Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege

Lawsuits pitting faculty members against universities and colleges¹ in disputes over hiring, promotion, tenure, and other employment-related issues have increased dramatically within the past fifteen years.² The volume of federal litigation, in particular, has escalated rapidly following the extension of the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 to academic institutions in 1972³ and the Supreme Court's revitalization of the private civil remedies under the Civil Rights Acts of 1866 and 1871.⁴ In faculty lawsuits, plaintiffs often seek access under the liberal federal discovery rules to sensitive university employment records, including confidential faculty evaluations⁵ and even secret votes on tenure and promotion applications.⁶ Efforts to compel disclosure of this information raise the issue of whether a university may protect confidentiality by claiming an evidentiary privilege. The question involves a clash of values—academic freedom and appointing the best professors versus the need for full disclosure in decisionmaking and litigation—and does not lend itself to

1. The term "university" as used in this Comment also refers to colleges.

2. Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U. L. REV. 473, 522 n.245 (1980). A major cause of the increase is the shrinking academic job market that has heightened competition for university positions and given faculty members added economic incentive to challenge unfavorable employment decisions. *Id.* at 522 & nn.243 & 246. See generally W. KAPLIN, *THE LAW OF HIGHER EDUCATION* 108-28 (1978); Marske & Vago, *Law and Dispute Processing in the Academic Community*, 64 JUDICATURE 165, 172-73 (1980); *Report of the Committee on Confidentiality in Matters of Faculty Appointment*, U. CHI. REC. 165, 166 (May 22, 1979) [hereinafter cited as *University of Chicago Report*].

3. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103 (1972) (codified at 42 U.S.C. § 2003-1 (1976)). For a list of other federal statutes giving faculty members a potential private cause of action against a university, see Yurko, *supra* note 2, at 480.

4. 42 U.S.C. §§ 1981, 1983 & 1985 (1976). For a brief discussion of the Court's revitalization of the private remedies under these statutes and their application to faculty suits against universities over employment disputes, see Yurko, *supra* note 2, at 480-81 & n.41.

5. See, e.g., *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), cert. denied, 434 U.S. 904 (1977) (four years of annual confidential evaluations of each faculty member, written by division and department chairmen); *McKillop v. Regents of Univ. of Cal.*, 386 F. Supp. 1270, 1272 (N.D. Cal. 1975) (plaintiff's personnel file as well as files of persons currently or formerly in tenure or tenure-track positions in the university's art department).

6. *Blaubeurg v. Board of Regents*, No. 79-42 (M.D. Ga. May 24, 1979), *expedited appeal granted sub nom. In re Dinnan*, 625 F.2d 1146, appeal docketed, No. 80-7432 (5th Cir. 1980).

easy resolution.⁷

Influential groups from the academic community, such as the American Association of University Professors, fear that uncontrolled access to university records in faculty renewal cases will jeopardize academic freedom.⁸ In contrast, the federal discovery rules strongly endorse the policy of full disclosure in litigation. Under the rules, "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action"⁹ Since any information that is useful or helpful to the plaintiff's cause of action is considered relevant,¹⁰ universities have little hope of preventing discovery of confidential employment information on grounds of irrelevance.¹¹ Thus, an evidentiary privilege becomes the only alternative for universities.

Federal courts, however, have not yet recognized a privilege that would protect a university's confidential employment records from discovery. Indeed, in a pending sex discrimination suit against the University of Georgia, one federal district court flatly refused even to consider a privilege claim.¹² Moreover, the court jailed a professor for contempt for refusing on privilege grounds to disclose his vote on the plaintiff's promotion application.¹³ This episode dramatically illustrates that under the permissive federal discovery rules trial courts can

7. "You're weighing two good principles against each other—the right to privacy and the right to know. You want to protect the review process, and at the same time you don't want to allow unfair discrimination." L. Francis, Associate Secretary for American Ass'n of Univ. Professors (AAUP), *quoted in Academic Freedom vs. Affirmative Action: Ga. Professor Jailed in Tenure Dispute*, *Chronicle of Higher Education*, Sept. 2, 1980, at 10, col. 4.

8. See AAUP, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, ACADEME, Feb.-Mar. 1981, at 27.

9. FED. R. CIV. P. 26(b)(1).

10. See *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978) (dictum); *Kerr v. United States Dist. Court*, 511 F.2d 192, 196-97 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976); *Smith v. Schlesinger*, 513 F.2d 462, 472-73 (D.C. Cir. 1975); 4 J. MOORE & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 26.56[1] (2d ed. 1979 & Supp. 1980-81).

11. See, e.g., *EEOC v. University of N.M.*, 504 F.2d 1296, 1302-04 (10th Cir. 1974) (university's pattern of treatment of employees of different races, sexes, and national origins even during years before Title VII applied to universities held relevant to suit alleging discrimination based on national origin).

Some courts have protected universities' confidential employment information by exercising their authority under FED. R. CIV. P. 26(c). But as discussed in the text accompanying notes 34-44 *infra*, this procedure does not adequately protect a university's confidentiality interest.

12. *Blauberger v. Board of Regents*, No. 79-42 (M.D. Ga. May 24, 1979), *expedited appeal granted sub nom. In re Dinnan*, 625 F.2d 1146, *appeal docketed*, No. 80-7432 (5th Cir. 1980).

13. 625 F.2d at 1148. The court explained that as no precedent existed for a university evidentiary privilege, the court had a duty to reject the professor's privilege claim. *Record*, vol. 3, at 21; vol. 4, at 2, *cited in* Brief Amicus Curiae at 2, *In re Dinnan*, No. 80-7432 (5th Cir., *appeal docketed* 1980).

The episode has engendered much public debate. *E.g.*, *Tenure, Sexism and Jail*, *The Washington Star*, Oct. 20, 1980, at A14, col. 1; *The Professor and the Judge*, *The Washington Post*, Oct. 14, 1980, at A14, col. 6; *Jailing of a Professor Heightens Fears for Campus Independence*, N.Y.

compel disclosure of sensitive university information without considering the competing interests in confidentiality and academic freedom.

This Comment argues that the federal courts should recognize a qualified evidentiary privilege for universities that would require a trial court to balance the conflicting needs for confidentiality and disclosure before compelling discovery of sensitive university information. Part I examines the framework provided by Federal Rule of Evidence 501 for analyzing any federal privilege claim. It argues that the rule places an affirmative duty on courts to consider novel evidentiary privilege claims. Part II explains why existing statutes and rules do not resolve the university privilege question. Parts III and IV respectively consider constitutional and common law principles governing evidentiary privileges and conclude that both require a qualified privilege for universities. Finally, Part V proposes an analysis for courts to use in determining when the qualified privilege for sensitive information must yield to the plaintiff's need for the information.

I

THE ANALYTICAL FRAMEWORK PROVIDED BY FEDERAL RULE OF EVIDENCE 501

In 1965 the Supreme Court, induced by demands for uniform rules of evidence,¹⁴ appointed a committee to draft a set of proposed rules. The final draft was approved by the Court and sent to Congress in 1972.¹⁵ Under the Rules Enabling Act,¹⁶ the proposed rules would have gone into effect automatically in ninety days. But in response to widespread criticism of the proposed rules, Congress prevented them from becoming effective.¹⁷

The proposed section on privileges was the most controversial¹⁸ and was drastically revised before the rules became law. This section originally enumerated nine specific privileges and provided that only those specified privileges were to be recognized in federal courts.¹⁹

Times, Sept. 14, 1980, at 1, col. 3; *Professor's Jailing: Is Academic Freedom at Issue?*, The Boston Globe, Aug. 3, 1980, at 41, col. 2.

14. See, e.g., Special Committee on Evidence of the Judicial Conference of the United States, *Preliminary Study of the Advisability and Feasibility of Developing Uniform Rules of Evidence for the Federal Courts*, 30 F.R.D. 79, 114-17 (1961); Joiner, *Uniform Rules of Evidence for the Federal Courts*, 20 F.R.D. 429, 439-40 (1957).

15. Rules of Evidence for the United States Courts and Magistrates, 56 F.R.D. 183, 184 (1972).

16. 28 U.S.C. § 2072 (1976).

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

18. See 119 CONG. REC. 7645, 7648 (1973) (remarks of Reps. Hungate and Holtzman regarding need to allow time to evaluate proposed rules).

19. 56 F.R.D. at 230-56. Proposed rule 501 limited privileges to those required by the Constitution or federal statute, plus those provided for in the rules themselves or other rules adopted

Congress rejected this section, which would have frozen the law of privilege, and replaced it with a more flexible rule, the current Federal Rule of Evidence 501. Rule 501 provides the starting point in analyzing any privilege claim in a federal court case. With respect to federal question litigation, it provides:

Except as otherwise required by the Constitution . . . Act of Congress . . . or in rules prescribed by the Supreme Court . . . , the privilege of a witness . . . 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.²⁰

According to the rule, a court is to analyze a privilege claim by considering four distinct sources of law: the Constitution, federal statutes, Supreme Court rules, and, if none of these is controlling, the principles of common law privileges.²¹ In short, instead of fixing rigid rules, rule 501 leaves the privilege problem to the courts.²²

Before Congress promulgated rule 501, courts were reluctant to recognize novel privileges.²³ Most commentators who have analyzed Congress' rejection of the Supreme Court's proposed rules in favor of rule 501, however, conclude that Congress now intends for the courts to adopt a more liberal attitude toward recognizing new evidentiary privileges.²⁴ This conclusion is buttressed by the legislative history. During the hearings, influential individuals and groups urged that evidentiary issues be confronted case-by-case.²⁵ This approach was also endorsed by Representative Hungate, the principal author of the Federal Rules of Evidence, just before the passage of the bill adopting rule 501. The

by the Supreme Court. Proposed rules 502-510 provided nine specific privileges; they did not include a privilege for universities. *Id.*

20. FED. R. EVID. 501. The rule also provides that in cases where state law supplies the rules of decision, "the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law." Some states have enacted "Peer Review Protection Acts" that may protect a university's confidential personnel files in such cases. *See, e.g.*, Peer Review Protection Act of 1974, PA. STAT. ANN. tit. 63, §§ 424.5, 425.1, (Purdon Supp. 1980-81). However, the bulk of the faculty litigation with which this Comment is concerned is brought under federal law, *see* notes 3-4 and accompanying text *supra*, and is governed by the federal question provisions of rule 501.

21. *See* 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 501[03] (1980) [hereinafter cited as WEINSTEIN].

22. *See* Krattenmaker, *Interpersonal Testimonial Privileges Under the Federal Rules of Evidence: A Suggested Approach*, 64 GEO. L.J. 613, 646 (1976).

23. *See* 8 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL § 2020, at 176-78 (1970).

24. *See, e.g.*, WEINSTEIN, *supra* note 21, at 501-29 to -30; Krattenmaker, *supra* note 22 at 646; Schwartz, *Privileges Under the Federal Rules of Evidence—A Step Forward?*, 38 U. PITT. L. REV. 79, 84-85 (1976). A few commentators favor the Court's proposed rules. *See, e.g.*, Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 21 (1974).

25. *See* Krattenmaker, *supra* note 22, at 640-41 & n.194. Other witnesses at the hearings favored specific rules but wanted greater privileges than those granted in the proposed rules. *Id.* at 641-42 & n.199.

rule, he said, "is intended to provide the courts with the flexibility to develop rules of privilege on a case-by-case basis. For example . . . [t]he language of rule 501 permits the courts to develop a [new] privilege for newspaperpeople on a case-by-case basis."²⁶ Moreover, the Supreme Court itself has recently endorsed the case-by-case approach, noting that the purpose of rule 501 was "to leave the door open to change."²⁷

Given the legislative history of rule 501 as well as the Supreme Court's endorsement of the case-by-case approach to privilege issues, it is fair to say that a court abdicates its judicial responsibility when, as in the University of Georgia case described above,²⁸ it refuses to consider a novel evidentiary privilege claim. Rather, the court has a duty to consider the four components of rule 501—constitutional requirements, federal statutes, Supreme Court rules, and common law principles—to determine whether a new privilege should be recognized.²⁹ This Comment begins its analysis of the university privilege issue with a review of existing statutes and Supreme Court rules.

II

FEDERAL STATUTES AND SUPREME COURT RULES

A. Federal Statutes

Although there have been calls for federal legislation to prevent judicial intervention in educational matters,³⁰ there is no federal statute

26. 120 CONG. REC. 40891 (1973) (remarks of Rep. Hungate).

27. *Trammel v. United States*, 445 U.S. 40, 47-48 (1980).

28. See text accompanying notes 12-13 *supra*.

29. One commentator has stated that the analysis of a privilege claim should also include an examination of the law of the state in which the communication took place to determine whether the state accords a privilege to the communication at issue. Krattenmaker, *supra* note 22, at 663. However, relying on state law to protect universities from divulging confidential personnel records is not satisfactory. Many states do not recognize privileges that would protect this information. Moreover, it is not altogether clear that federal courts will apply state law in federal question litigation. See Note, *Confidential Communication Privileges Under Federal and Virginia Law*, 13 U. RICH. L. REV. 593, 599-600 (1979). Rule 501 requires federal courts to apply state law only where state law "supplies the rules of decision." FED. R. EVID. 501. See Pedersen, *Federal, State Privilege Proposals Compared*, 53 NEB. L. REV. 373, 377 (1974) (explaining that the policy underlying rule 501's deference to state law in such situations is to eliminate forum shopping based on evidentiary privileges). Since rule 501 requires application of state evidentiary privileges only in cases decided by state law, it may, by negative implication, mean that federal courts need not apply state privileges in federal question litigation. Finally, as a policy matter, it would be better to establish a uniform federal evidentiary privilege rather than to rely on varying state privileges. Privileges are designed to encourage confidential communications; this encouragement will be diluted if privileges differ from jurisdiction to jurisdiction. Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177, 1194 (1978).

30. See, e.g., Hook, *Academic Freedom in Jeopardy—Time to Strike the Alarm Bell*, MEASURE, Sept. 1980 (published by University Centers for Rational Alternatives).

that protects a university's confidential employment information from being discovered in litigation.³¹ Given the strength of a university's interest in maintaining confidentiality and the desirability of a uniform resolution of this issue, one might argue that a federal statute would provide a better solution than an evidentiary privilege. Considering Congress' performance in formulating the privilege rule,³² however, the courts can be expected to provide a swifter and more adequate solution. Moreover, fixing a university privilege in a federal statute would undermine the judicial flexibility sought by Congress in adopting rule 501.³³

B. Supreme Court Rules

The second inquiry is whether any Supreme Court rule resolves the privilege issue.³⁴ One rule that has been employed to protect a university's records from discovery is Federal Rule of Civil Procedure 26(c). This rule allows a court to "make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."³⁵ In *Keyes v. Lenoir Rhyne College*,³⁶ the Fourth Circuit relied on the judicial discretion provided by this rule to affirm the trial court's refusal to permit a faculty plaintiff access to confidential faculty evaluations.³⁷ Reliance on the trial court's discretion to grant protective orders under rule 26(c), however, is not a satisfactory method of protecting university confidentiality interests.

In the first place, the rule's language and its traditional application indicate that it was not designed for this purpose. Its purpose is to vest discretion in the trial court to prevent bad faith or manifestly unreasonable discovery requests.³⁸ This discretion has been used most frequently to prevent harassment, embarrassment, and unduly burdensome information requests.³⁹ To employ the rule to resolve

31. See Kroll, *Title IX Sex Discrimination Regulations: Private Colleges and Academic Freedom*, 13 URBAN L. ANN. 107, 115 n.44 (1977).

32. For a thorough discussion of Congress' handling of rule 501, see Krattenmaker, *supra* note 22, at 635-46.

33. See text accompanying notes 18-27 *supra*.

34. See WEINSTEIN, *supra* note 21, ¶ 501[04]. An example of a Supreme Court rule that operates as an evidentiary privilege is the work product immunity of FED. R. CIV. P. 26(b)(3).

35. FED. R. CIV. P. 26(c).

36. 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

37. *Id.* at 581.

38. See 4 J. MOORE & J. LUCAS, *supra* note 10, ¶ 36.67, at 26-487 & n.3; 8 C. WRIGHT & A. MILLER, *supra* note 23, § 2036, at 268-69.

39. See, e.g., *Kaufman v. Edelstein*, 539 F.2d 811, 821-22 (2d Cir. 1976) (noting that there is no privilege for "experts" not to testify but that a court can exercise its discretion to prevent the expert from being repeatedly haled into court); *Donnelly v. Parker*, 486 F.2d 402, 404-05, 409 (D.C. Cir. 1973) (denying petition for mandamus to trial judge who refused to compel deposition

privilege claims is to stretch the rule beyond its intended scope.

Even if the rule could be properly employed in this context, the amount of discretion it vests in the trial court makes its use an inadequate solution. If the court happens to be sensitive to the university's needs, it may employ rule 26(c) to protect the confidential employment information;⁴⁰ but if the trial court is hostile toward the university's position,⁴¹ the university may have no alternative but to disclose the information. Thus, rule 26(c) does not adequately foster one important policy inherent in any evidentiary privilege, that of encouraging open communication between parties in particular relationships.⁴² To achieve this goal, the parties must know that their communications will be presumptively protected from disclosure in future litigation. However, because rule 26(c) gives the trial court wide discretion and because it places the burden of convincing the trial court of the need for confidentiality on the university,⁴³ it does not provide the necessary advance assurance of confidentiality required to foster open communication. If a university cannot be certain that its records will be presumptively privileged, it may follow the more prudent course and simply refrain from keeping formal records.⁴⁴

In sum, even if the court exercises its discretion in favor of the university, to employ rule 26(c) is really to avoid the privilege issue in an ill-advised manner and to shirk the duty under rule 501 to develop privilege law. Proper resolution of the issue requires consideration of the constitutional and common law components.

III

THE CONSTITUTIONAL COMPONENT: ACADEMIC FREEDOM

The right of academic freedom provides the basis for a constitu-

appearance of dangerously ill plaintiff); *Williams v. Thomas Jefferson Univ.*, 343 F. Supp. 1131, 1132 (E.D. Pa. 1972) (refusing to compel disclosure of names of those receiving abortions from defendant doctor). See generally 4 J. MOORE & J. LUCAS, *supra* note 10, ¶¶ 26.67-79.

40. See, e.g., *Keyes v. Lenoir Rhyne College*, 552 F.2d at 581.

41: For example, the trial court in the University of Georgia case, described in text accompanying notes 12-13 *supra*, displayed such a hostile attitude. Judge Owens felt that secret tenure ballots "open[ed] the door to faculty members having a popularity contest." Record vol. 2, at 41. He observed:

It reminds me very much of the box that would come around at the KA and Phi Delta fraternities back in your and my day at the University and we would put black balls in. Nobody had to stand up and have backbone enough to be counted. You would just drop a ball in. It used to make me mad as "H" to be honest with you.

Record, vol. 3, at 7, *quoted in* Brief Amicus Curiae at 5-6, *In re Dinnan*, No. 80-7432 (5th Cir., appeal docketed 1980).

42. Note, *The Proposed Federal Rules of Evidence: Of Privileges and the Division of Rule-Making Power*, 76 MICH. L. REV. 1177, 1194 (1978).

43. See 8 C. WRIGHT & A. MILLER, *supra* note 23, § 3035, at 264-65.

44. Note, *supra* note 42, at 1194.

tional evidentiary privilege for universities. In *Sweezy v. New Hampshire*,⁴⁵ the Supreme Court endorsed the constitutional stature of academic freedom for the first time in reversing the conviction of a professor who refused to respond to a state inquiry concerning his political beliefs and the content of his lectures.⁴⁶ Although disagreeing on whether the case should be decided on due process or first amendment grounds,⁴⁷ both Chief Justice Warren, speaking for four members of the Court, and Justice Frankfurter, speaking for himself and Justice Harlan, agreed that the conviction threatened academic freedom and constituted an impermissible government intrusion on university autonomy.⁴⁸

The other major Supreme Court case in the development of academic freedom is *Keyishian v. Board of Regents*,⁴⁹ which involved a challenge to a New York statute that required faculty members to take oaths certifying that they had never belonged to the Communist Party. The Court struck down the law, reasoning that a particularly strong interest in protecting academic freedom exists because the "classroom is peculiarly the 'marketplace of ideas'" and the nation's future depends on "leaders trained through wide exposure to that robust exchange of ideas which discovers truth."⁵⁰ The Court summarized its position on academic freedom by stating: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us That freedom is therefore a special concern of

45. 354 U.S. 234 (1957).

46. A constitutional right to academic freedom was earlier endorsed by individual Justices in *Wieman v. Updegraff*, 344 U.S. 183, 196-97 (1952) (Frankfurter, J., concurring), and *Adler v. Board of Educ.*, 342 U.S. 485, 510-11 (1952) (Douglas, J., dissenting).

47. The Court's four-Justice opinion, authored by Chief Justice Warren, based its conclusion on due process grounds. 354 U.S. at 254-55. Justice Frankfurter's concurring opinion was based on first amendment grounds. *See id.* at 260-66 (Frankfurter, J., concurring).

48. Chief Justice Warren stated that the conviction invaded the defendant's liberty "in the areas of academic freedom and political expression" and noted that "[t]he essentiality of freedom in the community of American universities is almost self-evident." *Id.* at 250. Justice Frankfurter also stressed the need to exclude the government from "the intellectual life of a university." *Id.* at 262 (Frankfurter, J., concurring).

49. 385 U.S. 589 (1967). Between *Sweezy* and *Keyishian* came *Barenblatt v. United States*, 360 U.S. 109 (1959). Although academic freedom was not the basis for the *Barenblatt* Court's holding, Justice Harlan, writing for the majority, affirmed that "this Court will always be on the alert against intrusions by Congress into this Constitutionally protected domain [of academic freedom]." *Id.* at 112.

For other discussions of the development of the constitutional right of academic freedom, see Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROB. 447, 453-57 (1963); Nordin, *The Legal Protection of Academic Freedom*, in THE COURTS AND EDUCATION 306, 315-21 (C. Hooker ed. 1978); Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM 59 (E. Pincoffis ed. 1975); Note, *Academic Freedom—Its Constitutional Content*, 40 U. COLO. L. REV. 600, 604-14 (1968).

50. 385 U.S. at 603.

the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."⁵¹

The most recent affirmation of the constitutional stature of academic freedom came in *Regents of the University of California v. Bakke*.⁵² Writing the Court's lead opinion, Justice Powell stated: "Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment."⁵³

Even though it is now clear that academic freedom qualifies for constitutional protection, the application of this right is not well defined.⁵⁴ Thus, it is necessary to explore the contours of this freedom more closely in order to determine whether it requires recognition of an evidentiary privilege for universities.

A. Institutional Autonomy: A Necessary Component of Academic Freedom

I. The Two Strands of Academic Freedom

The right of academic freedom can be asserted by faculty members whose rights have been infringed by either the university administration⁵⁵ or the government.⁵⁶ It can also be asserted by the university itself when its autonomy is threatened.⁵⁷ Thus, there are two distinct strands of academic freedom, the individual and the institutional. The former has been asserted frequently and is firmly entrenched as a constitutional right.⁵⁸ However, it is the latter, less developed strand that is implicated by compelled disclosure of a university's confidential employment information.⁵⁹ To decide whether academic freedom man-

51. *Id.*

52. 438 U.S. 265 (1978).

53. *Id.* at 312.

54. *Cooper v. Ross*, 472 F. Supp. 802, 813 (E.D. Ark. 1979). The court noted that the amorphous nature of the right poses significant problems when a case "involves a fundamental tension between the academic freedom of the individual teacher to be free of restraints from the university administration, and academic freedom of the university to be free of government, including judicial, interference." *Id.*

55. *See, e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 573-74 (1968) (public school teacher may not be dismissed for speech concerning school budget because that is a public issue); *Cooper v. Ross*, 472 F. Supp. at 810-12 (university may not dismiss professor for espousing Communist beliefs during class).

56. *See, e.g., Keyislian v. Board of Regents*, 385 U.S. at 602-04.

57. *See, e.g., Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Kunda v. Muhlenberg College*, 621 F.2d 532, 534, 547 (3d Cir. 1980) (university argued that its academic freedom was violated by the trial court's remedy of conditional tenure for a professor denied promotion for sex-discriminatory reasons).

58. Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 881-85 (1979). *See text accompanying notes 45-53 supra.*

59. In the University of Georgia sex discrimination suit discussed in text accompanying

dates an evidentiary privilege, it is necessary first to determine the status of institutional academic freedom.

2. *The Limited Endorsement of Institutional Autonomy*

The issue of institutional academic freedom has arisen infrequently, and the Supreme Court has never relied on this strand of academic freedom. Yet neither has the Court rejected the institutional strand. Indeed, the few explicit references to this strand of academic freedom in the Court's opinions endorse its constitutional stature. Moreover, the Court's practice, and that of the lower federal courts as well, has been to respect university autonomy.

The first Supreme Court reference to the institutional strand of academic freedom appears in Justice Frankfurter's concurring opinion in *Sweezy*.⁶⁰ Because *Sweezy* involved only the individual strand of academic freedom, the majority did not discuss the institutional issue. But Justice Frankfurter raised the issue, pointing out the necessity for "the exclusion of governmental intervention in the intellectual life of a university."⁶¹ In order to protect the university's autonomy Justice Frankfurter suggested recognition of "four essential freedoms" for an institution: to determine "who may teach, what may be taught, how it shall be taught, and who may be admitted to study."⁶² Clearly, the right to determine who may teach and who may be admitted to study is a right of the university collectively, not the individual faculty members.⁶³

The next explicit approval of the institutional right came in Justice Powell's opinion in *Bakke*.⁶⁴ Searching for an interest to justify the university's use of suspect racial classifications in selecting students,

notes 12-13 *supra*, Professor Dinnan argued that his individual right of academic freedom was threatened by the trial court's order to disclose his tenure ballot. See Reply Brief for Appellant at 7, *In re Dinnan*, 625 F.2d 1146, *appeal docketed*, No. 80-7432 (5th Cir. 1980). This argument misapplies the individual strand of academic freedom, which protects a professor's freedom of belief and expression, in and out of the classroom, on political and academic matters. See, e.g., *Keyishian v. Board of Regents*, 385 U.S. 589 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Cooper v. Ross*, 472 F. Supp. 802 (E.D. Ark. 1979). Professor Dinnan's tenure ballot was cast in an administrative role. Thus, his personal freedom of belief and expression was not threatened.

60. *Sweezy v. New Hampshire*, 354 U.S. 234 (1957).

61. *Id.* at 262 (Frankfurter, J., concurring).

62. *Id.* at 263 (Frankfurter, J., concurring).

63. Of course, university professors, as representatives of the university, may exercise the institutional right of academic freedom. In other words, the institutional and individual strands of academic freedom are not mutually exclusive. Indeed, given the managerial role of the faculty at many universities, see *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980) (faculty members excluded from protections of National Labor Relations Act because of managerial role in university operations), one can expect many claims of institutional academic freedom by faculty members.

64. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

Powell cited Justice Frankfurter's "four essential freedoms" with approval.⁶⁵ By doing so he affirmed the *university's* first amendment right of academic freedom, the right of the institution to make its own decisions with respect to the "four essential freedoms."⁶⁶

Despite occasional endorsements by individual Justices, the fact remains that a majority of the Supreme Court has neither explicitly recognized nor rejected institutional academic freedom. The Court's practice, however, has been to respect university autonomy.

Although not articulating a constitutional basis for its reluctance to intrude, the Court has refrained from interfering with university decisions regarding faculty and students. For example, in *Board of Curators v. Horowitz*⁶⁷ the Court held that a student dismissed from medical school on academic grounds has no right to a hearing before the school's decisionmaking body. Absent "arbitrariness or capriciousness," the decision to dismiss a student must rest on the judgment of school officials, since "[c]ourts are particularly ill-equipped to evaluate academic performance."⁶⁸

Lower federal courts have also respected university autonomy and have refrained from interfering with employment decisions absent some compelling necessity. In *Faro v. New York University*,⁶⁹ for example, the Second Circuit upheld a denial of a faculty member's application for a preliminary injunction against an adverse employment decision and stated: "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."⁷⁰ This is the reason many courts have given for maintaining a "hands-off" policy regarding university employment decisions.⁷¹

65. *Id.* at 312.

66. *Id.*

67. 435 U.S. 78 (1978).

68. *Id.* at 92.

69. 502 F.2d 1229 (2d Cir. 1974).

70. *Id.* at 1231-32.

71. See, e.g., *Stebbins v. Weaver*, 537 F.2d 939, 943 (7th Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977); *Duke v. North Tex. State Univ.*, 469 F.2d 829, 838 (5th Cir. 1972), *cert. denied*, 412 U.S. 932 (1973); *Huang v. College of the Holy Cross*, 436 F. Supp. 639, 653 (D. Mass. 1977); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1353-54 (W.D. Pa. 1977); *Peters v. Middlebury College*, 409 F. Supp. 857, 868 (D. Vt. 1976); *Labat v. Board of Higher Educ.*, 401 F. Supp. 753, 757 (S.D.N.Y. 1975).

The cases cited above deferred to the university decisionmaking process without considering the strength and validity of plaintiffs' claims. This practice is contrary to Congress' mandate that Title VII apply to academic institutions. See note 3 and accompanying text *supra*. More recent cases have corrected this flaw. See, e.g., *Kunda v. Muhlenberg College*, 621 F.2d 532, 541-44 (3d Cir. 1980); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154-59 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); *Sweeney v. Board of Trustees*, 569 F.2d 169, 174-76 (1st Cir.), *rev'd on other grounds*, 439 U.S. 24 (1978), *opinion on remand*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

The courts' lack of expertise does not adequately explain this hands-off policy, however. Courts do not hesitate to intrude in other areas in which they lack expertise.⁷² It is submitted that courts have intuitively respected universities' autonomy for reasons more compelling than lack of expertise.⁷³ These reasons are explored in the next section of this Comment.

3. *Institutional Autonomy: A Necessary Corollary of the First Amendment*

The right of institutional academic freedom should be recognized as a corollary of the first amendment. Corollary constitutional rights are recognized in order to make "the express guarantees fully meaningful."⁷⁴ For example, while the first amendment does not expressly include the right of association, it has been construed to include that right.⁷⁵ The individual strand of academic freedom is designed to protect the "intellectual interchange and pursuit of knowledge,"⁷⁶ and is itself a corollary of the first amendment. The individual strand alone, however, cannot adequately protect these interests; institutional freedom is also necessary. The Supreme Court suggested as much in *Griswold v. Connecticut*,⁷⁷ where it stated: "The right of freedom of speech and press includes not only the right to utter or to print, but . . . freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community."⁷⁸

72. For example, courts often determine the cause of complex industrial accidents or whether tonal similarities in musical scores are close enough to find a copyright infringement. See Yurko, *supra* note 2, at 497-98.

73. See H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 14-18 (1979). "At the present time the concept of autonomy for the institution is more an ideological expression of academic custom and usage than a specifically enunciated legal doctrine even though academic abstention is based on judicial recognition of institutional autonomy." *Id.* at 17.

74. *Griswold v. Connecticut*, 381 U.S. 479, 483 (1965).

Corollary rights should be distinguished from "penumbral" rights. The former are recognized in order to protect the textually enumerated rights. The latter are inferred from the text. For example, the right of privacy upheld in *Griswold* is regarded as a penumbral right. See Dixon, *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 B.Y.U. L. REV. 43, 84: ("[In *Griswold*, Justice Douglas,] skipped through the Bill of Rights like a cheerleader—'Give me a P . . . give me an R . . . an I . . . ' and so on, and found P-R-I-V-A-C-Y as a derivative or penumbral right.").

75. See *NAACP v. Alabama*, 357 U.S. 449, 460-62 (1957). The right to educate one's children in the school of one's choice, *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925), the right to teach foreign languages, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), and the right of news gathering, see notes 155-57 and accompanying text *infra*, have also been recognized as corollary rights.

76. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROB. 431, 433 (1963). See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

77. 381 U.S. 479 (1965).

78. *Id.* at 482.

A university's right of autonomy is a corollary of the first amendment for two reasons. First, it is a prerequisite for the unfettered exercise of individual academic freedom rights.⁷⁹ Second, it is necessary to safeguard society's interest in the development and unbridled dissemination of ideas—activity at the core of first amendment freedoms.

University autonomy is necessary to protect independent thought and teaching by faculty members. If this institutional safeguard of individual rights is not scrupulously respected, infringements on the individual rights are inevitable. For example, if the state impinges on institutional autonomy by determining that no Marxist may teach a political science course at a state university, the individual faculty members' freedom of speech in the classroom is ultimately what is threatened. This type of governmental interference may seem highly unlikely; but as Justice Frankfurter cautioned in *Sweezy*, "in these matters of the spirit, inroads on legitimacy must be resisted at their incipency."⁸⁰

Moreover, academic freedom has not been recognized solely for the purpose of protecting the rights of individual faculty members. Academic freedom also exists to protect that "robust exchange of ideas" in which the *public* has a great interest.⁸¹ The university's contribution to social progress is the ultimate justification for academic freedom;⁸² the university renders an "invaluable service . . . to society [which] can be performed only in an atmosphere entirely free from administrative, political, or ecclesiastical constraints on thought and expression."⁸³

In order to protect the public interest in the "robust exchange of ideas," it is necessary to recognize the university's right of academic freedom. The guarantee that the first amendment freedoms of individual professors are protected does not necessarily preclude other governmental intrusions that may stifle intellectual exchange. For example, one commentator has suggested that increased federal regulation of university hiring practices is destroying the "distinctiveness, diversity, and pluralism" of some universities.⁸⁴ Or, the government may withhold funds from certain universities if it does not approve of certain

79. Fuchs, *supra* note 76, at 433.

80. 354 U.S. at 263 (Frankfurter, J., concurring).

81. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (academic freedom is "of transcendent value to all of us and not merely to the teachers concerned").

82. Murphy, *supra* note 49, at 448.

83. Note, *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1048 (1968).

84. See Kroll, *supra* note 31, at 107 & n.5.

This Comment does not take the position that academic freedom precludes all governmental regulation of universities. Rather, the government's interest in regulation must be balanced against the university's competing academic freedom interests. See text accompanying notes 96-111 *infra*.

activities at a school.⁸⁵ Considering these possibilities, it becomes evident that individual academic freedom alone will not protect the "robust exchange of ideas." Because the university is "peculiarly the 'marketplace of ideas,'"⁸⁶ society has a strong interest in protecting the university's sanctity. Therefore, courts should endorse institutional academic freedom as a corollary to the first amendment.⁸⁷

To extend constitutional protection to institutional academic freedom would not necessarily mean, however, that a court could never compel disclosure of confidential university information. Before an evidentiary privilege based on academic freedom is recognized, it should first be clear that compelled disclosure would burden academic freedom in a constitutionally significant way. Moreover, even if compelled disclosure is found to pose a constitutionally significant threat to academic freedom, compelling countervailing interests may nevertheless justify a disclosure order. These two issues are explored in the following sections of this Comment.

B. The Burden of Compelled Disclosure

Compelling a university to disclose its secret tenure ballots and confidential faculty evaluations imposes significant burdens on institutional academic freedom. The most serious problem is the "chilling effect" it has on candid evaluations and voting, the information on which universities rely in making employment decisions. When assurances of confidentiality are removed, participants in the evaluation process will be reluctant to be candid.⁸⁸

This chilling effect may have several detrimental results. As the candor and thoroughness of evaluations diminish, the value and integrity of the peer evaluation system are eroded.⁸⁹ As the value of peer

85. Perhaps the legislators would object to the university's choice of speakers or movies offered to students.

86. *Keyishian v. Board of Regents*, 385 U.S. at 603.

87. See Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 STAN. L. REV. 95, 112 (1973) ("[A]cademic freedom is recognized as a prerequisite to educational excellence and even to our survival as a civilization.").

Two other arguments have been made in support of institutional academic freedom. First, the right of university autonomy might be based on freedom of speech, on the theory that the university hiring practices are tantamount to speech. Note, *supra* note 58, at 888-91. Second, institutional autonomy might be based on freedom of association. See Kroll, *supra* note 31, at 117-18.

88. *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *McKillop v. Regents of Univ. of Cal.*, 386 F. Supp. 1270, 1276 (N.D. Cal. 1975); Kroll, *supra* note 31, at 115; University of Chicago Report, *supra* note 2, at 168. Cf. *United States v. Nixon*, 418 U.S. 683, 705 (1974) (a denial of confidentiality for communications among high government officials would temper the officials' candor).

89. See Kroll, *supra* note 31, at 114-15.

evaluations decreases, the decisionmakers will cease to rely on them.⁹⁰ Then, tenure may be granted on the basis of incomplete and inaccurate information, a practice that will likely impair the quality of instruction and scholarship.⁹¹ This in turn will stifle the search for knowledge and the exchange of ideas—the core of academic freedom.

Another ramification of compelled disclosure might be the development of an informal system of review. As peer evaluations and tenure recommendations become less reliable, university decisionmakers may be forced to resort to oral and undocumented evaluations that are not subject to the procedural safeguards of the formal system. This would be unfortunate, since this formal system has been designed to maximize accuracy and fairness.⁹² Thus, compelling disclosure in the course of one plaintiff's attempt to challenge an employment decision may undermine an entire system developed to protect the interests of all current and potential faculty members.

Compelling disclosure of secret ballots and confidential evaluations may also result in divisiveness and tension among faculty colleagues.⁹³ In contrast to the business world, university appointment, tenure, and promotion recommendations are typically made by peers rather than by supervisors.⁹⁴ Forced disclosure of negative comments about a colleague's worth as a scholar would strain faculty relations.⁹⁵ The divisiveness that could result would stifle the robust exchange of ideas among the faculty that is necessary to stimulate intellectual growth.

However, although judicially compelled disclosure of confidential employment information would significantly burden a university's academic freedom interests, an absolute evidentiary privilege would be inappropriate and unwise. Rather, as in other first amendment contexts, courts should balance academic freedom interests against countervailing interests. The following section discusses the balancing approach typically used in first amendment cases, concluding that this balancing analysis mandates only a qualified privilege for universities.

90. *Id.* at 115.

91. *Id.* at 115 & n.45.

92. D. Rabban (AAUP), Memorandum, Confidentiality and Statements of Reasons 3 (Nov. 11, 1980) (on file with *California Law Review*). See letter to the editor from Professor David Riesman in *CHRONICLE OF HIGHER EDUC.*, Sept. 29, 1980, at 24, col. 2-3 ("[T]he experience of . . . academicians is that, when confidentiality cannot be guaranteed, letters lose all credibility. The advantage lies not with those previously discriminated against, but with those in the appropriate network who can have sponsors telephone on their behalf.").

93. *University of Chicago Report*, *supra* note 2, at 168.

94. See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980); AAUP, Statement on Government of Colleges and Universities 40, 43 (1977) (policy document at office of AAUP, One Dupont Circle, Washington, D.C.); Fuchs, *supra* note 76, at 440.

95. *University of Chicago Report*, *supra* note 2, at 168.

C. *Balancing in the Academic Freedom Context*

First amendment interests are not absolute and may be overcome by compelling countervailing interests. Thus, under current first amendment doctrine, when a competing interest exists, the court must balance that interest against the first amendment interest.⁹⁶ If the court finds the competing interest compelling, the first amendment right may be limited only to the extent necessary to further the competing interest.⁹⁷

This balancing approach has been employed in the academic freedom context. For example, in his concurring opinion in *Sweezy*, Justice Frankfurter argued that government intrusion on academic freedom should only be tolerated for "reasons that are exigent and obviously compelling."⁹⁸ Then in *Keyishian*, the Court employed a balancing approach in invalidating New York's loyalty oath requirement.⁹⁹ Although the state's interest in protecting the schools from subversion was found to be substantial, the Court held that it could be achieved by a more narrowly drawn means.¹⁰⁰

While *Sweezy* and *Keyishian* involve the individual strand of academic freedom, courts have also employed the balancing approach in cases dealing with threats to university autonomy. For example, in *Bakke*,¹⁰¹ the university's right to determine who may be admitted to study—one of Justice Frankfurter's "four essentials of academic freedom"¹⁰²—was undermined by the Court's willingness to invalidate the university's selection process and order Bakke admitted. Justice Powell affirmed that academic freedom, which included the "freedom of a university" to select students, is a "special concern of the First Amendment,"¹⁰³ but went on to strike down the school's inherently suspect racial classification. Once the Court found the admissions process violative of equal protection, the university's claim of institutional auton-

96. *E.g.*, *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 841-42 (1978); *Wooley v. Maynard*, 430 U.S. 705, 715-17 (1977); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562-70 (1976); *Williams v. Rhodes*, 393 U.S. 23, 31-32 (1968); Emerson, *First Amendment Doctrine and the Burger Court*, 68 CALIF. L. REV. 422, 447-48 (1980).

97. *See e.g.*, *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 786, 794 (1978); *Shelton v. Tucker*, 364 U.S. 479, 487-90 (1960). In *Shelton*, the Court acknowledged the state's legitimate interest in inquiring into the competence of its teachers, but invalidated a law requiring teachers to disclose every organization to which they belonged, since the law went beyond what was necessary to achieve its purpose. *Id.* This standard has been referred to as the "less drastic means" test. Emerson, *supra* note 96, at 450.

98. *Sweezy v. New Hampshire*, 354 U.S. 234, 262 (1957) (Frankfurter, J., concurring).

99. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

100. *Id.* at 602-04.

101. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

102. *See* text accompanying note 62 *supra*.

103. 438 U.S. at 312.

omy had to fail, since judicial intrusion was necessary to vindicate Bakke's compelling interest in being free from unconstitutional admissions programs. Thus, when a burden on institutional autonomy is necessary for the vindication of a person's constitutional rights, a claim of academic freedom must yield.

This same interest is sufficient to justify a burden on the university's right to select who may teach. In *Cooper v. Ross*¹⁰⁴ a federal district court found that a substantial factor in the nonrenewal of a faculty member's contract to teach was the exercise of his first amendment rights.¹⁰⁵ Although the court noted that "a state university has the undoubted right to . . . select its faculty and students," the court ordered Cooper reinstated since the university failed to prove the nonrenewal was based on legitimate grounds.¹⁰⁶ This is a clear case in which it was necessary for the court to intrude; but for the court's intrusion, the plaintiff's constitutional rights would have been violated without redress.¹⁰⁷

Similarly, in *Kunda v. Muhlenberg College*,¹⁰⁸ the plaintiff successfully proved that, but for the university's sex discrimination, she would have been promoted. In this case the court went even further than *Cooper*. Although acknowledging that university employment decisions should generally not be interfered with by courts, it not only ordered Kunda to be reinstated but ordered the university to award her tenure.¹⁰⁹ The university claimed that this was an impermissible invasion of academic freedom. The court rightly rejected this claim since the judicial intrusion was necessary to put the plaintiff in the position in which she would have been but for the university's unconstitutional discrimination.¹¹⁰

104. 472 F. Supp. 802 (E.D. Ark. 1979).

105. *Id.* at 808.

106. *Id.* at 809, 814-15.

107. Other cases in which intervention has been necessary to protect first amendment rights include *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-85 (1977); *Perry v. Sindermann*, 408 U.S. 593, 598 (1972).

108. 621 F.2d 532 (3d Cir. 1980).

109. The tenure award was conditioned on plaintiff's completing a master's degree within two years. *Id.* at 535.

110. The AAUP, long a defender of academic freedom, submitted a brief in *Kunda* arguing that the award of tenure was *not* an invasion of academic freedom. It took the position of Justice Powell in *Bakke*: "even when legitimate academic considerations are involved, 'individual rights may not be disregarded.'" Brief Amicus Curiae, at 18 (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. at 314). Thus, the courts must not abdicate their responsibility to enforce the Civil Rights Act of 1964, but they may not unnecessarily intrude on academic freedom. The duty of the court is "to steer a careful course between excessive intervention in the affairs of the university and the unwarranted tolerance of unlawful behavior." *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

Another interest which may justify intrusion on institutional autonomy emerges from recent criticisms of government regulation of university hiring decisions. *See, e.g., Freeman, Uncle*

The outcomes in *Bakke*, *Cooper*, and *Kunda* demonstrate that academic freedom is not absolute; it can be overcome by compelling countervailing interests. Because academic freedom is not absolute, it cannot serve as the basis of an unqualified evidentiary privilege. Nevertheless, the foregoing analysis has also demonstrated that compelled disclosure of tenure ballots, confidential faculty evaluations, and other sensitive information may undermine the university's autonomy and pose a serious threat to academic freedom.¹¹¹ Courts must not order disclosure of such information lightly; rather, they should treat such information as presumptively privileged. Under the traditional first amendment balancing approach, disclosure should not be ordered absent a compelling need. Part V of this Comment proposes an analysis for courts to employ in determining when this qualified privilege must yield. But first, Part IV will develop an alternative analysis leading to recognition of a qualified privilege for universities. Part IV's analysis is based on the final component of rule 501—common law privilege principles.

IV

THE COMMON LAW COMPONENT

A. *Mode of Analysis*

If the Supreme Court were to hold that a university has no constitutional academic freedom rights that could serve as a basis for a qualified evidentiary privilege, that would not end the inquiry. If a court is unable to resolve a privilege claim by consulting the preliminary components of rule 501—statutes, Supreme Court rules, and constitutional principles—it must consider “principles of common law . . . interpreted . . . in the light of reason and experience.”¹¹² The relevant common law principles are those which federal courts have applied to resolve claims for various other privileges.¹¹³ After the court has identified these principles it must weigh the competing factors and determine whether, on balance, the privilege is justifiable.¹¹⁴

Sam's Heavy Hand in Education, 30 NAT'L REV. 947, 949-51, 954-56 (1978). As a condition to receiving federal funding, the government often sets affirmative action goals. Universities have claimed that this violates their right to autonomy. See, e.g., 121 CONG. REC. 5827-28 (1975) (remarks of Kingman Brewster, Jr.). For an argument that the state's interest in equalizing employment opportunities justifies intruding on the university's right to select who may teach, see Note, *supra* note 58, at 894-95. See also Kroll, *supra* note 31, at 120 (state's interest in eliminating discrimination may outweigh university's interest in selecting students).

111. See text accompanying notes 88-95 *supra*.

112. FED. R. EVID. 501.

113. See Krattenmaker, *supra* note 22, at 665.

114. *United States v. Trammel*, 445 U.S. 40, 50 (1980); *Ryan v. Commissioner*, 568 F.2d 531, 543 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *Lora v. Board of Educ.*, 74 F.R.D. 565, 577 (E.D.N.Y. 1977); *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976), *aff'd*, 563 F.2d 559

This balancing should not be confused with the separate inquiry of when a qualified privilege must yield. Although several courts have blurred the distinction between the two questions,¹¹⁵ separate analyses should be employed. First, the court should determine whether the information is presumptively privileged. Second, the court should determine whether the party seeking the information has overcome the privilege. The Supreme Court's analysis in *United States v. Nixon*¹¹⁶ is illustrative. There the Court initially recognized a qualified privilege of confidentiality on the basis of the Chief Executive's need for candid opinions;¹¹⁷ then the Court held that the privilege must yield because of the importance of obtaining all evidence in a criminal case.¹¹⁸

This Part undertakes the first analysis. It identifies the principles that have influenced dispositions of common law privilege claims and concludes that, in light of these principles, courts should recognize a qualified common law privilege protecting universities' confidential employment information.¹¹⁹ The second analysis, used to determine when the privilege must yield, appears in Part V.

B. Identifying and Applying the Relevant Principles

Typically, in assessing common law privilege claims, courts consider three main factors: the need for full disclosure of all relevant facts, the social importance of the interest the privilege would protect, and the necessity of recognizing an evidentiary privilege to protect the asserted interest.¹²⁰ These factors are analyzed below.

1. The Need for Full Disclosure

It is frequently said that the "most important and least variable

(2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978). See *United States v. Bryan*, 339 U.S. 323, 331 (1950); R. LAMPERT & S. SALTZMAN, A MODERN APPROACH TO EVIDENCE 614 (1975); C. MCCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 72, at 152 (2d ed. 1972); 8 J. WIGMORE, EVIDENCE § 2190 (McNaughton rev. ed. 1961).

115. See, e.g., *Herbert v. Lando*, 441 U.S. 153 (1979); *Flora v. Hamilton*, 81 F.R.D. 576 (M.D.N.C. 1978); *Lora v. Board of Educ.*, 74 F.R.D. 565 (E.D.N.Y. 1977). In these cases the courts cited reasons that normally result in a qualified privilege being overcome as support for the conclusion that no privilege should be recognized.

116. 418 U.S. 683 (1974).

117. *Id.* at 708.

118. *Id.* at 711-13.

119. It should be noted that the policy arguments for recognizing a constitutionally based privilege overlap with those that support the common law argument. The analyses, however, have different bases. The constitutional argument is based on the first amendment, while the common law argument is based on society's need for effective decisionmaking by persons in a position to affect the public welfare.

120. Professor Wigmore has formulated the common law analysis in a somewhat different fashion, although the factors he considers are very similar to those discussed in this Comment. His four prerequisites to the recognition of a privilege are:

interest against recognizing a particular privilege is the need for full disclosure of all relevant facts."¹²¹ This principle is often referred to under the rubric that "the public . . . has a right to every [person's] evidence."¹²² Although this incantation serves as a reminder that privileges may cloak relevant facts from litigants, it states only a half-truth. If sunlight were always the best disinfectant, there would not be any evidentiary privileges. Thus, it is equally useful to remember that although "secrecy is generally suspect . . . too much sunlight does more than disinfect—it stimulates skin cancer."¹²³ In short, disclosure is not

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

8 J. WIGMORE, *supra* note 114, § 2285 (emphasis omitted).

Some courts have considered two other factors when appraising privilege claims under rule 501. First, many courts inquire whether the specific privilege claimed was one of the nine privileges enumerated in the Proposed Federal Rules of Evidence. Although Congress rejected the proposed section on privileges, courts have relied on it as a reflection of the common law. The proposed rules serve as a useful guide but are rarely dispositive. *See* *United States v. Gillock*, 445 U.S. 360, 366 (1980); *United States v. McPartlin*, 595 F.2d 1321, 1337 (7th Cir. 1979); *Ryan v. Commissioner*, 568 F.2d 531, 542-44 (7th Cir. 1977), *cert. denied*, 439 U.S. 820 (1978); *In re Franklin Nat'l Bank Sec. Litigation*, 478 F. Supp. 577, 580 (E.D.N.Y. 1979); *Flora v. Hamilton*, 81 F.R.D. 576, 578 (M.D.N.C. 1978); *In re Grand Jury Proceedings*, Detroit, Mich., Aug., 1977, 434 F. Supp. 648, 649, 650 n.1 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978); *United States v. King*, 73 F.R.D. 103, 105 (E.D.N.Y. 1976), *aff'd*, 563 F.2d 559 (2d Cir. 1977), *cert. denied*, 435 U.S. 918 (1978); *United States v. Mackey*, 405 F. Supp. 854, 857-58 (E.D.N.Y. 1975). None of the nine proposed privileges would apply to protect a university's confidential employment information. *But see* *McKillop v. Regents of Univ. of Cal.*, 386 F. Supp. 1270, 1278 n.15 (N.D. Cal. 1975) (stating in dictum that federal executive privilege—proposed rule 509—would cover the University of California's confidential faculty evaluations).

Second, several courts have considered state law when determining whether "reason and experience" require that the privilege be recognized as a matter of federal law. The federal courts acknowledge that "a strong policy of comity between state and federal sovereignties impels federal courts to recognize state privileges where this can be accomplished at no substantial cost to federal substantive and procedural policy." *United States v. King*, 73 F.R.D. at 105. *See* *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980); *Trammel v. United States*, 445 U.S. 40, 47-49 (1980); *Lora v. Board of Educ.*, 74 F.R.D. 565, 576 (E.D.N.Y. 1977). *See also* notes 20 & 29 *supra*.

121. Note, *Confidential Communication Privileges Under Federal and Virginia Law*, 13 U. RICH. L. REV. 593, 598 (1979). *See, e.g.*, *United States v. Nixon*, 418 U.S. at 709; *Lora v. Board of Educ.*, 74 F.R.D. at 578; *United States v. King*, 73 F.R.D. at 105.

122. *United States v. Trammel*, 445 U.S. at 50; *United States v. Bryan*, 339 U.S. 323, 331 (1950); *Blackmer v. United States*, 284 U.S. 421, 438 (1932); 8 J. WIGMORE, *supra* note 114, § 2192, at 70.

123. Letter from Professor William Van Alstyne to AAUP, at 3 (Nov. 6, 1980) (commenting on University of Georgia sex discrimination suit discussed in text accompanying notes 12-13 *supra* and 181-83 *infra*). Professor Van Alstyne's comment should not be interpreted as unequivocally favoring an absolute university evidentiary privilege, however. In his letter, Professor Van Alstyne concluded that an absolute privilege would be "too strong" and "too unfair to the real

invariably good, so it is not an absolute rule.

2. *The Importance of the Interest at Stake*

However, since privileges may protect relevant information from discovery, disclosure is the general rule.¹²⁴ Privileges are exceptions, recognized only when they protect interests and relationships whose social importance outweighs the value of litigants discovering every arguably relevant fact.¹²⁵ Accordingly, courts will recognize a common law privilege only when the claimant's interest in confidentiality is one of "significant public interest."¹²⁶

The federal courts have considered numerous interests that have been asserted by litigants attempting to justify privilege claims. The courts' dispositions of these claims comprise the common law that must be considered in order to appraise the strength of a university's interest in confidentiality and of the public interest in protecting that interest.

The interest in fostering full disclosure in certain relationships is the basis of several recognized privileges. The attorney-client privilege is justified by society's interest in clients fully informing their attorneys of all facts to ensure the adequacy of legal services.¹²⁷ The privilege for confidential communications between priest and penitent is justified by society's interest in people seeking spiritual rehabilitation.¹²⁸ And the societal interests in spousal harmony and full communications between spouses serve as the rationale for two privileges arising from the husband-wife relationship.¹²⁹

This interest in full disclosure between parties whose relationships generally further the public interest also has led courts to protect information through the use of other less well-known privileges. For exam-

problems confronted by a rejected candidate," but that "to proclaim that every faculty member of course has an obligation to respond whenever a question is otherwise allowed under the federal rules, however [would be] insensitive and naive." *Id.* at 5.

124. C. McCORMICK, *supra* note 114, § 72, at 152; 8 J. WIGMORE, *supra* note 114, § 2192, at 70.

125. C. McCORMICK, *supra* note 114, § 72, at 152.

126. *United States v. Mandel*, 415 F. Supp. 1025, 1030 (D. Md. 1976). The language describing the requisite importance of the interest has varied, but the "significant public interest" test is a representative example. *See, e.g.*, *Crawford v. Dominic*, 469 F. Supp. 260, 265 (E.D. Pa. 1979); *Robinson v. Magovern*, 83 F.R.D. 79, 86-88 (W.D. Pa. 1979); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 250 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); C. McCORMICK, *supra* note 114, § 72, at 152.

127. *See Fisher v. United States*, 425 U.S. 391, 403 (1976).

128. *See United States v. Trammel*, 445 U.S. at 51; *United States v. Wells*, 446 F.2d 2, 4 (2d Cir. 1971); *United States v. Gordon*, 493 F. Supp. 822, 823-24 (N.D.N.Y. 1980); *In re Verplank*, 329 F. Supp. 433, 435 (C.D. Cal. 1971).

129. *United States v. Lustig*, 555 F.2d 737, 747 (9th Cir. 1977). *See Hawkins v. United States*, 358 U.S. 74 (1958) (adverse spousal testimony privilege, which privilege was subsequently modified in *United States v. Trammel*, 445 U.S. 40 (1980)); *Blau v. United States*, 340 U.S. 332 (1951) (marital communications privilege).

ple, several courts have recognized an "evaluative privilege" to protect an association's internal evaluations of the quality of services rendered to the public.¹³⁰ Similarly, the strong public interest in encouraging self-criticism for improvement justifies protecting documents regarding a company's self-evaluation of its affirmative action plan.¹³¹

However, the public interest in full disclosure between parties that serve the public has not always been found sufficiently strong to justify an evidentiary privilege. The courts have held, for example, that society's interest in full disclosure between clients and their accountants,¹³² or between employers and their stenographers,¹³³ does not merit an evidentiary privilege.

A privilege analogous to the one proposed in this Comment is the executive or official information privilege.¹³⁴ This is a qualified privilege extended to recommendations or opinions that are expressed in connection with government decisionmaking.¹³⁵ It is justified by the public interest in having officials obtain all the facts and candid advice before making decisions.¹³⁶ The courts have consistently found this interest to be great enough to justify an evidentiary privilege.¹³⁷

Maintaining the confidentiality of university tenure ballots, faculty evaluations and similar sensitive information also serves public interests. As discussed in Part III, such information must remain confidential in order to protect academic freedom interests and the "robust exchange of ideas" essential to intellectual growth.¹³⁸ Moreover, compelled disclosure of this confidential information may undermine the university's ability to collect the candid evaluations it must receive in

130. See, e.g., *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970) (recognizing qualified privilege to protect the minutes of hospital staff meeting on the basis of the "overwhelming" public interest in the staff obtaining candid evaluations of their clinical practices), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

131. See *Rosario v. New York Times Co.*, 84 F.R.D. 626 (S.D.N.Y. 1979); *Stevenson v. General Elec. Co.*, 26 F.R. Serv. 2d 574 (S.D. Ohio 1978); *New York Stock Exch., Inc. v. Sloan*, 22 F.R. Serv. 2d 500 (S.D.N.Y. 1976); *Sanday v. Carnegie-Mellon Univ.*, 12 F.E.P. 101 (W.D. Pa. 1975); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971).

132. See *Mitsui & Co. v. Puerto Rico Water Resources*, 79 F.R.D. 72 (D.P.R. 1978).

133. See *United States v. Schoenheinz*, 548 F.2d 1389 (9th Cir. 1977).

134. These names are used interchangeably to describe the privilege. 2 D. LOUISELL & C. MUELLER, *FEDERAL EVIDENCE* § 229, at 732 (1978).

135. *Id.*

136. *United States v. Nixon*, 418 U.S. 683, 705 (1974); *In re Franklin Nat'l Bank Sec. Litigation*, 478 F. Supp. 577, 581 (E.D.N.Y. 1979); *Jabara v. Kelley*, 75 F.R.D. 475, 492 (E.D. Mich. 1977).

137. See, e.g., *United States v. Nixon*, 418 U.S. 683 (1974); *Ackerly v. Ley*, 420 F.2d 1336 (D.C. Cir. 1969); *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F.2d 600 (5th Cir. 1966); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). See also 2 D. LOUISELL & C. MUELLER, *supra* note 134, § 299.

138. See text accompanying notes 81-83 *supra*.

order to appoint and promote qualified teachers.¹³⁹ Thus, society's interest in protecting the quality of universities seems at least as significant as the interests that justify the privileges discussed above.¹⁴⁰ Indeed, some courts have already deemed this interest to justify protecting university records from discovery.¹⁴¹

3. *The Privilege Must be Necessary*

The determination that an interest is of sufficient public interest to warrant recognition of a privilege is not conclusive in the common law analysis. The court will recognize the privilege only if it is necessary to protect the asserted interest.¹⁴² To do otherwise would be to incur the costs of the privilege without realizing a correlative increase in benefits.

A privilege is unnecessary if the interest at stake would be protected even without assurances of confidentiality. For example, the court in *United States v. Mendoza*¹⁴³ rejected a spousal privilege claim by a husband when the prosecution attempted to introduce a cassette tape made by the wife which contained incriminating evidence. The interest in spousal harmony would be protected even if the privilege claim were rejected since the incriminating tape was being used against the wife's wishes.¹⁴⁴

Conversely, a privilege is unnecessary if the interest at stake would be destroyed even with recognition of the claimed privilege. Thus, in *United States v. Trammel*¹⁴⁵ the Supreme Court held that a wife could not be foreclosed from voluntarily testifying against her husband since the interest in spousal harmony was already destroyed by the wife's willingness to testify.¹⁴⁶ The Court reasoned that under these circumstances, the marital testimonial privilege was an unnecessary impediment.

139. See text accompanying notes 88-95 *supra*.

140. One committee report on the need for university confidentiality notes: "It is particularly perverse that the deliberative activities of the federal government itself—memoranda which set forth evaluations and recommendations—are exempted from mandatory public disclosure in order to protect the integrity of the advice-giving process, while similar activities of private associations have no such protection." *University of Chicago Report*, *supra* note 2, at 169.

141. See *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.) (protecting faculty evaluations from discovery in order to protect university's interest but finding it unnecessary to recognize a privilege), *cert. denied*, 434 U.S. 904 (1977); *McKillop v. Regents of Univ. of Cal.*, 386 F. Supp. 1270, 1278 (N.D. Cal. 1975) (applying state law).

142. See 8 J. WIGMORE, *supra* note 114, § 2285.

143. 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988 (1978).

144. *Id.* at 1380. See also *In re Grand Jury Impaneled Jan. 21, 1975*, 541 F.2d 373, 382-83 (3d Cir. 1976) (state interest in compliance with required reports statute not seriously impaired if court refused to recognize privilege).

145. 445 U.S. 40 (1980).

146. *Id.* at 52-53. In doing so the Court modified the rule of *Hawkins v. United States*, 358 U.S. 74 (1958).

ment in the search for all relevant facts.¹⁴⁷

A privilege is necessary when full disclosure to the party claiming the privilege is in the public interest and is likely to occur only when a privilege is recognized. Courts have found a privilege of confidentiality to be necessary for full disclosure in several contexts: attorney and client;¹⁴⁸ priest and penitent;¹⁴⁹ and inmate and prison official.¹⁵⁰ The Supreme Court has also found a qualified privilege of confidentiality to be necessary for effective government decisionmaking:

Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.¹⁵¹

This rationale is applicable in the university context, because confidentiality is essential to protect a university's interest in obtaining candid faculty evaluations and in ensuring that tenure ballots are cast in an atmosphere free of coercion.¹⁵² Several courts have recognized that a privilege is necessary to promote candor in evaluations of employees by supervisors.¹⁵³ The same principle applies to peer evaluations and tenure ballots in the university setting.

In sum, the principles of the common law of privileges militate strongly in favor of recognizing an evidentiary privilege to protect a university's confidential employment information. The interest at stake is strong and confidentiality is necessary to protect it. But as with the constitutional analysis, this conclusion does not mean that parties may never discover this information. This privilege is qualified and must yield under certain circumstances.

V

OVERCOMING THE PRIVILEGE

As indicated earlier,¹⁵⁴ a privilege analysis, whether based on the Constitution or on common law, is a two-step inquiry. After determining that the information sought should be presumptively privileged, the

147. *Trammel v. United States*, 445 U.S. at 53.

148. *See Fisher v. United States*, 425 U.S. 391, 403 (1976).

149. *See* note 128 *supra*.

150. *See Dykes v. Morris*, 85 F.R.D. 373, 377 (N.D. Ill. 1980).

151. *United States v. Nixon*, 418 U.S. at 705.

152. *See* text accompanying notes 88-92 *supra*.

153. *Swanner v. United States*, 406 F.2d 716, 719 (5th Cir. 1969); *Robinson v. Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979); *New York Stock Exch., Inc. v. Sloan*, 22 F.R. Serv. 2d 500 (S.D.N.Y. 1976); *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344-45 (E.D. Pa. 1973); *Gillman v. United States*, 53 F.R.D. 316, 319 (S.D.N.Y. 1971); *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283 (N.D. Ga. 1971); *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249, 251 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

154. *See* text accompanying notes 96-111, 115-18 *supra*.

court must determine whether the party seeking the information can overcome the privilege. To determine when a university's privilege for its confidential employment information should yield, it is useful to consider the analyses employed by courts to determine when other qualified privileges have been overcome. The newsgathering and official information privileges are two useful analogues.

Newsgathering cases raise issues closely analogous to those involved when a faculty plaintiff seeks discovery of a tenure ballot or confidential evaluation. Both involve first amendment interests.¹⁵⁵ Like academic freedom, newsgathering is protected as a corollary of a textual right; it exists to protect the freedom of the press.¹⁵⁶ Since judicially compelled disclosure of confidential news sources impinges on this right,¹⁵⁷ it is generally permissible only if justified by a compelling interest.

Several general rules can be derived from the numerous newsgathering cases that have considered the issue of when the need for disclosure overcomes the constitutionally based privilege.¹⁵⁸ Typically, the need for disclosure is found compelling when the information is sought by a grand jury,¹⁵⁹ when the information is relevant to a criminal investigation,¹⁶⁰ or when the information is crucial to a party's civil action.¹⁶¹ The final category is the one most likely to be implicated in a faculty plaintiff's discovery request, so it requires closer analysis.

155. See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979); *Baker v. F & F Inv.*, 470 F.2d 778, 783-85 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); text accompanying notes 76-77, 81-83 *supra*.

156. See *Branzburg v. Hayes*, 408 U.S. at 681; *Griswold v. Connecticut*, 381 U.S. at 482-83 (dictum).

157. See *Baker v. F & F Inv.*, 470 F.2d at 785; *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1202-04 (N.D. Ill. 1978). But see *Branzburg v. Hayes*, 408 U.S. at 690-96, where the Supreme Court was not convinced that newsgathering would be threatened if reporters were compelled to respond to questions put to them by a grand jury or in the course of a criminal investigation.

158. See, e.g., cases cited in notes 159-61 *infra*.

159. See *Branzburg v. Hayes*, 408 U.S. 665 (1972).

160. See *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978). But see *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) (recognizing journalists' privilege in a criminal case).

161. See *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), *cert. denied*, 358 U.S. 910 (1958); *Gulliver's Periodicals, Ltd. v. Chas. Levy Circulating Co.*, 455 F. Supp. 1197, 1204 (N.D. Ill. 1978); *Altemose Constr. v. Building & Constr. Trade Council*, 443 F. Supp. 489 (E.D. Pa. 1977).

For example, disclosure of the identity of a confidential news informant is sometimes crucial to a libel cause of action. A public figure plaintiff may be unable to prove malice as required under *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964), unless he can show that the defendant knew it was reckless to rely on the informant. In such cases, courts have compelled disclosure of the news source despite the newsgatherer's constitutional privilege. *Herbert v. Lando*, 441 U.S. 153 (1979); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 1759 (1981).

In a leading newsgathering case, *Silkwood v. Kerr-McGee Corp.*,¹⁶² the Tenth Circuit identified several factors that courts should consider in determining whether to compel disclosure of the identity of a confidential news source in civil litigation.¹⁶³ Three of these factors are relevant in determining whether the information is "crucial" to the plaintiff's action: whether the party seeking the information can obtain it from another source; whether the information sought "goes to the heart of the matter;" and whether the information is of "certain relevance."¹⁶⁴ This analysis, the court declared, is designed to rule out "compulsory disclosure in the course of a fishing expedition"¹⁶⁵ In other words, a showing that the information sought may be "useful" or "helpful," as is normally required under the federal rules,¹⁶⁶ would not be sufficient to discover presumptively privileged information.

The official information privilege cases¹⁶⁷ provide additional analytical guidance.¹⁶⁸ When determining whether this qualified common law privilege must yield, the courts have considered both the availability of the evidence from other sources and the relevance of the evidence.¹⁶⁹ To this extent the approach is virtually the same as that in the newsgathering cases. But in the official information privilege cases the courts have added a third consideration: the degree of harm that would be caused by compelling disclosure.¹⁷⁰ This additional factor leads to a more explicit balancing analysis where the courts must weigh

162. 563 F.2d 433 (10th Cir. 1977).

163. A similar analysis has been used in other newsgathering cases. See *Riley v. City of Chester*, 612 F.2d 708, 717 (3d Cir. 1979); *Garland v. Torre*, 259 F.2d 545 (2d Cir.), cert. denied, 358 U.S. 910 (1958); *Gilbert v. Allied Chem. Corp.*, 411 F. Supp. 505 (E.D. Va. 1976); *Apicella v. McNeil Labs., Inc.*, 66 F.R.D. 78, 81-83 (E.D.N.Y. 1975). The *Silkwood* factors have also been considered important in common law privilege cases. See, e.g., *Robinson v. Magovern*, 83 F.R.D. 79, 89 (W.D. Pa. 1979) (compelling disclosure of minutes of hospital staff meetings on the basis that they went "to the heart of the issues in [the plaintiff's antitrust] case"). When considering common law privilege claims, courts have consistently held that preventing a party from discovering information crucial to a claim would impose an unacceptable cost on that party and on the judicial system. See, e.g., *Garrity v. Thomson*, 81 F.R.D. 633, 636 (D.N.H. 1979); *Crawford v. Dominic*, 469 F. Supp. 260, 263 (E.D. Pa. 1979).

164. See 563 F.2d at 436. The other factor identified by the court—the "type of the controversy"—requires the court to consider, for example, whether the evidence is being requested as part of a grand jury or criminal investigation. If so, it is likely the need for disclosure will be found compelling. See notes 159 & 160 and accompanying text *supra*.

165. 563 F.2d at 438.

166. See notes 9 & 10 and accompanying text *supra*.

167. See text accompanying notes 134-37 *supra*.

168. The showing required to overcome the attorney work product doctrine's "qualified immunity from discovery" is another analogue. See 8 C. WRIGHT & A. MILLER, *supra* note 23, §§ 2025-2028. Such material is subject to discovery only upon a showing that the party seeking discovery has "substantial need of the materials" and is "unable without undue hardship to obtain" the material elsewhere. FED. R. CIV. P. 26(b)(3).

169. See 2 D. LOUISELL & C. MUELLER, *supra* note 134, § 229.

170. See *id.*

the need of one litigant to obtain the information against the other's interest in confidentiality.¹⁷¹

Courts faced with the issue of whether an academic freedom privilege must yield should adopt an analysis that combines the approaches of the newsgathering and official information privilege cases. They should explicitly balance the interests of the litigants, and do so in light of the factors enumerated in *Silkwood*. The goal is to prevent plaintiffs from going on "fishing expeditions" that would undermine a university's academic freedom, while ensuring that a plaintiff with a meritorious claim is able to collect all evidence that is crucial to that claim.

To prevent fishing expeditions, as for example in a suit claiming discrimination in the denial of tenure, the court should look for independent evidence that the plaintiff's claim is meritorious. However, the court should not require that a prima facie case of discrimination be made before disclosure is compelled. Such a requirement might prevent a plaintiff from uncovering crucial evidence of discrimination contained only in the university's employment records. But the court should at least require a showing that convinces it that the complaint is credible.¹⁷² For example, statistical evidence of past discrimination by the university, expert testimony, evidence of prior discriminatory treatment of the plaintiff, testimony of the parties themselves, or evidence that certain decisionmakers were motivated by improper considerations could demonstrate the merit of a plaintiff's discrimination allegations.¹⁷³ In addition, the court should also consider the adequacy of the university procedures employed in the nonrenewal decision, the adequacy of the reasons offered in defense of the decision, and the adequacy of the institution's own review procedures.¹⁷⁴

One case in which the facts suggest that the plaintiff was fishing for evidence to legitimize a discrimination case that lacked merit is *Equal Employment Opportunity Commission (EEOC) v. University of New Mexico*.¹⁷⁵ Before the university had begun termination proceedings, the plaintiff had been given a list of his teaching "inadequacies."

171. See *Smith v. FTC*, 403 F. Supp. 1000, 1015 (D.C. Del. 1975); *United States v. Beatrice Foods Co.*, 52 F.R.D. 14, 20-21 (D.C. Minn. 1971); *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 329 (D.D.C. 1966), *aff'd*, 384 F.2d 979 (D.C. Cir.), *cert. denied*, 389 U.S. 952 (1967); *Kaiser Aluminum & Chem. Corp. v. United States*, 157 F. Supp. 939, 946 (Ct. Cl. 1958).

172. This standard was proposed by David M. Rabban, counsel for the AAUP. See D. Rabban (AAUP), *supra* note 92, at 5.

173. See *McDonnell Douglas Corp. v. Green*, 441 U.S. 792, 804-05 (1973); Yurko, *supra* note 2, at 495.

174. The AAUP favors a qualified privilege for a university's confidential employment information and has proposed that these factors be considered by a court before compelling disclosure. See AAUP, *A Preliminary Statement on Judicially Compelled Disclosure in the Nonrenewal of Faculty Appointments*, ACADEME, Feb.-Mar. 1981, at 27.

175. 504 F.2d 1296 (10th Cir. 1974).

When he continued to fail to perform, the university held termination proceedings and fired him. He was provided with a statement of reasons for the dismissal. Even after the state commission on discrimination determined that there was no discrimination against the plaintiff, he filed a federal claim through the EEOC. After complying with numerous discovery requests, the university refused to produce the personnel files of the entire faculty of the School of Engineering. Yet, the court of appeals upheld the trial court's order to disclose all the files.¹⁷⁶ In cases such as this, where the university's procedures seem fair and there is no independent evidence to lend credence to the plaintiff's complaint, the court should be extremely reluctant to compel the disclosure of sensitive files.

Once the court determines that the plaintiff is not merely engaged in a fishing expedition, it must consider whether the evidence sought is crucial to the plaintiff's action by examining the three factors enumerated in *Silkwood*. If the information is available from another source, there may be no compelling need for disclosure. For this reason, in *McKillop v. Regents of the University of California*,¹⁷⁷ the court, while acknowledging "the strong federal interest in redressing sex-based discrimination in employment," refused to allow a professor to discover documents in her tenure files during a discrimination suit against the university for denial of tenure.¹⁷⁸ The plaintiff contended that without the information she could not proceed with her case. The court rejected this claim on the ground that the plaintiff had an alternative method of discovery: the defendants "agreed [to permit an] impartial academician [to] review the files to determine whether any implication of discrimination arises therefrom."¹⁷⁹ Given this, the court concluded that the university's need to preserve confidentiality outweighed the plaintiff's need for the information.¹⁸⁰

In applying the other two *Silkwood* factors—whether the information sought "goes to the heart of the matter" and is of "certain relevance"—the court should consider the elements of the plaintiff's cause of action and the evidence required to establish the case. This analysis can be illustrated by recalling the sex discrimination case discussed in the introductory section of this Comment.¹⁸¹ In that case, Professor Dinnan refused on privilege grounds to disclose his vote on the plain-

176. *Id.* at 1306.

177. 386 F. Supp. 1270 (N.D. Cal. 1975).

178. *Id.* at 1277. *McKillop* actually applied California law in finding a university privilege. *Id.* at 1274. The balancing analysis called for by CAL. EVID. CODE § 1040 (West 1966) is similar to the analysis proposed in this Comment.

179. 386 F. Supp. at 1277-78.

180. *Id.* at 1278.

181. See notes 12-13 and accompanying text *supra*.

tiff's tenure application. The court summarily rejected the privilege claim and jailed the professor for contempt because there was no direct case law support for such a privilege. Not only did the court ignore the legislative mandate of rule 501 to consider novel privilege claims,¹⁸² but it also failed to weigh the relative burdens of disclosure and nondisclosure on the litigants. The court should have inquired whether the information sought—Professor Dinnan's tenure vote—was crucial to the plaintiff's sex discrimination claims. Specifically, the court should have inquired whether the tenure vote of an individual professor would "go to the heart" of the plaintiff's Title VII sex discrimination claim¹⁸³ and be of certain relevance.

Under Title VII, a plaintiff can establish a prima facie case of sex discrimination by proving (1) she belongs to a protected class; (2) she was qualified for the job from which she was discharged; (3) she was demoted the position despite being qualified; and (4) the employer hired or retained persons not in the protected class who were comparably or less qualified.¹⁸⁴ Professor Dinnan's tenure vote is not probative of any of these four elements and is unnecessary in establishing a prima facie case under Title VII. Accordingly, even though knowing one professor's vote might have been "useful" or "helpful," and thus discoverable under the liberal federal discovery rules,¹⁸⁵ the plaintiff could not make the showing of compelling need that would be necessary to overcome the university's qualified privilege.

In some cases, however, a faculty plaintiff may be able to prove compelling need for disclosure even though a prima facie case can be made without the evidence. Once a plaintiff establishes a prima facie Title VII case, the burden shifts to the defendant to "articulate some legitimate, nondiscriminatory reasons for [plaintiff's] rejection."¹⁸⁶ If the university attempts to rebut a prima facie case by claiming that its decision was made solely on the basis of negative evaluations, the balance may tip in favor of disclosure.¹⁸⁷ At this point the information sought is certainly relevant to the case; without an opportunity to ex-

182. See text accompanying notes 23-28 *supra*.

183. The plaintiff in *Dinnan* also alleged a violation of 42 U.S.C. § 1983. Most of the claims brought against universities have been under Title VII, see *Yurko*, *supra* note 2, at 482-83, so a Title VII action is used as the paradigm.

184. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). This test was originally formulated for claims of racial discrimination but has been applied to other Title VII cases as well. See, e.g., *Davis v. Weidner*, 596 F.2d 726, 729 (7th Cir. 1979); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154-55 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978); *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir.), *rev'd on other grounds*, 439 U.S. 24 (1978), *opinion on remand*, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

185. See notes 9-10 and accompanying text *supra*.

186. *McDonnell Douglas Corp. v. Green*, 411 U.S. at 802.

187. See *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980).

amine the information and rebut it, the plaintiff may not be able to proceed with the case. On the other hand, if the university does not use these evaluations to rebut a *prima facie* case, it would be proper to protect the records from disclosure.¹⁸⁸

In some exceptional cases the court may have difficulty determining the validity of a plaintiff's claim or the degree of relevance of the information sought. When this occurs the court should order the university to produce the material for an *in camera* inspection.¹⁸⁹ By examining the information personally the court can look for indications of improper activity.¹⁹⁰ The use of an *in camera* inspection would also allow the court to compel disclosure of only that information that is truly necessary for the case.¹⁹¹ This approach will aid the court in striking the balance between conflicting interests.

CONCLUSION

Our society has a strong interest in ensuring that universities operate free of governmental intrusion and appoint the best available teachers. Impingements on this interest should be permissible only if there are compelling countervailing interests at stake. A showing that a university's confidential employment information may be "helpful" to a litigant should not justify judicially compelled disclosure of that information. Unless the courts recognize an evidentiary privilege to protect this information, courts will undermine a university's promotion system by continuing to compel disclosure of information before it is shown to be truly necessary for the plaintiff's case.

This Comment has argued that the courts have the authority, and indeed the duty, to consider novel privileges. It has shown that when the privilege proposed here is analyzed in the manner required by Federal Rule of Evidence 501, both the constitutional right of academic freedom and the principles of common law privileges mandate recognition of a qualified privilege. To resolve the clash of interests that occurs during litigation against a university, the courts should balance a

188. See *Keyes v. Lenoir Rhyne College*, 552 F.2d 579, 581 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

189. Courts frequently use *in camera* inspections before ruling on privilege claims. See, e.g., *Kerr v. United States Dist. Court*, 426 U.S. 394, 406 (1976); *United States v. Nixon*, 418 U.S. at 714; *Dykes v. Morris*, 85 F.R.D. 373, 377 (N.D. Ill. 1980). See also 2 D. LOUISELL & C. MUELLER, *supra* note 134, § 231, at 763.

190. The court might even follow the suggestion in *McKillop v. Regents of Univ. of Cal.*, 386 F. Supp. 1270, 1277-78 (N.D. Cal. 1975), that an impartial academician review the material to see if any implication of discrimination arises therefrom. The obvious merit of such an approach would be that the academician has more expertise than the court in judging whether the plaintiff's evaluations showed that the plaintiff was fully qualified for the position sought.

191. The court could also order the university to provide a summary of the information sought, or produce only a portion of the information.

university's interest in confidentiality against the litigant's need for the information. Recognition of an evidentiary privilege will trigger this balancing analysis.

*Charles J. Stevens**

* B.A. 1979, Colgate University; third-year student, Boalt Hall School of Law, University of California, Berkeley.