

# THE ACADEMIC FREEDOM PRIVILEGE: A SWORD OR A SHIELD?

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## INTRODUCTION

Employment discrimination in higher education has sparked widespread attention in the academic community in recent years as faculty members have sought to challenge civil rights violations in adverse hiring, promotion, and tenure decisions.<sup>1</sup>

In resorting to litigation, plaintiffs alleging discrimination based on sex, race, or national origin<sup>2</sup> have attempted to gain access to confidential faculty tenure review evaluations under the existing liberal federal discovery rules.<sup>3</sup> Colleges and universities have resisted discovery, basing protection of the confidentiality of these peer review proceedings upon an evidentiary privilege against discovery of the committee's reports.<sup>4</sup>

The federal government has made repeated efforts to thwart discrimination in college and university employment, most effectively through passage of the Equal Employment Opportunity Act of 1972<sup>5</sup> (the 1972 Act) which expanded coverage of the Civil

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1. Title VII of the Civil Rights Act of 1964, codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. V 1981), and the Civil Rights Acts of 1866 and 1873, codified as amended at 42 U.S.C. §§ 1981, 1983, 1985 (1976 & Supp. V 1981), prohibits discrimination on the basis of sex, color, race or national origin in any federally-funded program. Title VII, however, originally exempted educational institutions. Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (1964).

2. See *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977); *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974); *Green v. Board of Regents of Texas Tech. Univ.*, 474 F.2d 594 (5th Cir. 1973); *Gray v. Board of Higher Educ.*, 92 F.2d 87 (S.D.N.Y. 1981); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328 (W.D. Pa. 1977); *McKillop v. Regents of the Univ. of California*, 386 F. Supp. 1270 (N.D. Cal. 1975).

3. The Federal Rules of Civil Procedure, rule 26(b)(1) provides, in relevant part, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . ."

4. See generally Note, *Civil Rights—Academic Freedom, Secrecy and Subjectivity as Obstacles to Providing a Title VII Sex Discrimination Suit in Academia*, 60 N.C. L. REV. 438 (1982) [hereinafter cited as Note, *Civil Rights*]; Stevens, *Evaluation of Faculty Competence as a "Privileged Occasion"*, 4 J.C. & UNIV. L. 281 (1976-77); Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879 (1979) [hereinafter cited as Note, *Academic Freedom*].

5. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat.

Rights Act of 1964 to educational institutions. Prior to the 1972 Act, academic institutions were exempt from the reach of federal guidelines<sup>6</sup> which preclude discrimination in hiring decisions. While the legislative history of the 1972 Act clearly reveals a congressional intent to include academic institutions within the purview of the Civil Rights Act of 1964,<sup>7</sup> efforts to compel disclosure of confidential tenure reports have met with spirited criticism from the academic community. The arguments most frequently advanced include the concerns that a "[u]niversity's standards are matters of professional judgment,"<sup>8</sup> that "the peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution,"<sup>9</sup> and that "[s]uch disclosure would represent the most serious breach of the confidentiality of the tenure selection process . . . ."<sup>10</sup> These arguments all make the assumption that, in the absence of an evidentiary privilege, candid and conscientious evaluation of professional competence cannot realistically occur.

There is an important societal interest in unmasking employment decisions that are a pretext for discrimination.<sup>11</sup> Yet, courts are mindful that the success of academic institutions depends upon

103, 103-04 (1972) amended the Civil Rights Act of 1964 by removing the educational institution exemption. Employment discrimination by educational institutions is now prohibited, whether the institution be public or private. See 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. V. 1981). Secondly, the Educational Amendments of 1972, prohibit discrimination on the basis of sex or blindness in any educational program receiving federal funding. 20 U.S.C. §§ 1681-86 (1976). See Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473, 480-81 (1980) for a list of federal statutes which might give faculty members a potential private cause of action against a university. Additionally, the Fair Labor Standards Act of 1938 may be a means of redressing unfair employment practices. 29 U.S.C. § 206(d)(1976).

6. The federal guidelines are applicable to all educational institutions that receive federal funding in excess of \$10,000. 41 C.F.R. § 60-1.5(a)(1) (1983).

7. Senator Allen, joined by Senator Ervin, attempted to exempt academic and religious institutions on the grounds that subjecting them to federal guidelines would jeopardize their academic freedom. The argument was rejected by Congress by a vote of 55-25. 118 CONG. REC. 946, 1993 (1972).

8. *Green v. Board of Regents of Texas Tech. Univ.*, 474 F.2d 594, 596 (5th Cir. 1973).

9. *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977).

10. *McKillop v. Regents of the Univ. of California*, 386 F. Supp. 1270, 1278 (N.D. Cal. 1975).

11. In the case of *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379 (5th Cir. 1980), the court said that "caution against intervention in a university's affairs cannot be allowed to undercut the explicit legislative intent of Title VII." *Id.* at 1383. Similarly, in *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978), the court again advised "caution against permitting judicial deference to result in judicial abdication of a responsibility entrusted to the courts by Congress." *Id.* at 176.

faculty appointment decisions that are highly subjective and rarely amenable to judicial review.<sup>12</sup> In this regard, a privilege from disclosure need not conceal the evaluations of the peer review committees, but rather only *who* said *what* and how each person voted.

Typically, a candidate can demand a statement of reasons for an adverse tenure decision. The statement is comprised of a compilation of the review committee evaluations but individual comments are rarely disclosed. Even if individual comments made during the review process were revealed, it is improbable that they would expose an unlawful bias. Thus, compelling discovery of the actual proceedings would often only succeed in breaching the confidentiality of the committee's recommendations without reaching the issue of improper motivation.

The law of evidentiary privileges under the Federal Rules of Evidence<sup>13</sup> has generally resulted in courts balancing the interest in proving title VII discrimination violations with that of preserving the confidentiality, privacy, and integrity of peer review proceedings. The issue is not easily resolved and the unique facts of each case may need to be examined to do justice to the competing interests. Professor Wigmore has developed a four part test<sup>14</sup> that courts have frequently adopted to determine whether to recognize an evidentiary privilege.<sup>15</sup> The test requires a balancing of the

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12. See *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978). The court pointed out, however, that it recognized "that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting." *Id.* at 176. See also *McKillop v. Regents of the Univ. of California*, 386 F. Supp. 1270, 1278 n.13 (N.D. Cal. 1975) and *Gray v. Board of Higher Education*, 92 F.R.D. 87, 92 (S.D.N.Y. 1981).

13. The Federal Rules of Evidence provide:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State Law.

FED. R. EVID. 501.

14. 8 J. WIGMORE, ON EVIDENCE § 2285 (1961). See *supra* text accompanying note 42 for the full text of the four part Wigmore test.

15. See, e.g., *Radiant Burners, Inc. v. American Gas Ass'n*, 320 F.2d 314, 318 (7th Cir. 1963); *Morris v. Avallone*, 272 A.2d 344, 348 (Del. Super. 1971); *Hague v. Williams*, 37 N.J. 328, 181 A.2d 345, 348 (1962); *In re Application of A & M*, 61 A.D.2d 426, 403

damage to the confidential relationship upon disclosure of the information against the potential benefit to be gained by such disclosure.<sup>16</sup> The privilege would thus be granted only if the injury to the confidential relationship is greater than the value of the disclosure to the litigation.

This paper argues in favor of a qualified academic freedom privilege which would require federal courts to recognize the concerns for preserving the confidentiality of university hiring decisions in addition to the concerns of eliminating employment discrimination through the Civil Rights Act of 1964. The proposed qualified privilege places the initial burden on the plaintiff to demonstrate that the confidential information sought would reveal that the committee's report was a pretext for discrimination. Since "[t]here is little likelihood that leaders in the world of scholarship and college teaching will give us the benefit of their candid opinions of colleagues in their fields if they cannot be assured of confidentiality,"<sup>17</sup> the initial burden should be on the plaintiff to demonstrate that he has a bona fide reason to gain access to these privileged communications. This paper further explores the importance of a qualified privilege in terms of the committee's role as final decision-maker. It concludes that the need for an academic freedom privilege transcends the peer review committee's decision-making function and is essential to the very nature of the academic process.

## I. EVIDENTIARY PRIVILEGES UNDER THE FEDERAL RULES

State peer review protection statutes do exist<sup>18</sup> although most of these statutes are specifically geared towards medical peer review committees.<sup>19</sup> State common law in this area, however, has

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N.Y.S.2d 375, 381 (1978); *State v. Roberts*, 14 Wash. App. 727, \_\_\_, 544 P.2d 754, 758 (1976).

16. *State v. Roberts*, 14 Wash. App. 727, \_\_\_, 544 P.2d 754, 758 (1976), quoting 8 J. WIGMORE, ON EVIDENCE § 2285(4)(1961).

17. *Gray v. Board of Higher Education*, 92 F.R.D. 87, 92 (S.D.N.Y. 1981)(quoting from an affidavit submitted in support of the defendant's objections by David B. Rigney, Vice Chancellor for Legal Affairs of the City University of New York).

18. See, e.g., Peer Review Protection Act of 1974, PA. STAT. ANN. tit. 63, §§ 425.1-425.4 (Purdon Supp. 1983-84).

19. See, e.g., CONN. GEN. STAT. ANN. §§ 38-19a to 19f (West Supp. 1983-84); MINN. STAT. ANN. §§ 145.61 to .67 (West Supp. 1984); DEL. CODE ANN. tit. 24, § 1768 (1981); N.Y. PUB. HEALTH LAW § 2801-b (McKinney 1977). See also Comment, *Medical Peer Review Protection in the Health Care Industry*, 52 TEMP. L. Q. 552 (1979).

not developed because academic peer review challenges are usually brought in federal courts with plaintiffs alleging section 1983<sup>20</sup> or title VII<sup>21</sup> violations.<sup>22</sup> The Federal Rules of Civil Procedure endorse a policy of full discovery of information and documents pertaining to the litigation:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.<sup>23</sup>

When the United States Supreme Court promulgated the Federal Rules of Evidence in response to demands for uniform evidentiary rules in the federal courts,<sup>24</sup> the proposed article V on privileges enumerated nine specific privileges.<sup>25</sup> This section, rejected by Congress,<sup>26</sup> would have effectively "frozen" the law of privileges by limiting federal courts to recognizing only the nine enumerated privileges. Subsequent to its rejection, the Committee on the Judiciary amended article V by eliminating the specific rules and by creating a single rule which allows the courts to develop the law of privileges under a uniform standard applicable to civil and criminal cases.<sup>27</sup> The purpose was to mandate "the application of the principles of the common law as interpreted by the courts of the United States in the light of reason and experience."<sup>28</sup>

Before the creation of rule 501, courts were hesitant to recognize new evidentiary privileges.<sup>29</sup> However, the Court has subse-

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20. 42 U.S.C. § 1983 (1976 & Supp. V 1981).

21. 42 U.S.C. §§ 2000e-2000e-17 (1976 & Supp. V 1981).

22. See *supra* note 4.

23. FED. R. CIV. P. 26(b).

24. See *Joiner, Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 439 (1957). See also *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 184 (1973).

25. The proposed Federal Rules of Evidence 503-10 which were never enacted, set out at 56 F.R.D. 183, 235-56 (1973), and the Uniform Rules of Evidence 502-09 enumerate the following specific privileges: Lawyer-Client, Psychotherapist-Patient, Husband-Wife, Priest-Penitent, Political Vote, Trade Secrets, Secrets of States and Other Official Information, Identity of Informer.

26. Act of March 30, 1973, Pub. L. No. 93-12, 87 Stat. 9 (1973).

27. FED. R. EVID. 501.

28. *Id.*

29. See generally Schwartz, *Privileges Under the Federal Rules of Evidence—A Step Forward?*, 38 U. PITT. L. REV. 79 (1976). See also generally Moore & Bendix, *Congress,*

quently endorsed the ad hoc approach of developing the law of privileges on a case by case basis. "Congress manifested an affirmative intention not to freeze the law of privilege. Its purpose rather was to 'provide the courts with the flexibility to develop rules of privilege on a case-by-case basis,' and to leave the door open to change."<sup>30</sup> Judicial creation of new evidentiary privileges had previously been resisted in order to promote the policy of full disclosure.<sup>31</sup> Thus the Court's stated policy of a flexible privilege rule represents an important change from the Court's previous attitude which held that "these exceptions to the demand for every man's evidence are not lightly created nor expansively construed for they are in derogation of the search for truth."<sup>32</sup> This change in attitude encourages other courts to consider judicial creation of novel privilege claims when warranted by the circumstances and facts of the case.

Rule 501 of the Federal Rules of Evidence establishes the guidelines for judicial recognition of privilege claims,<sup>33</sup> including the privilege covering academic peer review committee communications. Rule 501 requires that, with respect to federal question issues, the Constitution, federal statutes, and rules prescribed by the Supreme Court pursuant to statutory authority are controlling. In the absence of specific reference "the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."<sup>34</sup> The Constitution is silent on the issue of privileged communications and federal statutes similarly provide no guidance as to whether a university's confidential peer evaluations should be privileged. Thus, the question is left open for the court's interpretation in the light of "reason and experience."

#### A. Choice of Law

Unlike federal diversity cases that are governed by the *Erie*

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*Evidence and Rulemaking*, 84 YALE L.J. 9 (1974).

30. *Trammel v. United States*, 445 U.S. 40, 47 (1980) (citation omitted).

31. See *ACLU v. Finch*, 638 F.2d 1336 (5th Cir. 1981) in which the court stated that "[p]rivileges are strongly disfavored in federal practice." *Id.* at 1344.

32. *United States v. Nixon*, 418 U.S. 683, 710 (1974).

33. FED. R. EVID. 501.

34. *Id.*

doctrine,<sup>35</sup> federal courts ruling on civil rights claims are free to either apply the state law of privilege or look to federal common law.<sup>36</sup> However, the public policy of comity between state and federal governments suggests that federal courts should recognize state privilege rules if it is possible to do so without significant detriment to federal substantive or procedural policy.<sup>37</sup>

In a 1975 Ninth Circuit case, *McKillop v. Bd. of Regents of University of California*,<sup>38</sup> a college professor brought a cause of action against the California State University School system challenging denial of her tenure. The court held that the availability of a peer review privilege concerning the tenure decision would be governed by the law of the forum state, not federal law.<sup>39</sup> Both the court and the parties agreed that the controlling case on the choice of law question was *Baird v. Koerner*.<sup>40</sup> In addressing a similar issue, the court in *Baird* stated that it "would not be justified in ignoring such a clear and unequivocal pronouncement of the public policy of the state in which it sits."<sup>41</sup>

In short, rule 501 does not act as a mechanical rule requiring that the state law of privileges prevails in diversity cases while federal common law applies to federal question cases.<sup>42</sup> In cases where the privilege claim is not specifically grounded upon a federal question, there is simply no federal interest strong enough to war-

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35. *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Generally, *Erie* requires application of state privilege law in diversity cases arising under 28 U.S.C. §§ 1332, 1335, and 1441(b) (1976). The *Erie* doctrine supports deference to state policy as well as prevention of forum-shopping.

36. *United States v. Allery*, 526 F.2d 1362, 1364-65 (8th Cir. 1975).

37. *Lora v. Board of Ed. of City of New York*, 74 F.R.D. 565, 576 (E.D.N.Y. 1977); *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976). The federal courts may also choose to incorporate state law to fill the gaps in federal statutory phrases. In *D'Oench, Duhme & Co. v. Federal Depositors Insurance Corp.*, 315 U.S. 447 (1942), Jackson, J., stated in a concurring opinion that "[a] federal court sitting in a non-diversity case does not sit in a local tribunal. In some cases it may seem fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis, its decision turns upon the law of the United States, not that of any State." *Id.* at 471.

38. 386 F. Supp. 1270 (N.D. Cal. 1975).

39. *Id.* at 1274.

40. 279 F.2d 623 (9th Cir. 1960). *Baird* involved an application of the attorney-client privilege which had been invoked by the defendant's attorney when the Internal Revenue Service attempted to compel discovery of the identity of his client. The court considered which law would govern in the federal court and concluded that the law of the forum state would control. *Id.* at 632.

41. *Id.* at 629 (citing *Ex Parte Sparrow*, 19 F.R.D. 351 (N.D. Ala. 1953)).

42. See *Scott v. McDonald*, 70 F.R.D. 568, 571 (N.D. Ga. 1976). See also *LAWYERS EDITION FEDERAL PROCEDURE* § 33.187 (1983).

rant departure from the established state policy.<sup>43</sup>

### B. Principles of Privilege Claims

In *United States v. King*,<sup>44</sup> the district court held that the principles of federal common law concerning the development of new privileges require a balancing of: 1) the federal government's need for the information to enforce substantive and procedural policies, 2) the importance of the relationship or policy sought to be furthered by the state privilege rule and the probability of accomplishing that end, 3) any special need for the information sought to be privileged, and 4) any adverse effect on local policy resulting from nonrecognition of the privilege.<sup>45</sup> In *King*, the defendant was prosecuted for failure to declare certain income. The United States Attorney issued a subpoena *duces tecum* ordering the Department of Finance of the City of New York to furnish the defendant's city income tax returns.<sup>46</sup> The court refused to enforce the order, stating that a strong policy of comity between state and federal sovereignties urges federal courts to recognize claims of state privileges where it is possible without substantial cost to federal substantive procedural policy.<sup>47</sup>

Professor Wigmore has also identified four factors<sup>48</sup> which he suggests must be satisfied before a court is willing to grant an evidentiary privilege: 1) that the communication originate in confidence with the expectation that it not be disclosed, 2) that this element of confidentiality be essential to the full and satisfactory maintenance of the relationship between the parties, 3) that the relationship be one that in the opinion of the community ought to be fostered, and 4) that the injury that would result to the relationship by the disclosure of the communication be greater than the benefit gained by its contribution to the litigation.<sup>49</sup>

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43. FED. R. EVID. 501 (Notes of Committee on the Judiciary, House Report No. 93-650 at 557).

44. 73 F.R.D. 103 (E.D.N.Y. 1976).

45. *Id.* at 105.

46. *Id.* at 104.

47. *Id.* at 105-06.

48. 8 J. WIGMORE, ON EVIDENCE § 2285 (1961). Federal and state courts have used this test in the past. See *supra* note 15.

49. *Id.*

## II. SUPREME COURT GUIDELINES

Although the United States Supreme Court has not explicitly addressed the applicability of an academic freedom privilege to equal employment legislation, in *McDonnell Douglas Corp. v. Green*,<sup>50</sup> the Court set forth a four part test for evaluating an allegation of discrimination for disparate treatment in employment opportunities.<sup>51</sup> The *McDonnell Douglas* formula requires the plaintiff to carry the initial burden of establishing a prima facie case of discrimination by proving the following elements: 1) that the complainant is a member of a protected minority, 2) that he/she applied and qualified for a position for which the employer was seeking applicants, 3) that the complainant was nevertheless rejected, and 4) that the position remained open and the employer continued to seek applicants with the same qualifications.<sup>52</sup>

Once the plaintiff establishes a prima facie case of discrimination, the defendant is required to "articulate some legitimate, non-discriminatory reason for . . . rejection."<sup>53</sup> The burden then reverts back to the plaintiff to demonstrate that the articulated explanation is actually a pretext for discrimination.<sup>54</sup> This later burden represents a major stumbling block in plaintiff's efforts to prove discrimination. However, it is unclear whether access to confidential peer review committee proceedings would in fact, shed any light on a university's peer review proceedings. Generally,

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50. 411 U.S. 792 (1973). Such a suit may be brought individually or as representative of a similarly situated class. See, e.g., *Scott v. University of Delaware*, 455 F. Supp. 1102 (D. Del. 1978).

This test has been employed in the context of employment discrimination in academia. See *Lynn v. Regents of the Univ. of California*, 656 F.2d 1337, 1340-41 (9th Cir. 1981); *Jeppen v. Florida Bd. of Regents*, 610 F.2d 1379, 1382 (5th Cir. 1980); *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169, 174 (1st Cir. 1978); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1360 (W.D. Pa. 1977).

51. 411 U.S. at 802.

52. *Id.* In tailoring the *McDonnell Douglas* criteria to academic tenure decisions, at least two courts have relaxed the fourth requirement. See *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1360 (W.D. Pa. 1977) and *Huang v. College of the Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977). The court in *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir. 1978), vacated and remanded *per curiam*, 439 U.S. 24 (1978), observed that the *McDonnell Douglas* criteria does not "[impose] a very arduous burden upon a plaintiff." *Id.* at 177.

53. 411 U.S. at 802. The Court in *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24 (1978) held that this does not require proof of absence of discriminatory motive. *Id.* at 24.

54. 411 U.S. at 804.

proof of blatant discrimination cannot be found.<sup>55</sup> Plaintiff must usually resort instead to the use of statistical data in alleging that the university's history of employment practices reveals a statistically significant failure to employ, promote, or tenure members of a suspect class.

The plaintiff's burden is enhanced by the lack of meaningful statistics. Courts often complain that plaintiffs provide insufficient statistical data from which the court can make conclusive findings.<sup>56</sup> One reason for this may be that most university departments are too small to establish an employment history from which statistical correlations can be made to the requisite degree of significance.<sup>57</sup> Even if such data is available, it is relatively easy for the defendant university to counter the plaintiff's statistics by making selective comparisons which obscure disparate employment practices such as statistics of the department only, statistics of the entire university, or statistics for a particular period of time.

Universities justify their reluctance to accept judicial intervention in academic employment decisions by pointing out that the evaluation of academic qualifications is highly subjective and frequently beyond the competence of individual judges. They argue that these decisions do not lend themselves to either statistical evaluation or court supervision.<sup>58</sup> Academic employment qualifications include education, experience, teaching and research ability, publications, and overall contribution to the university. As a result, selective comparisons are difficult to quantify and experts can generally be found to support either the university's decision or the candidate's allegation of discrimination.

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55. See Yurko, *Judicial Recognition Of Academic Collective Interests: A New Approach To Faculty Title VII Litigation*, 60 B.U.L. REV. 473, 493 (1980).

56. See, e.g., *United States v. University of Maryland*, 438 F. Supp. 742, 757 (D. Md. 1977). See also generally Note, *Academic Freedom*, supra note 4 and Kroll, *Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom*, 13 URBAN L. ANN. 107 (1977).

57. In *Keys v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977), the court noted that "in presenting her statistical evidence, the plaintiff made no comparison of salaries discipline by discipline or department by department. The district court [thus] found that the plaintiff had failed to establish a prima facie case by her statistical evidence. . . ." *Id.* at 580.

58. In *Kunda v. Muhlenberg College*, 621 F.2d 532 (3rd Cir. 1980), the court said that "[w]herever the responsibility lies within the institution, it is clear that courts must be vigilant not to intrude into that determination, and should not substitute their judgment for that of the college with respect to the qualifications of faculty members for promotion and tenure." *Id.* at 548.

Academics who support the evidentiary privilege further contend that they must remain free to select and promote their members according to these subjective and qualitative criteria which are simply not adaptable to the *McDonnell Douglas* four part test.<sup>59</sup>

Although the Supreme Court has not, to date, ruled directly on the issue of whether a college or university might invoke an academic freedom privilege, the Court has reached the issue of academic freedom in other contexts. In the 1957 case of *Sweezy v. New Hampshire*,<sup>60</sup> the Court explicitly held that an academic freedom interest derived from the rights of freedom of association and expression guaranteed by the Bill of Rights and the fourteenth amendment.<sup>61</sup> The Court exonerated a university professor who refused to respond to a state inquiry regarding the content of a lecture that he had given. "[T]he grave harm resulting from government intrusion into the intellectual life of a university"<sup>62</sup> was recognized and the Court held that "[t]eachers 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."<sup>63</sup> Justice Frankfurter's forceful concurrence identified "four essential freedoms of a university—to determine for itself on academic grounds *who may teach*, what may be taught, how it shall be taught, and who may be admitted to study."<sup>64</sup> *Sweezy*, however, does not necessarily extend to academic institutions an automatic exemption from judicial intervention in university decisions concerning faculty promotion and tenure. Rather the remarks may be interpreted as an articulation of an important policy inter-

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59. In *Gray v. Board of Higher Educ.*, 92 F.R.D. 87 (S.D.N.Y. 1981) the court, in recognizing the importance of the peer review process, commented that "[t]he tenure system is an essential linchpin in the commitment to safeguard the academic freedom of individual teachers. . . . The peer review system of decision-making with regard to the granting or withholding of tenure is intended to ensure that academic considerations will be of primary concern in the decision whether or not to grant tenure." *Id.* at 92. See also *Kunda v. Muhlenberg College*, 621 F.2d 532, 547 (3rd Cir. 1980); *McKillop v. Regents of the Univ. of California*, 386 F. Supp. 1270, 1276 (N.D. Cal. 1975).

60. 354 U.S. 234 (1957).

61. *Id.* at 250. See also Note, *Academic Freedom—Its Constitutional Context*, 40 U. COLO. L. REV. 600 (1968); *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952).

62. 354 U.S. at 261 (Frankfurter, J., concurring).

63. *Id.* at 250.

64. *Id.* at 263 (emphasis added)(citation omitted). Justice Frankfurter's "four essential freedoms" have been quoted extensively: *E.g.*, *Gray v. Board of Higher Educ.*, 92 F.R.D. 87, 92 (S.D.N.Y. 1981); *In re Dinnan*, 661 F.2d 426, 430-31 (5th Cir. 1981). See also Note, *Academic Freedom*, *supra* note 4 at 881 and Note, *Civil Rights*, *supra* note 4 at 446.

est that must be considered in determining whether an academic freedom privilege should exist.

Ten years after *Sweezy*, the Supreme Court recognized academic freedom as a "special concern of the First Amendment" in the case of *Keyishian v. Board of Regents*.<sup>65</sup> The issue before the Court was the constitutionality of a New York statute that required faculty members to take an oath certifying that they were not, and never had been, members of the communist party.<sup>66</sup> The Court referred to the classroom as the "'marketplace of ideas'" and said that "[o]ur Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned."<sup>67</sup> Again, the opinion does not make specific reference to a proposed evidentiary privilege for confidential communications among academics. Rather, it identifies an important policy concern that subsequent courts are urged to consider in developing the common law.

### III. LOWER COURT INTERPRETATIONS OF THE SUPREME COURT GUIDELINES

The Second Circuit Court of Appeals in *Gray v. Board of Higher Education*,<sup>68</sup> rendered one of the most recent decisions on discovery of academic peer evaluations. In the lower court, a community college teacher brought a civil rights action against the college after being denied reappointment with tenure.<sup>69</sup> Two of the named defendants refused to reveal how they had voted on the tenure issue and the plaintiff moved to compel discovery.<sup>70</sup> The court refused to order production of the documents, holding that in balancing the potential benefits of compelled discovery with the effects that forced disclosure would have on the faculty evaluation process, "the scales tip[ped] decidedly toward the protection of the confidentiality of the faculty peer review system . . . ."<sup>71</sup>

The district court, in recognizing this evidentiary privilege, acknowledged that Congress intended to avoid freezing the federal

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65. 385 U.S. 589, 603 (1967).

66. *Id.* at 603.

67. *Id.*

68. 692 F.2d 901 (2d Cir. 1982).

69. 92 F.R.D. 87, 88 (S.D.N.Y. 1981).

70. *Id.*

71. *Id.* at 94.

law of privileges in order to give courts flexibility in developing their own rules on an individual case basis.<sup>72</sup> The court stated that a privilege from forced disclosure would have to reflect a weighing of the societal interest in a full and fair adjudication of the litigated issues against the policy concerns of protecting the confidentiality of communications made within the context of certain confidential relationships.<sup>73</sup> Thus the district court, in granting the privilege, agreed that the peer review context constituted a confidential relationship.<sup>74</sup>

In considering the benefits of maintaining the confidentiality of the peer evaluations and those of compelling disclosure, the lower *Gray* court identified a number of factors that should be considered: "[1] whether the desired information is available from other sources; [2] whether the desired information goes to the heart of the matter at issue; [3] the degree of harm that would be caused by the disclosure; and [4] the type of controversy before the court."<sup>75</sup> The court intimated that it would be more willing to compel disclosure in the context of a criminal or grand jury investigation than in a civil action, especially when the desired information is demonstrated to be central to the litigation.<sup>76</sup>

In evaluating the foregoing factors, a court must decide whether the anticipated adverse consequences to the peer review process, if disclosure were mandated, would outweigh the potential societal interest in unmasking latent discrimination. Since the plaintiff typically demands access to a written report or evaluation upon which the tenure or promotion decision was based, it is not clear that discovery of the confidential discussions or the individual votes would be probative of discriminatory motivation or criteria used in the decision-making process.<sup>77</sup> To the extent that com-

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72. *Id.* at 90.

73. *Id.* at 93. See also *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980), in which the court said: "The legislative history of Title VII is unmistakable as to the legislative intent to subject academic institutions to its requirements. . . . 'Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment.'" *Id.* at 550 (citation omitted).

74. 92 F.R.D. at 94.

75. *Id.* at 91.

76. *Id.*

77. In addressing the issue of proving improper motive or discriminatory intent, the court noted: "It is also not clear to the Court that the specific information sought by plaintiff even addresses the matter at issue. It is unclear in what way knowledge of specifically *who* voted for or against plaintiff's retention will clarify the motivation—either proper or improper. . . ." *Id.* at 93 (emphasis in original).

parative data is useful in demonstrating disparate treatment of minorities, plaintiffs can gather this evidence through access to the statistical and historical employment practices of the defendant university.<sup>78</sup> Thus the confidential discussions and individual votes are not the sole avenue through which a plaintiff alleging title VII actions can obtain pertinent evidence in support of his/her claim.

In analyzing the balancing approach, the *Gray* court concluded that it was the impact on the expectation of confidentiality that would be destructive to the academic peer review process.<sup>79</sup> The court agreed that "[t]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution."<sup>80</sup> The *Gray* court further observed that "[t]he secret ballot has long been regarded as essential to any voting process which is to be free of influence and pressure from those with power and/or influence over those voting."<sup>81</sup>

On appeal, the Second Circuit Court of Appeals<sup>82</sup> adopted the position of the American Association of University Professors which required that "[i]f an unsuccessful candidate for reappointment or tenure receives a meaningful written statement of reasons from the peer review committee and is afforded proper intramural grievance procedures,"<sup>83</sup> then the individual votes of faculty members would be protected by a qualified privilege.<sup>84</sup> The court stated that such a statement would serve to avoid arbitrariness or bias in the decision-making process while at the same time permit candid discussion among those involved. The appellate court concluded that the position of the American Association of University Professors permits the courts to "steer the 'careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior.'"<sup>85</sup>

The most recent federal court to address the issue was the Seventh Circuit Court of Appeals in *EEOC v. University of Notre*

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78. See *supra* notes 50-51 and accompanying text.

79. 92 F.R.D. at 93.

80. *Id.* at 92 (quoting *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980)).

81. *Id.*

82. 692 F.2d 901 (2d Cir. 1982)(reversing the lower court's decision).

83. *Id.* at 907.

84. *Id.*

85. *Id.* at 908 (citing *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir. 1978)).

*Dame Du Lac*<sup>86</sup> in which a faculty candidate who was denied tenure alleged racial discrimination by the defendant university. The university responded to the plaintiff's subpoena for the entire department's personnel records with a request to delete all material in the files indicating the identity of peer review participants who had provided information for the tenure selection process.<sup>87</sup> In granting the university's request to withhold the identifying information, the seventh circuit cited *Gray* in holding that the Equal Employment Opportunity Commission would be required to demonstrate a substantial and "particularized" need<sup>88</sup> before the court would mandate disclosure. Thus the court followed the second circuit's grant of a qualified academic freedom privilege to protect the "frank and unrestrained discussions"<sup>89</sup> which it agreed were so vital to the academic selection process.

In a previous federal district court case, *McKillop v. Regents of the University of California*,<sup>90</sup> the court refused to permit discovery of the peer review committee's confidential reports because it concluded that "[to] allow depositions would require that the identity of the evaluators be disclosed in addition to the text of the evaluations . . . and would represent the most serious breach of the confidentiality of the tenure selection process . . . ."<sup>91</sup> In *McKillop*, a state university professor challenged his denial of tenure on the grounds of sex discrimination and lack of due process of law. The court sought to protect the "decision-making process" by stating that "the material sought here contains information bearing on the actions and state of mind"<sup>92</sup> of the tenure committee which makes it an inappropriate subject for judicial inquiry.<sup>93</sup> The court held that "the University's need to preserve the confidentiality of the tenure files in question decisively outweighs the plaintiff's need for their production."<sup>94</sup>

Several courts have repeated this theme in subsequent decisions,<sup>95</sup> although not all courts, in applying the balancing formula,

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86. 715 F.2d 331 (7th Cir. 1983).

87. *Id.* at 333-34.

88. *Id.* at 338.

89. *Id.* at 337.

90. 386 F. Supp. 1270 (N.D. Cal. 1975).

91. *Id.* at 1278.

92. *Id.*

93. *Id.*

94. *Id.*

95. See *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980); *Gray v. Board of*

have decided in favor of the university. This indicates the flexibility which rule 501<sup>96</sup> provides. In *In re Dinnan*,<sup>97</sup> a university professor was jailed for contempt when he refused to disclose his vote on the plaintiff's tenure application. The Fifth Circuit Court of Appeals summarily denied the university's privilege claim on the ground that there was no controlling precedent for recognizing an academic freedom privilege.<sup>98</sup> Had the court applied the *McDonnell Douglas* criteria for establishing a prima facie case, it would have balanced the competing interests of the plaintiff's need for the information to prove his or her civil rights action with the university's need for confidentiality of its academic peer review and tenure process. Instead, the court not only refused to inquire as to whether the information sought would be probative of the alleged claim of sex discrimination, the court also ignored the congressional mandate of rule 501 to consider evidentiary privilege proposals which should be "interpreted by the courts of the United States in light of reason and experience."<sup>99</sup>

The societal interest in providing title VII plaintiffs with adequate means of proving civil rights violations is an important con-

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Higher Educ., 92 F.R.D. 87 (S.D.N.Y. 1981); *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977); *Faro v. New York Univ.*, 502 F.2d 1229 (2d Cir. 1974).

96. FED. R. EVID. 501.

97. 661 F.2d 426 (5th Cir. 1981), *reh'g denied*, 666 F.2d 592 (5th Cir. 1981).

98. *Id.* at 427. The court also said:

No one compelled [the appellant] to take part in the tenure decision process. . . . In such a case, he must have the courage to stand up and publicly account for his decision. If that means that a few weak-willed individuals will be deterred from serving in positions of public trust, so be it; society is better off without their services. . . . If the appellant was unwilling to accept responsibility for his actions, he should never have taken part in the tenure decision-making process.

*Id.* at 432. This opinion, however, is contrary to virtually all other court opinions, including those denying the privilege. Most courts recognize the importance of the academic interest and the desirability of confidentiality but hold that it is outweighed by the plaintiff's need to gain access to the committee's confidential files to prove a title VII claim. See *Lynn v. Regents of the Univ. of California*, 656 F.2d 1337 (9th Cir. 1981). In denying the privilege, the ninth circuit held that "[w]hen determining whether tenure review files, including peer evaluations, are privileged, courts have balanced the university's interest in confidentiality, i.e., in maintaining the effectiveness of its tenure review process, and the need which Title VII plaintiffs have for obtaining peer evaluations in their efforts to prove discriminatory conduct." *Id.* at 1347. See also *Gray v. Board of Higher Educ.*, 92 F.R.D. 87 (S.D.N.Y. 1981), in which the court noted with approval that "[t]here is little likelihood that leaders in the world of scholarship and college teaching will give us the benefit of their candid opinions of colleagues in their fields if they cannot be assured of confidentiality." *Id.* at 92, (citation omitted).

99. FED. R. EVID. 501.

cern.<sup>100</sup> To the extent that the peer review process conceals discriminatory intent, plaintiffs have a legitimate interest in penetrating the confidentiality of those communications.<sup>101</sup> However, a presumption of discrimination in the absence of the plaintiff's first having established a prima facie case is inconsistent with protecting academic freedom.<sup>102</sup>

If, on the other hand, a plaintiff is able to meet his initial burden, the court should consider whether disclosure of the confidential evaluation will shed any light on the litigated issues. The court could resolve the discovery motion by ordering an in camera inspection to examine the committee's proceedings for improper activity.<sup>103</sup> The value of in camera inspection is twofold: first, since presumably, the entire committee's evaluative process would be exposed, even the communications of those members who acted in good faith, an in camera viewing should minimize involuntary disclosure of any "privileged" material which is not probative of the discrimination issue; second, since the in camera inspection might reveal *no* improper activity even if the plaintiff has established his or her prima facie case, the court's private review would prevent unnecessary intrusion into the defendant university's confidential peer review proceedings.

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100. In *McKillop v. Regents of the Univ. of California*, 386 F. Supp. 1270 (N.D. Cal. 1975), it was noted that "the court is mindful of the strong federal interest in redressing sex-based discrimination in employment and the federal policy of ensuring access to public information." *Id.* at 1277.

101. In *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977), the court refused to require the college to produce the confidential evaluations of faculty members on the grounds that confidentiality was essential in enabling the college to receive honest and candid appraisals of faculty members by their peers. The court noted, however, in dictum, that "if the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them to demonstrate that the explanation was pretextual." *Id.* at 581 (citing *McDonnell Douglas*).

102. In *McKillop v. Regents of the Univ. of California*, 386 F. Supp. 1270 (N.D. Cal. 1975), the court suggested an alternative method of discovery to which the defendants agreed: that an impartial academician review the files to determine whether there was any implication of discrimination. The plaintiff declined, conceding that she would need further to depose the authors in order to determine whether any bias affected the decision-making process. The court stated that "[s]uch disclosure would represent the most serious breach of confidentiality of the tenure selection process, a breach which even proponents of limited disclosure have opposed." *Id.* at 1278.

103. In camera inspection is frequently a useful tool in ruling on privilege claims. See *United States v. Nixon*, 418 U.S. 683, 713-15 (1974). The judge views the presumptively privileged material in chambers, to determine (1) if the information would give any indication of improper activity and (2) if so, which part(s) of the material would be necessary and useful in proving the discrimination claim.

In *EEOC v. University of Notre Dame Du Luc*,<sup>104</sup> a court of appeals directed the university to produce the original unaltered personnel files for in camera inspection by the district court in addition to those with the deleted identifying features that were made available to the Equal Employment Opportunity Commission. It was then incumbent upon the district court to determine whether the deletions were necessary to maintain the anonymity of the peer review participants and whether the plaintiff had met its burden of demonstrating a "particularized need."<sup>105</sup>

In camera inspection does not solve many of the important difficulties that title VII litigants must overcome. Latent discrimination is almost impossible to detect in the documents which would be the subject of in camera inspection. Similarly, the misuse of statistical data to shield disparate employment practices is not significantly affected by this procedure. In this regard, the operative inquiry is not whether discrimination might remain undetected but whether compelled discovery helps to expose such practices. Consequently, the court should not even reach the balancing stage before making an initial determination that the documents sought are both relevant and material to the litigation.

The universities contend that the evaluation process exposed by in camera inspection is highly subjective and thus an inappropriate object of judicial supervision.<sup>106</sup> The recognition of an academic freedom interest in maintaining confidentiality would preserve the integrity of the peer review process and compel courts to balance the competing interests before issuing a judgment in the summary fashion depicted in the *In re Dinnan* decision.

#### IV. AN ANALOGY TO MEDICAL PEER REVIEW

The issue of peer review in the context of evaluating physicians has been addressed by statute in some jurisdictions.<sup>107</sup> Gen-

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104. 715 F.2d 331 (7th Cir. 1983).

105. *Id.* at 338.

106. In *Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980), the court acknowledged that "[d]eterminations about such matters as teaching ability, research scholarship, and professional stature are subjective, and unless they can be shown to have been used as the mechanism to obscure discrimination, . . . they often involve inquiry into aspects of arcane scholarship beyond the competence of individual judges." *Id.* at 548.

107. See, e.g., CONN. GEN. STAT. ANN. § 38-19(a)(iv)(d) (West Supp. 1984) which provides:

The proceedings of a medical review committee conducting a peer review

erally, such legislation has been enacted in favor of an evidentiary privilege to ensure confidentiality in evaluating medical professionals. The typical lawsuit challenging the nondiscoverability of the minutes of a peer review proceeding involves a plaintiff alleging medical malpractice against a physician who has staff privileges at a medical facility.<sup>108</sup> The plaintiff seeks to discover evidence of the physician's incompetence by means of the confidential evaluations by his peers. The defendant institution resists discovery by claiming an evidentiary privilege on the grounds that the evaluations must be kept confidential to assure candid and conscientious review by the peer committees. In the absence of a governing statute, the court will balance the plaintiff's need for the committee's evaluations in proving his or her malpractice action against the medical facility's need to preserve the confidentiality of the peer review process to regulate the quality of physicians.<sup>109</sup>

In *Morse v. Gerity*,<sup>110</sup> the defendant hospital administrator in a malpractice suit moved to quash a subpoena *duces tecum* for the confidential documents of the peer review committee.<sup>111</sup> In addressing the essential nature of the privilege claim, the court held "[i]t is indisputable that the legislature enacted the privilege to encourage meaningful peer review by assuring the confidentiality of all proceedings . . . . The danger of inhibiting candid profes-

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shall not be subject to discovery or introduction into evidence in any civil action for or against a health care provider arising out of the matters which are subject to evaluation and review by such committee, and no person who was in attendance at a meeting of such committee shall be permitted or required to testify in any such civil action as to the content of such proceedings. . . .

*Id.*

108. See, e.g., *Hollowell v. Jove*, 628 F.2d 413 (5th Cir. 1980); *Morse v. Gerity*, 520 F. Supp. 470 (D. Conn. 1981); *Berdice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970).

109. In *Ott v. St. Luke Hosp.*, 522 F. Supp. 706 (E.D. Ky. 1981), the court acknowledged its

mandate to decide whether the privilege claimed by the hospital in this case should be recognized as a matter of good judicial policy. The proper task . . . is to analyze the purpose and the force of the . . . interest[s] involved and balance [them] against the rationale and comparative strength underlying the particular evidentiary privilege claimed so as to determine which, in the interest of ultimate justice, on the particular facts presented should predominate.

*Id.* at 708. See also *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979); *United States v. King*, 73 F.R.D. 103 (E.D.N.Y. 1976).

110. 520 F. Supp. 470 (D. Conn. 1981).

111. *Id.* at 471.

sional peer review exists by the mere potential for disclosure . . . . No chilling effect can be tolerated if the committees are to function effectively."<sup>112</sup>

The most prominent opinion in the line of cases recognizing an evidentiary privilege for medical peer review is *Bredice v. Doctors Hosp., Inc.*<sup>113</sup> The plaintiff in this malpractice action sought discovery of the minutes and reports of the peer review committee concerning her case.<sup>114</sup> Holding that such reports were privileged, the court reasoned:

Confidentiality is essential to effective functioning of these staff meetings; and these meetings are essential to the continued improvement in the care and treatment of patients. Candid and conscientious evaluation of clinical practices is a *sine qua non* of adequate hospital care . . . . Constructive professional criticism cannot occur in an atmosphere of apprehension.<sup>115</sup>

Thus courts have held that in considering a plaintiff's need for confidential files to prove his or her malpractice action and the medical profession's need for candid and uninhibited peer review, the balance strikes decisively in favor of nondiscovery.<sup>116</sup> However, when the plaintiff's interest shifts from that of establishing a malpractice action to that of establishing a civil rights violation, courts consistently have been less likely to provide a privilege for confi-

112. *Id.* at 471-72.

113. 50 F.R.D. 249 (D.D.C. 1970).

114. The plaintiff moved for discovery pursuant to rule 34 of the Federal Rules of Civil Procedure which states, in relevant part:

Upon motion of any party showing good cause therefore . . . the court . . . may (1) order any party to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control.

115. 50 F.R.D. at 250. The court went on to say: "There is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded." *Id.* at 251.

116. But see *Ott v. St. Luke Hosp.*, 522 F. Supp. 706 (E.D. Ky. 1981) where the court stated:

There are strong conflicting values both for and against the recognition of the privilege. Nevertheless, the court holds that the considerations favoring the privilege are outweighed by the factors militating against it and that the deliberation of the peer review committees of the defendant hospital are subject to discovery by the plaintiff.

*Id.* at 708.

dential proceedings.<sup>117</sup> This is so even in the context of a medical peer review committee.

In *Ott v. St. Luke Hospital*,<sup>118</sup> the plaintiff physician alleged that he was denied substantive and procedural due process when the hospital refused to grant his application for staff privileges.<sup>119</sup> The district court noted that while the privilege claimed by the hospital appeared to be codified in the Kentucky statutes,<sup>120</sup> that statute appeared to address malpractice actions exclusively. Irregardless, the court adopted Wigmore's four-part balancing test<sup>121</sup> and refused to be bound by state law in a case which involved a federal question.<sup>122</sup> The court stated that it could not allow "the discharge of its responsibility to conduct a search for the truth with regard to these matters to be thwarted by rules of privilege in the absence of 'strong countervailing public policies.'"<sup>123</sup> Thus, the court declined to recognize the privilege.<sup>124</sup> *Ott* shows the reluctance to recognize a privilege in the face of a civil rights claim, at least in cases where there is no constitutional basis for granting the privilege. While it is clear that no basis exists in the constitution for recognizing a medical peer review privilege, the United States Supreme Court has indicated that academic freedom is constitutionally protected.<sup>125</sup> This constitutional protection serves to distinguish the academic from the medical line of cases, and argues in favor of granting an academic peer review privilege.

117. See, e.g., *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379 (5th Cir. 1980); *Lynn v. Regents of the Univ. of California*, 656 F.2d 1337 (9th Cir. 1981); *In re Dinnan*, 661 F.2d 425 (5th Cir. 1981).

118. 522 F. Supp. 706 (E.D. Ky. 1981).

119. *Id.* at 707.

120. *Id.* at 708-09. The Kentucky statute states in relevant part:

The proceedings, records, opinions, conclusions and recommendations of any committee [or] board . . . shall be confidential and privileged and shall not be subject to discovery, subpoena, or introduction into evidence, in any civil action in any court. . . . This subsection shall not apply to any proceedings or matters governed exclusively by federal law or federal regulation.

KY. REV. STAT. ANN. § 311.377(2) (Baldwin 1983).

121. 522 F. Supp. at 710.

122. *Id.* The court stated: "Although we are not bound by state law in this federal question case, it is appropriate to consider state law to see if it should be applied by analogy or as a matter of comity." *Id.* at 708.

123. *Id.* at 711 (footnote omitted).

124. *Id.* at 711-12.

125. See *supra* notes 54-61 and accompanying text.

## V. CAN RIGHTS OF ACCESS BE WAIVED?

Colleges and universities might attempt to maintain the privacy of their peer review process by asking tenure candidates to waive their rights of access to the committee's confidential files.

The Family Educational Rights and Privacy Act<sup>126</sup> brought the concept of waiving access to certain files and records into the classroom in the form of privacy legislation. This act addresses a number of educational privacy issues<sup>127</sup> including a student's right of access to confidential letters of recommendation written on their behalf for admission to colleges and universities. Of particular interest is the Buckley Amendment<sup>128</sup> which contains the following provision: "A student or person applying for admission may waive his right of access to confidential statements . . . . Such waivers may not be required as a condition for admission to . . . or receipt of any other services or benefits from such agency or institution."<sup>129</sup>

Whether faculty tenure candidates might similarly be requested to waive their right of access to the peer review committee's confidential evaluations has not been addressed by the courts. Such a provision might be instituted either at the time that the employment contract is negotiated or sometime later when the formal tenure process is ready to begin.

The validity and effectiveness of a waiver will depend upon court interpretation. "Waiver" is generally defined as the voluntary relinquishment of a known right,<sup>130</sup> with the voluntariness of

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126. Codified at 20 U.S.C. § 1232q (1976 & Supp. V 1981).

127. At issue was the possibility of students' access to such documents as parents' financial statements, psychiatric records, medical reports and confidential letters of recommendation.

128. Pub. L. No. 93-568, 88 Stat. 1855 (codified as amended at 20 U.S.C. § 1232q (1976)). Many educational institutions were concerned about the broad scope and potential implications of the Family Educational Rights and Privacy Act and, prior to the effective date for implementation, it was postponed and corrective legislation was introduced. Before the end of the 93rd Congress, this act was reintroduced with a number of significant additions to satisfy the concerns of educational authorities. The new bill, referred to as the "Buckley Amendment" addressed the concern, among other things, of students' access to confidential letters of recommendation. For the conference committee's report of the amendments to the original Buckley Amendment, see 1974 U.S. CODE CONG. & AD. NEWS, 6794-97.

129. 20 U.S.C. § 1232q(1)(C)(1976).

130. BLACK'S LAW DICTIONARY 1417 (5th ed. 1979).

the act as its most essential characteristic.<sup>131</sup> In the context of the confidentiality of peer evaluations, a waiver imposed as a condition of employment would lack voluntariness. Even if it were not a condition of employment, the request may nevertheless be coercive, thus undermining the essential nature of the agreement.<sup>132</sup> To the extent that the agreement lacks the element of coercion, it does not achieve the desired effect.

To the extent that securing a waiver of access to peer review proceedings is identifiable with the denial of a civil right, courts could find that such an agreement conflicts with the intent of certain sections of the Civil Rights Act of 1964.<sup>133</sup> For example, a court might hold that an institution that accepts any public funding cannot condition the receipt of a government benefit on the relinquishment of a constitutional or civil right.<sup>134</sup> Furthermore, title VII prevents even private parties from negotiating an employment contract that violates or restricts the Civil Rights Act of 1964.

Colleges and universities urging the validity of a waiver may defend their position by pointing out that a waiver need not necessarily be clothed as a condition of employment. The purpose of such an agreement would, arguably, parallel that of an evidentiary privilege; to encourage candid evaluations, whether they be for student letters of recommendation or for faculty tenure discussions. Without the expectation of confidentiality, faculty members would be inhibited in writing student letters or in serving on tenure committees. The Buckley Amendment utilizes the waiver agreement as merely an efficient means of implementing an evidentiary privilege for those confidential communications.

When the validity of a waiver is defended on the same principles that underlie an academic freedom privilege, the existence of the waiver would likely have little effect on the outcome of a court's determination on whether to permit discovery of confidential peer review communications. Those courts that would, in balancing the interests involved, weigh in favor of recognizing the privilege, would probably do so regardless of any previous waiver.

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131. See *United States v. Morton Provision Co.*, 294 F. Supp. 385, 392 (D. Del. 1968).

132. In *Bumper v. North Carolina*, 391 U.S. 543 (1968), the court stated: "[w]here there is coercion there cannot be consent." *Id.* at 550.

133. See 42 U.S.C. §§ 1981, 1983, 1985 (1976 & Supp. V 1981).

134. See Note, *The Buckley Amendment: Opening School Files for Student and Parental Review*, 24 *CATH. U. L. REV.* 588, 595 (1975).

Similarly, those courts that would rule against the privilege would be likely to dispute the validity of a waiver. They might hold that the waiver agreement was procured by means of coercion, that it inhibits a plaintiff in proving his or her rights claim, and that the court thus need not give effect to the provision.

A waiver in the initial employment contract might, nevertheless, serve an important function. As new faculty join the university community a waiver will at least make them aware of the confidential nature of the peer review process and it can begin to introduce the initiate to, as Justice Frankfurter called them, the four essential freedoms<sup>135</sup> possessed by the university employer. This would have the effect of generating debate within the community which could ultimately result in a clearly articulated policy reached after all of the issues have been publicly aired. In either case, the awareness would likely stimulate active interest not simply among those who are forced to consider it in the context of a hiring or tenure challenge, but also among the entire community.

#### CONCLUSION

While an evidentiary privilege is generally granted by statute in state court for tort actions, the federal courts have been more reluctant to grant an evidentiary privilege when a civil rights violation is at issue. Exceptions have arisen in several recent cases involving peer review among academics. Even for medical review committees where the importance of confidentiality has been acknowledged by statute, the privilege is not accorded the same "fundamental" status that these recent courts have recognized for academic review.<sup>136</sup> "Determinations about such matters as teaching ability, research, scholarship, and professional stature are subjective, and . . . must be left for evaluation by the professionals . . . ."<sup>137</sup>

Any peer review committee in any field of professional work can maintain that their role in a decision making process warrants an evidentiary privilege. The need for privacy in the university context, however, transcends that of evaluating professional com-

135. See *supra* note 58 and accompanying text.

136. Compare *Ott v. St. Luke Hosp.*, 522 F. Supp. 706 (E.D. Ky. 1981) with *McKillop v. Regents of Univ. of California*, 886 F. Supp. 1270 (N.D. Cal. 1975) and *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir. 1977).

137. *Kunda v. Muhlenberg College*, 621 F.2d 532, 548 (3d Cir. 1980).

petence. Freedom of thought and discussion are integral parts of academic scholarship and thus are fundamental to the very essence of the university function. It is primarily in this capacity that courts, in cases such as *Sweezy*, have chosen to identify an academic privilege in the context of a constitutional freedom.

