such judgments were not.

Two more recent decisions by the U.S. Supreme Court affirm this basic judicial posture. A medical student appealing dismissal from the University of Missouri lost her appeal because the university had carefully observed her procedural rights. The case provoked a signal from Justice William Rehnquist, writing for the majority, that courts would not second-guess substantive academic decisions:

> The decision to dismiss . . . rested on the academic judgment of school officials that [respondent] did not have the necessary clinical ability to perform adequately as a medical doctor and was making insufficient progress toward that goal. Such a judgment is by its nature more subjective and evaluative than the typical factual questions presented in the average disciplinary decision. Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision-making. . . . Under the circumstances, we decline to ignore the historic judgment of educators and thereby formalize the academic dismissal process by requiring a hearing (Horowitz v. Board of Curators of University Missouri 1978, 955).

The second case dealt with a Title VII (sex discrimination) complaint, but the Second Circuit Court of Appeals in *Zahorik v. Cornell University* (1984) gave a similarly wide berth to the special role of peer judgment. Citing "generations of almost universal traditions stemming from considerations as to the stake of an academic department in such decisions and its superior knowledge of the academic

field and the work of the individual candidate," the court declined to overturn a summary judgment granted in a lower court to Cornell (p. 96).

If *Horowitz* established the Court's willingness to accept a "historic" rationale for academic independence, the more recent *Regents of University of Michigan v. Ewing* decision written by Justice Stevens (1985) recognized that common practice is the touchstone by which the exercise of independent judgment may be evaluated:

> When judges are asked to review the substance of a genuinely academic decision . . . they should show great respect for the faculty's professonal judgment. Plainly, they may not override it unless it is such a substantial departure from academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment (p. 513).

In an accompanying footnote, Justice Stevens expanded on the gradually emerging idea of an institutional academic freedom: "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, and somewhat inconsistently, on autonomous decision-making by the academy itself. Discretion to determine, on academic grounds, who may be admitted to study, has been described as 'one of the four essential freedoms of a university.' " (p. 514).

Ewing, as noted below, is the latest in a series of decisions that shows the Supreme Court's receptivity to both corporate and professional autonomy in colleges and universities.

Corporate Academic Freedom

I have addressed elsewhere the issue of corporate autonomy, which has achieved some measure of protection under the label of "institutional academic freedom" (Leslie 1986). Justice Powell's opinion in *Bakke* [1978, 312] brought the corporate university's right to make admission decisions under the umbrella of the First Amendment's "special concern" for academic freedom. Relying on the 1957 *Sweezy* precedent, Powell recognized a public policy justification for university autonomy—the creation of a special institution dedicated to intellectual inquiry.

More recently, Justice Powell again outlined the nature of a corporate academic freedom in *Widmar v. Vincent* (1985). He there affirmed "the right of the University to make academic judgments as to how to best allocate scarce resources or 'to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study' " (p. 276). Although the precise scope and nature of this corporate academic freedom right have yet to be articulated, the Supreme Court has clearly articulated the fundamental rationale for its existence on several occasions. To

wit: A university is held to exist for the purpose of advancing the free pursuit of ideas and enjoys some measure of First Amendment respect, if not direct protection, as an instrument for the advancement of this basic social value.

Common-Law Autonomy

The existence of a widely accepted standard for academic employment relations is sometimes the key to a court's decision. The 1940 AAUP statement, representing such a standard, has been a central factor in several important cases.

To determine the proper disposition of a professor's complaint in *Krotkoff v. Goucher College* (1978), the Fourth Circuit Court of Appeals needed a standard to refer to. Krotkoff was released from a tenured position because of fiscal problems, but the college's bylaws did not explicitly define tenure, cause for removal, or financial exigency. In this vacuum, the court looked to "the national academic community's understanding of the concept of tenure" (p. 678). It heard expert testimony from Dr. Todd Furniss, then director of the Office of Academic Affairs of the American Council on Education, regarding the meaning of the 1940 statement and its applicability to the Krotkoff situation. After defining the contours of the AAUP policy statement concerning tenure, the court addressed the applicability issue: "Probably because it was formulated by both administrators and professors, all of the secondary authorities seem to agree that it is the "most widely accepted academic definition of tenure" (p. 679, citing Brown 1977).

Goucher College's president testified that he was using *tenure* in the same sense that it was generally understood, and the court concluded that the AAUP statement was a relevant standard accepted by the national academic community (p. 680).

The *Krotkoff* decision drew heavily on the *Greene v. Howard University* (1969) decision that had identified the academic employment situation as one in which special customs and practices were likely to affect the meanings and interpretations of employment contracts (p. 1135). *Krotkoff* stands out because it determined that the AAUP statement constituted the common-law standard to which a court can look to address the issues in a dispute. Such a standard allows the academic community to be self-determining in disputes concerning basic substantive and procedural questions in employment, or other professional, disputes. It will be seen later that this standard may not be so universally accepted that it governs all cases. Nevertheless, there are important cases that generally track with the *Krotkoff* lessons.

Similarly important is the decision of the Rhode Island Supreme Court in *Drans v. Providence College* (1980). In that case, a superior court judge had explicitly declined to consider national professional

norms in hearing a mandatory retirement case. The trial judge sharpened the issue by responding at rehearing, "All that I know is that this is a controversy between a professor and Providence College and no one else. What Boston University may do or what the American Association of University Professors thinks or may do is of no consequence in resolving this controversy" (p. 631). Supreme Court Justice Kelleher firmly pointed out that a contract of employment should be interpreted in light of "the meaning that is unique to the . . . profession" (p. 632). In this case, he repeatedly reminded the trial judge that the national academic community, and particularly the AAUP, has established norms and standards that apply directly to interpreting the employment relationship. The rights of Professor Drans were to be understood as they related to the common law of the profession—and not within the confines of a particular institutional policy.

A third decision points in the same direction. In *Gray v. Board of Higher Education of the City of New York,* the Second Circuit Court of Appeals addressed the balancing of confidentiality and disclosure in a tenure appeal.[2] Recognizing a strong constitutional preference for confidentiality, the court referred to the AAUP guidelines as the touchstone against which to test its balancing process.

The decision was a victory for the recognition of a common law standard of professional relations. In this case, the court followed the AAUP recommendation that providing reasons in a negative tenure vote should prevent disclosing individual professors' votes. Since the tenure process is an essential element in the protection of academic freedom, a protected First Amendment interest, the court was willing to give every consideration to a professional standard devised to further the basic institutional goal.

Institutions may, of course, adopt the 1940 statement directly and incorporate it by reference into their policies. In 1978, Whitman College was found to have adopted the 1940 statement and the AAUP's 1958 Statement on Procedural Standards in Faculty Dismissal Proceedings, and its board was held to have bound itself to these standards in dismissal proceedings against a tenured professor (*Lehmann v. Board,* 1978). The Supreme Court of Washington refused to allow the board to modify unilaterally a decision by an internal review panel and required the board, in accord with AAUP procedure, to refer any recommended modifications back to that panel. In other cases, courts have noted that policies are consistent with or generally follow the recommended policies of the AAUP (*Peters v. Middlebury, 1976; Beitzell v. Jeffrey,* 1981) Professor Robert O'Neil has

[2]*But see Dinnan v. Board Of Regents, University System of Georgia,* 661 F.2d 426 (1981). The Fifth Circuit held that an academic freedom privilege could not override a fundamental individual right.

concluded that courts have shown an "increasing receptivity . . . to national AAUP statements" (1984, p. 290).

Substantive Due Process

Substantive due process requires that decisions be rational and not trespassing on fundamental rights. While standards of substantive due process are not crystal clear concerning academic common law, they do provide the latitude required for the customary judgmental qualities in academic decision-making. The *Ewing* decision addresses this point: "Plainly [judges] may not override [substantive academic judgments] unless [they are] such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment" (1985, 513).

The Supreme Court thus ties together "accepted norms" and the exercise of professional judgment. In other words, by showing that it conforms to normal or widely practiced standards and procedures—such as the AAUP statements—an institution may show that it has relied upon the common law and thus observed the requisite minima for substantive due process.

To pursue a substantive due-process cause of action, the plaintiff must establish that university decision makers exercised arbitrary and capricious behavior. There must be "no rational basis" for the decision in question, it must be "motivated by bad faith or ill will unrelated to academic performance" (*Stevens v. Hunt* 1981, p. 1190). As noted elsewhere, academic decisions are widely recognized to be subjective judgments that lie peculiarly within the province of those who are qualified to make them (*Mauriello* 1986; *Hines* 1981). Therefore, courts might see if generally accepted practice has been followed, relying on the academic common law as a test of substantive due process. In both *Ewing* and *Mauriello,* the "substantial departure" standard would require the court to look carefully at accepted academic norms to detect if a substantive due-process error had been made.

In these various ways, we may conclude that there is a common-law basis for recognizing accepted academic community norms as the standard by which to judge employment and other disputes. Whether an institution of higher education, has directly adopted AAUP statements or whether the court considers the statements as relevant contextual and interpretive material, it is often necessary to invoke "accepted practice" on the grounds that:

1. A Consitutional right to free expression implies strong protection for academic freedom, and convention teaches the means by which such protection may be effected;

2. Sufficient vagueness exists in the terms of a particular contract of employment to require reference to the common understandings peculiar to the academic profession;

3. Substantive due process may require that academic decisions be made consistent with accepted norms and practices.

The Yeshiva Presumption

Although not often viewed as such, the landmark *National Labor Relations Board v. Yeshiva* case (1980) could be interpreted as a strongly consistent precedent with decisions that respect the common-law character of academic employment. Justice Powell relied on both the historical character of collegial relations in colleges and universities as well as the need for the faculty's special expertise in academic matters when he wrote for the majority that the Court of Appeals had not erred in finding that faculty at Yeshiva University were managerial employees and thus ineligible to bargain collectively. Citing Baldridge (1971), Brubacher and Rudy (1976), and Mortimer and McConnell (1978), Justice Powell established that modern shared authority was essentially an extension of the medieval pattern of self-governing academic guilds. He further indicated that in professional decisions, faculty interests cannot be distinguished from the interests of "management" (pp. 680, 682–88).

Four justices dissented pointedly from the majority, disagreeing about the nature of university governance (p. 691). Referring to the majority's "idealized model of collegiate decision-making that is a vestige of the great medieval university," Justice Brennan concluded that universities had progressively withdrawn authority from the faculty in the interest of corporate efficiency (p. 701–3). But *Yeshiva* retains its vitality. Most recently, the NLRB was guided by the decision in denying faculty at Boston University the right to bargain (Heller 1986b).

There appears to be a well-established view (cf. *Bakke, Yeshiva, Widmar,* and *Ewing*) on the Court that custom, tradition, and historical autonomy protect and enhance the essential academic freedom they understand to be the core value and main social purpose of the American university. Recent changes in the Court's composition appear to foretell a strengthening of this modal view. This position provides protection for the exercise of customary, common-law practice in line with widely accepted norms shared by the academic community. Future courts may have to wrestle with the inevitable tension between institutional and individual freedom (Leslie 1986, 155). But the Court has clearly established a broad space for the academic common law.

Foundations for Common-Law Autonomy

Analysis of court opinions yields several often-cited grounds for common-law autonomy. I will identify five such grounds and note the authority upon which their advancement can be built.

Historical autonomy is recognized in various judicial opinions, but most effectively in *Yeshiva*. Justice Powell traced the roots of academic self-regulation to the academic guilds in the medieval university. Whether it is realistic to draw such a connection in the modern university—and the dissent in *Yeshiva* bluntly said it is not—this Supreme Court decision has profoundly shaped the course of collective bargaining in the private sector. It indicates a clear concept of the university with historical roots and long-standing customs that merit preservation and a measure of legal protection. The merits of *Yeshiva* aside, it is important to establish the Court's conceptual understanding of the nature of universities—in this case, it leads to a strong presumption that custom, tradition, and historical practices merit preservation. This is an essential ingredient in judicial recognition of common law.

First Amendment autonomy derives from the special respect accorded to academic freedom as an adjunct to the fundamental right to free speech. The *Sweeny* case of three decades ago laid the foundation, and succeeding opinions written principally by Justices Stevens and Powell in *Ewing*, *Bakke*, and *Widmar* have extended the protection. The free exchange of ideas is seen as a special, sanctioned function of universities. As such, universities deserve a special latitude when their truth-seeking function is at stake, as in decisions about tenure or about the academic qualifications of students.

Professional autonomy is recognized where special expertise is required to make academic decisions. The clearest statement on this point appears in *Ewing*. Earlier, however, in the 1970s when the first discrimination suits began to test certain practices in tenure decision-making, the federal courts were reluctant to substitute their judgments for those of faculty. *Faro v. New York University* is generally recognized as a key precedent with its statement: "Of all fields which the federal courts should hesitate to invade and take over, education and faculty appointments at a University level are probably the least suited for federal court supervision" (1974, 1231–32).

Many cases have followed *Faro* in recognizing the faculty as the appropriate judgmental factor in academic decisions. In a somewhat different context, the Third Circuit Court noted that, "we are required to show 'great respect for the faculty's professional judgment'" (*Mauriello*, p. 52, citing *Ewing*, p. 513). As long as the issue involves bona fide professional judgment, the courts will look to the generally accepted professional standards for guidance. With academic judgments, the courts usually reserve considerable latitude for subjectivity. In this latitude is the space for the operation of a common law.

Common understandings constitute a fourth root for academic common law. By its very existence, the AAUP 1940 Statement and its progeny of interpretive and supplementary statements—endorsed by various groups and adopted by many institutions—give the courts a basis for seeking interpretive guidance from the common practice of the profession. It may be buttressed by parallel sources of common law, such as incorporation of accrediting standards into faculty contracts (*Bason,* 1980).

Corporate autonomy might provide latitude for the emergence of a common law of professional relations in universities. This autonomy is distinct from that created under the First Amendment, in which the corporate mission to advance the free exchange of ideas provides protection for certain customary practices. Judges often refer to a university's need to maintain standards, quality, reputation, or excellence—all animating values behind the university's corporate concern with educational policies and objectives (*University Education,* 1984). In tenure cases, maintaining standards and excellence—a core interest of the university—is sometimes found to be at stake, and courts give great latitude to the academic decision-making process when it so profoundly affects the future of the institution's basic interests. The result is often a substantial amount of corporate freedom and, consequently, further space for the development of common law (*Lieberman v. Gant* 1980).

Constraints on Common Law Autonomy

While judges are receptive to the five main bases of autonomy and therefore to the conditions under which an academic common law could thrive, they are often faced with a factual situation that causes their decisions to appear hostile to such a common law. Courts sometimes decide that a common-law solution has been preempted by other considerations. In this section, I will enumerate these considerations and the conditions under which they come into play.

Rejection of AAUP Statements

Individual colleges and universities may freely decide to adopt recommended AAUP policies wholesale. They are just as free to reject the statements, adopt them in parallel or modified form, or to ignore their existence. Sometimes an insitution will adopt regulations, policies, or bylaws that explicitly provide a different set of terms and conditions than would be recommended by the AAUP. It is not necessary for an institution to reject the AAUP statements explicitly for a court to find that those statements do not apply to a dispute; any one of the foregoing conditions might be sufficient to neutralize or nullify the force of a professional common law.

A prime illustration is offered in *Amoss v. University of Washington* (1985). A faculty member denied tenure alleged that AAUP regulations limited the president's role in reviewing a faculty tenure committee decision. The appellate court ruled that the AAUP regulations had no effect on its decision because they were not incorporated into existing university regulations. The court pointed out that the university "could . . . provide [for such incorporation] in its Faculty Code" if it so chose (p. 359). It further pointed out that the university had affirmatively adopted its own regulations specifying a different set of terms and conditions for considering tenure than the AAUP had recommended. In the University of Washington situation, "the Faculty Code vests considerably greater discretion and decision making authority in the president and the Board than does the AAUP policy (p. 359). Thus, by not adopting AAUP policies and by affirmatively adopting its own alternative policy, the university effectively negated the operation of common-law standards in the tenure process.

There is no guarantee that widespread faculty belief in the existence of a common-law system actually creates one. The Fourth Circuit in 1985 disposed of a professor's claim to tenure against the Eastern Virginia Medical Authority by pointing out that the authority's explicit tenure policy differed from that of the AAUP. "It is unlikely in the extreme," the court noted, "that an institution which has a formal tenure policy stated with precision in writing in a generally circulated and available faculty handbook has also developed an altogether inconsistent informal policy" (Sabet 1985, 1270). The court went on to point out that the medical school operated by the authority was under no obligation to issue a disclaimer notice that its policies differed from those of other institutions or from the AAUP.

There is also no guarantee that references to AAUP policy statements in university handbooks thereby confers on them the status of university policy. The University of Maine included an AAUP statement on service credit in an appendix to its handbook, but the First Circuit held that this material could not supersede *contrary* language in the main body of the university's regulations (*Beitzell* 1981, 877). The court noted that the university's policy language was reinforced by actual practice contradictory to the AAUP policy (cf. *Greene v. Howard*, 1969).

Even where the AAUP's policies are in operation, they may not be taken literally or enforced to the letter.

Two cases involving the 1976 Recommended Insitutional Regulations on retrenchment are good examples. In *Scheuer v. Creighton University* (1977), the Supreme Court of Nebraska concluded that, "we do not accept the 1976 recommendation of the AAUP defining 'financial exigency' so as to limit that term to an imminent crisis

which threatens the survival of the institution as a whole" (p. 600). Among the reasons the court cited for its interpretation was "common sense" (p. 601). In the generally parallel case of *Knowles v. Unity College* (1981), fiscal emergency forced the Maine college to abolish its tenure system in 1971. Shortly thereafter, it adopted the AAUP's 1976 Recommended Institutional Regulations with the proviso that they would be implemented only in ways "consistent with the financial condition of Unity College" (p. 222). Literal conformity was not required of the college when it faced real threats to its financial viability.

For many institutions, the AAUP standards exist as rules to which they take explicit or implicit exception, and the courts support their right to do this. By ignoring, rejecting, or modifying the recommended standards, insitutions may unilaterally establish rules that are different from those once promulgated, hoping that they might become a national common law.

Statutory Preemption

The Supreme Court in *Perry* (1972) and in *Board of Regents v. Roth* (1972) established that property rights under the Fourteenth Amendment are established by reference to "existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits" (p. 577). Tenure systems in many institutions, specifically public institutions, are in and of themselves *statutory* tenure systems.

When a tenure system is specified in a state code, whether statutory or regulatory, it will have the force of state law. Consistent with the *Perry* and *Roth* decisions, such statutory status for the tenure system will preclude any effect of informal understandings or common law. Such was the ruling in *McElearney v. University of Illinois (1979)* and in a series of parallel cases from other states.[3] The *Amoss* case resulted in a similar conclusion, as the court examined carefully the requirements of the Washington Faculty Code (items 25–62), and drew specific contrasts with the national AAUP policy, noting, "This policy . . . is not stated in the University rules and Faculty Code" (p. 359). The statutory rule takes precedence over other informal or common law understandings (See also *Nzomo* 1978). Statutory tenure systems preempt common-law tenure systems.

Restricted Delegation of Authority

Common-law tenure systems may also be precluded if authority for tenure decisions has been delegated to particular officers or boards.

[3]*McElearney v. University of Illinois*, 612 F.2d 285 (1979); *Needleman v. Bohlen*, 602 F.2d 1 (1979); *Willens v. University of Massachusetts*, 570 F.2d 403 (1978); *Haimowitz v. University of Nevada*, 579 F.2d 526 (1978).

Amoss is particularly instructive. The AAUP statement recommends that certain authority for tenure decisions be delegated to faculty committees. In *Amoss*, it was alleged that the president's powers of review were limited by national practice as represented in the AAUP guidelines. The court, however, looked to the administrative code of the state of Washington to determine the precise authority of the president and the board in tenure decisions and appeals. These specified powers were held to have precluded reliance on common-law standards as represented in AAUP documents.

The *Amoss* decision went a step further, however. The opinion referred to generic principles of administrative law that give "agency heads," such as university presidents, clear decision-making authority—a broader power range than just reviewing recommendations made by internal agency committees (p. 358). Under the provisions of administrative law, a tenure committee would constitute such an internal review panel; and the president, by reason of his administrative position alone, could make fully independent findings after receiving the committee's report (recognizing that final authority is likely to be vested in a board, system chancellor, or other higher authority).

Therefore, even though a university's tenure policy may conform to the AAUP's standards, reservation or delegation of powers, as well as the principles of administrative law, might preclude the operation of a common-law system.

Collective Bargaining

While courts look to state law when analyzing contractual claims (*Perry v. Sinderman* 1972), a collective bargaining contract would supercede many other sources of authority (*Council*, 1982). If collective agreements contain provisions affecting academic freedom and tenure, the terms of the contract will preclude any common law understanding or practice. Many decisions following the landmark *Roth* case have explicitly referenced the determinative power of contractual terms in analyzing the relationship between faculty and their institutions. (See *Clark v. Whiting*, 1979).

Collective bargaining contracts are also exclusive. That is, once a faculty elects a bargaining agent, that agent is,[4] under the National Labor Relations Act and applicable state law, the exclusive agent representing faculty interests. Although the terms of a negotiated agreement might recognize or acknowledge the contours of common law, it is equally possible that the agreement may contradict or

[4]*The National Labor Relations Board first asserted jurisdiction over private institutions in Cornell University, 74 LRRM 1269 (1970). The situation varies widely among states, many of which have provided for faculty rights to elect an exclusive bargaining agent. It is beyond the scope of this paper to review the parameters of these rights.*

modify these familiar norms of practice. If an agent negotiates, for example, a shorter or longer probationary period for tenure accrual than either AAUP standards or common practice specify, it is the agent's right as exclusive agent to do so, and the AAUP could not intervene to override the contract terms.

Amoss v. University of Washington

In 1985, the Court of Appeals of the state of Washington upheld a superior court decision affirming the University of Washington's denial of tenure to an anthropology professor. On Professor Amoss's appeal, the AAUP's Washington chapter (AAUPW) filed an *amicus curiae* (friend of the court) brief that addressed the status of academic common law head-on. The AAUPW's attorney concluded his brief asking, "that this court . . . impose upon the University only those reasonable restraints inherent in the concept of shared governance and widely accepted by all segments of the nation's academic community" (1985, 29). Alleging a "failure of 'shared governance' at the University," the AAUPW brief protested that administrative authority to review tenure decisions should be modulated by the priority of faculty expertise as represented in various AAUP policy statements (p. 29).

Central to the AAUPW's argument was the precise authority of the university president to reverse tenure recommendations from faculty committees. The association felt that national AAUP policy statements restrict the president's review powers to an essentially appellate function, that is to sustain the faculty committee's decision or to return the decision for further consideration in light of the president's objections. Specifically, the AAUPW argued:

> AAUP standards make it plain that, within the university setting, tenure decisions are primarily committed to the faculty. When disputes arise and the hearing process is invoked, it is anticipated that the president and governing board will defer to the decision of the faculty committee. Adverse exercise of the administration's power of review is justified only in "exceptional circumstances," in "rare instances," and for "compelling reasons." Even then, the matter should ordinarily be returned to the committee for reconsideration, as the University's Code allows (p. 15).

These standards, the AAUPW points out, offer the court "substantial guidance as to the norms, values, and expectations . . . of American higher education as a whole" (p. 14).

Finding that tenure decisions at the University of Washington are covered in both substance and procedure under provisions of the state administrative code, the court rejected these AAUPW arguments in a very direct and simple statement:

> The references to the national AAUP's recommended regulations illuminate the fact that the University of Washington Faculty Code and

> governing statutes create a significantly different framework of decision making. AAUP policy provides that on tenure matters the "governing board and president should . . . concur with the faculty judgment except in rare instances and for compelling reasons which should be stated in detail" (pp. 358–39)

The court goes on to point out:

> This policy, however, is not stated in the University rules and Faculty Code. On its face the Faculty Code vests considerably greater discretion and decision making authority in the president and the Board than does the AAUP policy. If the University wished to require the president and the Board to defer to the tenure committee findings or to return a matter to the tenure committee for reconsideration . . . the University could so provide in its Faculty Code (p. 359).

This decision clearly illustrates how a common-law standard may be rendered irrelevant by statutory and administrative preemption. An explicit statutory provision covering the issues and statutory delegation of authority for decision making effectively close out any court review of a common-law standard for either substantive or procedural guidance.

This decision is, of course, a particular response to one case governed by the state law of Washington. It does not reverse other decisions that find considerable latitude for common-law autonomy of academic decision making. However, it is a precedent that deserves careful attention. While common-law autonomy is broadly understood in the profession and upheld by courts in many circumstances, it is just as clear that law does not sustain such autonomy when it has been preempted by one or more of the factors identified here.

Fragmentation of the Profession

Does the academic community have enough unity of values or of practice to generate a consensus about common-law autonomy? The evidence suggests a fragmented profession. A variety of systems now regulate professional relations in higher education, and faculty members are represented by several agents instead of by a single voice speaking with moral authority for deeply held consensual values.

Public and private sectors now exist under separate systems of law for collective bargaining. The *Yeshiva* decision severely diminished private bargaining activity (Begin and Lee 1985). Faculty in private institutions are seen as managerial employees who must effectively demonstrate otherwise if they are to secure bargaining rights. On the other hand, faculty in public institutions are covered by laws in most states that favor their right to bargain. Because faculty status—as either managerial or professional—now demonstrably differs

according to whether one is employed in a public or private institution, it is more difficult to demonstrate that a common understanding exists regarding such status. Two different systems of law governing this aspect of professional relations in academe, make it difficult to argue that a single common law should be recognized.

Likewise, the public and private sectors are divided by a system of public law that governs, often through elaborate statutory and administrative codes, the substantive and procedural aspects of professional relations that might otherwise be covered by a single common-law understanding. Not only does this preemptive public regulation preclude recognition of common-law understandings, but it places public colleges under one system of law while faculty at private institutions may elect on their own to adopt, modify, or reject provisions of recommended academic common law.

Separate systems of law—private agreement, common law, statutory law, administrative law, and collective bargaining—divide rather than unify academic relationships, and the relatively weak national position of the AAUP may exacerbate the problem. Troubled by falling numbers, the AAUP, with about 90,000 members in 1971 (Garbarino, 1975, p. 88) and 52,000 in 1986 (Watkins and Jacobson, 1986, p. 19), is also now smaller than either of its two principal competitors for faculty loyalties. The National Education Association (with 65,000 members) and the American Federation of Teachers (with 83,000 members) together have almost three times the members of what was once thought to be the prime collective voice of American academics (Watkins and Jacobsen 1986, 20). Reflecting this decline, the national AAUP president recently said one of his priorities is to "make the AAUP what it once was: the unquestioned voice of the professoriate" (p. 20) The association's role in collective bargaining has put it in the curiously schizoid position of defending a national common law for academic relations on the one hand and pursuing a system of professional relations on the other hand that—in legal terms, at least—*preempts* the existence of such a common-law system. The AAUP's dilemma seems to represent the profession's larger dilemma: it has fragmented itself into several interest groups and has been fragmented into incompatible systems of public and private law that treat professional relations as if a common standard did not exist. This fragmentation has occurred despite obvious judicial receptivity to a common-law system of academic governance, of academic freedom and tenure, and of professional autonomy in academic affairs.

Policy Issues

The academic profession and the nation's judicial system recognize that common-law autonomy in academic institutions is a basic *desideratum*. The courts have articulated what I call a "legal space" for

academic decision-making that virtually begs for a strong and universal set of norms to which disputing parties can turn for guidance. I have tried to establish that this space has been preempted in a variety of ways, that the profession is fragmented, and that AAUP leadership is weakened, making an effective reassertion of core values and unified advocacy of a common-law autonomy for universities difficult. Therefore, a major policy consideration must be identifying alternative means to achieve autonomy in academic decision-making.

Dispute Resolution

The Association of Governing Boards recently proposed a Project for Dispute Resolution in Higher Education to be housed at the National Institute for Dispute Resolution (Heller 1986). The project would provide conciliation and mediation services by knowledgeable intermediaries to help reach settlements and avoid litigation. Finkin proposed a similar, and fully detailed, plan in 1980. Proposing a national commission to mediate and conciliate professional relations disputes, Finkin outlined a system of voluntary regulation in which faculty and administrators would play equal roles. He acknowledged one important defect: the proposal would apply readily to the private sector, but the doctrine of "impermissible delegation of authority" might prevent public institutions from accepting the commission's findings as binding. (Statutory regulation and collective bargaining contracts might also preempt the commission's authority.)

Although mediation of disputes is an attractive alternative to costly litigation, the special commission or "court" for academic disputes would have an additional attraction: it could develop a body of case law to govern professional disputes and thereby provide an effective common law alternative to either judicial or statutory intervention in professional academic affairs. Obviously, this was the role that the AAUP once hoped to play. Both the AGB and Finkin proposals imply the need for a stronger, more legitimate voice in the development of academic common law. As long as the courts provide a legal space within which such a common law can grow, there will be a need to develop, maintain, and advance an authoritative system of common law to bring direction and substance to the profession's own system of values and standards.

Private Agreement

Universal adoption of the AAUP policies is unlikely. Even if such a system of private agreement could be effected, it would still be open to challenge in the public sector by statutory and administrative preemption.

A second alternative would be to establish professional and institutional accrediting standards that would incorporate terms of the

academic common law. In effect, accreditation is a system of private agreements about standards. While it lacks machinery for adjudication of disputes, it provides a framework for self-regulation and for the promulgation of common policy statements. However, a system that cannot adjudicate and the "impermissible delegation" problem would probably make it impossible to effectuate a common law of the profession through accrediting bodies.

Corporate Autonomy

Courts have been increasingly respectful of a certain measure of corporate autonomy for academic institutions. Where a professional common law may once have provided sufficient guidance to resolve academic disputes, recent trends may focus judicial attention on corporate rights to decide important issues of academic and related matters under conditions of relative freedom from intervention by civil authorities, including the courts.

This common-law autonomy is based on a series of key Supreme Court decisions that have created a scaffolding of basic propositions concerning academic freedom and insitutional rights to the freedom of judgment. Recognizing education as a basic value (*Brown v. Board* 1954), and observing a respectful measure of care for the protection of academic freedom as a basic First Amendment right (*Bakke*, 1978), the courts have shaped a set of presumptions about university corporate freedoms:

1. "[Opportunity for] education is perhaps the most important function of state and local government. . . . It is the very foundation of good citizenship" (*Brown* 1954, 493).
2. "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die" (*Sweezy*, 1957, 250).
3. "A free society depends on free universities. "This means the exclusion of governmental intervention in the intellectual life of a university" (*Sweezy*, 1957, 252)
4. As a concomitant of academic freedom, a university must have "the right to make academic judgments as to how best to allocate scarce resources or to 'determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study'" (*Widmar*, 1981, 278).
5. "Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also . . . on autonomous decision making by the academy itself" (*Ewing*, 1985, 514).
6. "When (external authorities) are asked to review the substance of a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment" (*Ewing*, 1985, 513).

Although corporate autonomy may provide one means of protecting the academy from judicial intrusion, it is not the same thing as an affirmative body of professional standards with universal acceptance. Its security depends upon each case decision, and it is ultimately subject to an array of balancing tests that may weaken its effect in areas of particular significance. Further, corporate autonomy can be preempted—as noted earlier—by statute or administrative action. Corporate autonomy is a conceptually attractive alternative to common law as a means of securing legal space for the exercise of professional self-government, but in practical terms, it may have too little effect to be a substitute.

Keast II

If the force of academic common law has been significantly eroded, as I contend, and if appropriate policy alternatives fail to protect basic professional values, then perhaps common law itself should be reassessed.

Because higher education has changed dramatically since 1940 and since legal processes now override academic common law, I think it is time for a highly visible and credible reexamination of the terms and conditions under which the academic profession works. The AAUP's influence has declined significantly at just the time when the courts are widening the scope of corporate autonomy. The issue is how to give structure and content to that autonomy in the face of other forces operating to constrain academic rights and privileges.

The Keast Commission (1973) examined the issues of academic freedom and tenure in the mid-1970s. But changes have occurred in the profession since then (Bowen and Schuster 1986), and a reexamination of the Keast report is due—if not overdue.

Because public policy interests have become so entwined with the constraints on academic autonomy, it seems important to involve not only academics in this reexamination, but legislators and their staff, governors and their staff, and agents of coordinating bodies that mediate on behalf of academic interests and issues. The major issues are rapidly becoming issues of state law and policy, and the assessment of contours for academic freedom would deal with policy issues in arenas like patents and copyrights that were but imaginary problems even as recently as a decade ago. Whether a consensus is possible is doubtful; that a clear understanding of academic issues is needed among state policy makers is, however, not.

Conclusion

Although universities enjoy a certain measure of common-law autonomy, this autonomy is being preempted by private agreement, statutory law, administrative law, and collective bargaining. These

preemptive actions occur at a time when the profession appears to be more fragmented than it was when a consensus on academic freedom and tenure was reached in 1940. This paper has established that Supreme Court decisions have given considerable latitude for a common-law autonomy. I have also pointed out that there are several ways to refocus efforts to restore common law autonomy: dispute resolution, private agreement, the legal defense of corporate autonomy, and the formation of a national commission to reassess the state of academic freedom in an era of state regulation.

The academic community itself can take certain initiatives to reconsider principles of professional self-government. We need to study the long-term impact of collective bargaining and the implementation of highly specific rule-systems (handbooks, policy manuals, etc.). These developments assume a far different environment than was present in 1940—and a less trusting relationship among the key policy actors in higher education.

More generally, deeper study and analysis about the shifting status of common law in the academic profession is needed:

1. Under what conditions can a common law of professional self-governance exist? What factors sustain such a system and legitimize its authority?
2. What policy conditions will tend to maintain both corporate and professional academic autonomy under existing law?
3. Who will act to revitalize the national commitment to core academic values? What body can achieve sufficient legitimacy to sustain these values? Who speaks for the profession?
4. What are the alternatives to a common law basis for professional self-governance? If self-regulation under a universal system of common law is not the answer, then how are the valid interests of an ancient and independent profession to be protected under existing law?

In short, the profession is challenged to keep its legacy of independence from external control, but it must find the vehicle for maintaining its own common law if it is to succeed.

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