Comments

Academic Freedom vs. Title VII: Will Equal Employment Opportunity Be Denied on Campus?

In 1972 Congress amended Title VII of the Civil Rights Act of 1964[1] to eliminate the immunity that colleges and universities previously enjoyed from employment discrimination suits.[2] As a consequence, numerous charges of sex, race, and national origin discrimination have been litigated against institutions of higher learning. The courts, initially cautious about intervention in college professional employment decisions,[3] have recently seemed more willing to use the same tests and discretion applicable to discrimination suits in nonacademic settings.[4] However, the nature and extent of an investigation by a court or government agency of a university's employment practices have been challenged in many of these cases.

A novel argument against judicial intervention in academic employment decisions was rejected in a recent Fifth Circuit case.[5] In this case, a female professor sued the University of Georgia for sex discrimination after twice being denied tenure. During the course of pretrial discovery, a member of the university's tenure committee, Dr. James Dinnan, refused to divulge his evaluation or vote in the plaintiff's application for tenure even after the trial

---

1. 42 U.S.C. § 2000e (1976).

2. Equal Employment Opportunity Act of 1972, § 3, 42 U.S.C. § 2000e-1 (1976). The amendment removed the previous exemption for, among others, academic employees at non-religious educational institutions. Congress thus created a statutory cause of action for victims of alleged employment discrimination in academia. Prior to this amendment, a plaintiff had to demonstrate the violation of his or her civil rights under 42 U.S.C. § 1981, 1983, or 1985. *See, e.g.*, Holliman v. Martin, 330 F. Supp. 1 (W.D. Va. 1971).

3. *See, e.g.*, Faro v. New York Univ., 502 F.2d 1229 (2d Cir. 1974), in which the court commented that the judiciary lacks the expertise to review academic employment decisions; McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270 (N.D. Cal. 1975), in which the court denied a female plaintiff's request for discovery of confidential employment records, holding that the university's interest in maintaining the integrity of its tenure process outweighed plaintiff's interest in free access to the evaluations of her ability.

4. *See, e.g.*, Kunda v. Muhlenberg College, 621 F.2d 532 (3rd Cir. 1980) (female physical education instructor discriminated against by the dean's failure to inform her of the tenure requirement of an advanced degree); Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980) (court rejected university's proffered reasons for dismissal—poor relationship with staff and transactions of personal business at university expense—as pretext for discriminatory dismissal of a white professor at a predominantly black institution); Jepsen v. Florida Bd. of Regents, 610 F.2d 1379 (5th Cir. 1980) (female faculty member's interest in reviewing evaluations of her ability outweighed college's interest in maintaining their confidentiality); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980) (factual determination that university's articulated reasons for refusing to promote female faculty member were pretextual is not clearly erroneous); Powell v. Syracuse Univ., 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978) (court warned that excessive caution in handling discrimination cases in academia was contrary to mandate of Title VII, but held that the university's reasons for dismissal effectively rebutted black woman's charge of employment discrimination).

5. *In re* Dinnan, 661 F.2d 426 (5th Cir. 1981).

court had ordered that he provide that information.[6] His refusal was based on a claim that a right to academic freedom provided an evidentiary privilege.[7]

Judicial recognition of such a privilege could seriously hamper future attempts to remedy employment discrimination on college campuses. This Comment examines the basis of the privilege asserted by Professor Dinnan, the necessity of such a privilege, and the impact that a grant of such protection to universities would have on equal employment opportunity efforts.

I. ELEMENTS OF A TITLE VII CASE

The Supreme Court has recognized two types of cases covered by Title VII:[8] disparate effect cases, in which facially neutral job requirements result in a disproportionate representation of a particular group in hiring or promotion;[9] and disparate treatment cases, in which there is intentional discrimination against a particular employee or class of employees.[10] This distinction is important to an analysis of the impact a special privilege for universities would have on a Title VII suit.

In disparate effect cases, no allegation of employer intent is required; the claimant need establish only that the questionable employment practice in fact operates to exclude a particular group from the work force and that this practice is not legitimately related to job performance.[11] In the first case to articulate this test, *Griggs v. Duke Power Co.*,[12] the Supreme Court struck down the job requirements of a high school diploma and intelligence test for unskilled workers because those requirements were not job-related, and the evidence was clear that they tended to exclude blacks from the work force.[13] The Court noted that by enacting Title VII, "Congress has placed on the employer the burden of showing that any given requirement [has] a manifest relationship to the employment in question."[14] If the plaintiff can demonstrate that a particular business practice is discriminatory,[15] the employer then must

---

6. *In re* Dinnan, 625 F.2d 1146, 1148 (5th Cir. 1980).

7. *In re* Dinnan, 661 F.2d 426, 427 (5th Cir. 1981).

8. 42 U.S.C. § 2000e (1976). Section 2000e-2(a) provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

9. *E.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

10. *E.g.*, Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). *See* Ward, *Diagnosing an Employment Civil Rights Claim*, 6 J.C. & U.L. 279, 285 (1980).

11. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

12. 401 U.S. 424 (1971).

13. *Id.* at 431.

14. *Id.* at 432.

15. Usually this evidence consists of statistical comparison of the composition of the relevant "potential employee" pool with the makeup of employees in the job under review. *See* Note, *Title VII and Employment*

prove that the practice fulfills a legitimate business purpose to avoid liability under Title VII.

In *McDonnell Douglas Corp. v. Green*,[16] the Supreme Court established the order and allocation of proof in a disparate treatment case. A plaintiff must establish a prima facie case of unfair treatment by the employer in his or her application or promotion.[17] The employer may then rebut this charge by articulating some legitimate, nondiscriminatory reason for its action. Once such a reason is articulated, it falls to the plaintiff to prove that this reason is merely a pretext to cover up the employer's discriminatory motive.

The elements of proof in both disparate effect and disparate treatment cases are very difficult to establish in many instances of job discrimination in upper-level management or professional positions. If the plaintiff is trying to prove the unequal effect of a particular job requirement (for example, a requirement that all teachers of the Portugese language be native speakers, when it may be that the Portugese culture is biased against women pursuing higher education), statistical evidence of the effect of this requirement becomes important. Since upper-level positions require skills not found in the general population, this statistical evidence may be difficult to gather, since it involves determining the relevant "pool" of similarly qualified potential applicants.[18] In addition, statistics alone are not always deemed conclusive proof by the courts.[19]

On the other hand, disparate treatment cases have different problems of proof. Statistics, while still valuable, have less importance.[20] What is crucial to the disparate treatment plaintiff is the ability to prove discriminatory intent by the employer as well as to demonstrate that the reason offered by the college is not the true basis for the rejection or dismissal.[21] No plaintiff can

---

Discrimination in "Upper Level" Jobs, 73 COLUM. L. REV. 1614 (1973). The evidence can also be provided by proving that the job criteria themselves are discriminatory or have been applied in a discriminatory way. This second mode of proof is especially helpful in cases involving "upper-level" (*i.e.*, managerial or professional) positions, where meaningful statistics are not readily available.

16. 411 U.S. 792 (1973).

17. The Court required the plaintiff to prove:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

411 U.S. 792, 802 (1973). The Court noted that the prima facie test will vary from case to case, depending on the fact situation. *Id.* at 802 n.13. In a later case, the Court expressly approved the *McDonnell Douglas* test for use in Title VII cases involving academic employment. Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978).

18. For an excellent discussion of this problem, *see* Note, *Title VII and Employment Discrimination in "Upper Level" Jobs*, 73 COLUM. L. REV. 1614, 1623–28 (1973).

19. International Bhd. of Teamsters v. United States, 431 U.S. 324, 339–41 (1977) (the utility of statistics in proving discrimination "depends on all of the surrounding facts and circumstances"); Cooper v. University of Tex. at Dallas, 482 F. Supp. 187, 198 (N.D. Tex. 1979) (court required a causal link between hiring practice and adverse impact on the female plaintiffs). *See also* Mazia and de Ita, *Sex Discrimination in Academia: Representing the Female Faculty Plaintiff*, 9 GOLDEN GATE U.L. REV. 481, 494 (1979).

20. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 805 (1973); Sweeney v. Board of Trustees of Keene State College, 604 F.2d 106, 111–13 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980).

21. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804–05 (1973); Presseisen v. Swarthmore College, 442 F. Supp. 593, 600–01 (E.D. Pa. 1977). *See also* Ward, *Diagnosing an Employment Civil Rights Claim*, 6 J.C. & U.L. 279, 285 n.47 (1980).

begin to bear this burden if evidence relating to the evaluation of his or her qualifications is deemed privileged by the court. To recognize such an evidentiary privilege would either make a college immune from employment discrimination suits or take the employment decision away from the college completely, since each plaintiff's qualifications would be reviewed by a court-appointed expert.

II. EVIDENTIARY PRIVILEGES IN GENERAL

No evidentiary privilege exists to shield a university or university professor from disclosing the substance of a peer-review evaluation.[22] Rule 501 of the Federal Rules of Evidence, however, provides that "the privilege of a witness [to withhold evidence] . . . shall be governed by the principles of the common law as . . . interpreted by the courts of the United States in light of reason and experience."[23] A university or professor has, therefore, the right to petition for the recognition of a new common-law privilege based on the "necessity" of confidentiality in peer reviews.

But what standards should be used to determine the necessity of such a privilege? Historically, our common-law system has presumed it to be the duty of all members of society to give testimony when called upon.[24] The quest for truth in the pursuit of justice is of paramount importance; consequently, any testimonial privilege must be considered exceptional in nature and be restricted in application.[25] A new privilege to withhold information relevant to a lawsuit is recognized only when the interest sought to be protected by the privilege is of greater importance to society's welfare than the pursuit of justice in the particular case.[26] The use of such a high standard has resulted in relatively few common-law privileges. Those recognized fall into two general types: "privileged communication"[27] and "privileged topics."[28]

---

22. *See* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2192, 2285–2286 (McNaughton rev. ed. 1961).

23. FED. R. EVID. 501. *See* Trammel v. United States, 445 U.S. 40, 47–48 (1980).

24. 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (McNaughton rev. ed. 1961).

25. *Id.*

26. *Id.* § 2285.

27. *Id.* §§ 2285–2396. Certain communication is recognized as privileged to protect the nature of confidential relationships. Relationships in which the communication between the parties is privileged from discovery include: attorney-client, husband-wife, and in most instances priest-penitent. *Id.* Wigmore has identified four conditions that must be met before a privilege protects such communication:

> (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.

Id. § 2285 (emphasis in original).

28. *Id.* §§ 2210–2284. Privileged topics are certain classes of facts undiscoverable because of their nature. They include such things as trade secrets, official or state secrets, and information that incriminates the witness. The grant of a privilege shielding such information is an evaluation of the policy considerations involved, and because of the wide range of potentialities, no general test is practical. There is no absolute privilege covering any particular topic.

The information that a university may seek to shield from discovery falls within either the communication or topical constructs. This information typically consists of evaluations of the applicant's ability or publications by scholars and colleagues in the same field. In addition, the university and tenure committee members may want to keep the committee's proceedings confidential. Since a confidential relationship usually exists between the university and either the evaluators or tenure committee members, this communication may qualify as privileged communication,[29] or the university and its faculty may assert that the whole area of academic employment is a topic worthy of a blanket privilege.

If the communication construct is applied, the courts can use a balancing test to weigh the university's or committee member's interests against those of the applicant.[30] If the topic privilege is asserted, however, the claim is based on the university's or faculty member's right to academic freedom,[31] a claim that goes deeper than an employer's desire to keep personnel discussions secret.

The recognition of a topical privilege based on academic freedom could lead the courts to tip the scales in favor of the university across the board, since academic freedom, as currently recognized, is a first amendment interest deeply rooted in our educational system.[32] However, as the discussion below indicates, such an expansion of the concept of academic freedom is unwarranted and would do great harm to the Title VII protection for professors.

III. THE NATURE OF ACADEMIC FREEDOM

The concept of "academic freedom" traces back to the German cultural notion of "*Lehrfreiheit*"—the freedom to teach.[33] The basic idea is that within the academic environment, scholars must be free to propose and study new concepts in their respective disciplines—that is, uninhibited by society at large, which may resist new theories or the full investigation of new discoveries. This freedom is imperative if the university is to carry out its social purpose of expanding the boundaries of knowledge and providing a healthy intellectual forum for the education of the next generation.

The German idea of an uninhibited academic environment has been borrowed and adapted by American scholars. Professor Arthur O. Lovejoy,

---

29. *See* note 27 *supra*.

30. *Id.*

31. *See* text accompanying note 7 *supra*.

32. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978); Keyishian v. Board of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967). *See also* Hunter, *Federal Antibias Legislation and Academic Freedom: Some Problems with Enforcement Procedures*, 27 EMORY L.J. 609, 621–30 (1978).

33. *See generally* Hunter, *Federal Antibias Legislation and Academic Freedom: Some Problems with Enforcement Procedures*, 27 EMORY L.J. 609, 617–18 (1978); Searle, *Two Concepts of Academic Freedom*, in THE CONCEPT OF ACADEMIC FREEDOM 86, 87–90 (E. Pincoffs ed. 1975); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1048–50 (1968).

founder of the American Association of University Professors, articulated the classical "continental" definition of academic freedom:

> Academic freedom is the freedom of the teacher or "research worker" in higher institutions of learning to investigate and discuss the problems of his science and to express his conclusions, whether through publication or in the instruction of students, without interference from political or ecclesiastical authority, or from the administrative officials of the institution in which he is employed, unless his methods are found by qualified bodies of his own profession to be clearly incompetent or contrary to professional ethics.[34]

Professor Will Herberg of Drew University accepts Lovejoy's definition but warns that the protection afforded by academic freedom should be restricted: "only when acting as an academician is [one] protected by the special right to academic freedom. . . . Any definition of academic freedom that attempts to extend beyond [Lovejoy's] limits is something that will never be tolerated by society, nor should it be."[35] Thus, the essence of academic freedom is to allow freedom of investigation, research, expression, and action within an educational setting. As discussed below, however, recognition of tangential academic concerns as encompassed by the aegis of academic freedom has expanded these previous narrow limits.

The elements and limits of academic freedom are usually articulated or examined only when activities in the academic community conflict with the wonts and tolerances of society at large. Since these conflicts usually are resolved only in the courtroom, the most important definitions are not necessarily those given by academicians, but rather those used by the judiciary.[36] Although academic freedom has not risen to the level of a constitutional right,[37] it is a protection of a particular type of free expression and, as such, the Supreme Court has recognized it as a "special concern of the First Amendment."[38]

The first and most significant cases to discuss the freedom of the academic community involved challenges to statutes that required loyalty oaths or proscribed the teaching of certain subjects.[39] The most significant decision of this genre is the Supreme Court case of *Sweezy v. New Hampshire*,[40] which overturned a contempt citation against a university professor who had refused to answer questions about one of his lectures at a state investigation into

---

34. Lovejoy, *Academic Freedom*, in 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 384, 384 (1930), *reprinted in* THE AMERICAN CONCEPT OF ACADEMIC FREEDOM IN FORMATION (W. Metzger ed. 1977).

35. Herberg, *On the Meaning of Academic Freedom*, in ON ACADEMIC FREEDOM 1, 2 (American Enterprise Institute for Public Policy Research Special Analysis No. 17, 1971).

36. For a thorough discussion of the Supreme Court's treatment of academic freedom, *see* Hunter, *Federal Antibias Legislation and Academic Freedom: Some Problems with Enforcement Procedures*, 27 EMORY L.J. 609, 621–30 (1978).

37. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 312 (1978).

38. Keyishian v. Board of Regents of the Univ. of the State of N.Y., 385 U.S. 589, 603 (1967).

39. Epperson v. Arkansas, 393 U.S. 97 (1968); Whitehill v. Elkins, 389 U.S. 54 (1967); Keyishian v. Board of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967); Belian v. Board of Pub. Educ., 357 U.S. 399 (1958); Adler v. Board of Educ., 342 U.S. 485 (1952).

40. 354 U.S. 234 (1957).

subversive activities. The plurality's discussion of academic freedom, though dictum,[41] recognized the importance to society of protecting free thought in the country's institutions of learning.[42] Justice Frankfurter's eloquent concurrence provided a working definition of academic freedom for courts in later cases:

> For society's good—if understanding be an essential need of society—inquiries into [the problems confronting all disciplines of study at universities], speculations about them, stimulation in others of reflection upon them, must be left as unfettered as possible. Political power must abstain from intrusion into this activity of freedom, pursued in the interest of wise government and the people's well-being, except for reasons that are exigent and obviously compelling.[43]

Frankfurter continued, quoting from the definition posited by two South African educators:

> "It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university—to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[44]

Frankfurter's statement represents an expansion of the concept of academic freedom beyond the protection of uninhibited expression and action in the halls of learning.[45] Academic freedom is now seen to include admission and employment decisions. Though seemingly slight, this expansion is significant. These "four essential freedoms" are indeed basic to the idea of a truly free collegial community. It seems, however, that both the South African commentators and Justice Frankfurter recognized the potential problems of totally unbounded university discretion in these matters. By prefacing the list of freedoms with the phrase "to determine for itself *on academic grounds,*" they place an important limitation on academia's exercise of these freedoms. As long as only academic grounds are used to determine the faculty, curriculum, teaching methods, and student body, the university should be protected from outside interference.

---

41. The Court held that the attorney general, who conducted the investigation on behalf of the state legislature, failed to demonstrate that the legislature had authorized the broad investigatory powers he had exercised in this case. *Id.* at 253–55.

42. The Court stated:

> The essentiality of freedom in the community of American universities is almost self-evident. No one should underestimate the vital role in a democracy that is played by those who guide and train our youth. To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. at 250.

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

44. *Id.* at 263 (Frankfurter, J., concurring) (quoting THE OPEN UNIVERSITIES IN SOUTH AFRICA 10–12, a "statement of a conference of senior scholars from the University of Cape Town and the University of the Witwatersrand").

45. *See* text accompanying notes 33–35 *supra.*

Most often the protection of the "four essential freedoms" has been invoked by the courts when first amendment rights of students, professors, or universities were threatened by governmental interference.[46] The emphasis in these decisions has been on balancing the importance of the right of the institution or individual to exercise these freedoms against society's interest in restricting these activities. Courts have never held the freedoms to be absolute. In other words, the freedom of the university to determine its curriculum or composition of its student body or faculty is to be uninhibited unless there are vital interests of society threatened by such determinations.[47]

In the first cases in which the courts reviewed university personnel decisions, the necessarily tolerant attitude of the judiciary translated into a presumption of propriety in the tenure process. Early cases show the unwillingness of courts to intervene in campus decisions because, as the courts saw it, no vital interest of society was impinged. The Second Circuit set the tone for the subsequent "hands off" treatment observed by the judiciary in the 1974 case of *Faro v. New York University*.[48] This sex discrimination case was brought by a female instructor against the N.Y.U. medical school when she was not rehired. In affirming the lower court's decision in favor of the university, the court observed: "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."[49] The court attributed its "hesitation" to the complexities involved in a review of the tenure committee's determination and expressed its lack of expertise in reviewing the qualifications of an academician.[50] In affirming, it relied on the lower court's determination that there was no apparent sex discrimination against Dr. Faro and found that the university's explanation of budget constraints provided a rational basis for her dismissal.[51]

After *Faro* courts continued to tread lightly in the area of university employment. In *Keddie v. Pennsylvania State University*[52] a male professor

46. *See, e.g.*, Keyishian v. Board of Regents of the Univ. of the State of N.Y., 385 U.S. 589 (1967) (state treason statutes unconstitutionally vague, since they may proscribe too many legitimate activities); Shelton v. Tucker, 364 U.S. 479 (1960) (school board's requirement of list of teacher's affiliations was an improper invasion of constitutional liberties); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (state Attorney General's investigation into subversive activity an improper exercise of authority); Wieman v. Updegraff, 344 U.S. 183 (1952) (state's purpose for loyalty requirement of state employees outweighed by individual's interest to freely participate in innocent activities); Cooper v. Ross, 472 F. Supp. 802 (E.D. Ark. 1979) (professor's dismissal based on out of classroom statements or affiliations was improper, since it infringed on constitutionally protected freedom). *But cf.* Barenblatt v. United States, 360 U.S. 109 (1959) (government's interest in investigating subversive activities outweighs individual interests of keeping affiliations secret); Adler v. Board of Educ. of City of N.Y., 342 U.S. 485 (1952) (New York Feinberg Law proscribing membership in subversive organizations is a rational limitation on first amendment freedoms of public servants).

47. A recent example of the Court's protection of the vital interests of society by intervening in campus activities is its disallowance of a university's admission procedures that served to discriminate against discrete classes within society. Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

48. 502 F.2d 1229 (2d Cir. 1974). A female faculty member alleged sex discrimination in salary and in her demotion. The court rejected her claim and approved the district court's finding that the pay differential was due to a difference in qualifications and the demotion was due to budget constraints of the university. *Id.* at 1232–33.

49. *Id.* at 1231–32.

50. *Id.* at 1232.

51. *Id.*

52. 412 F. Supp. 1264 (M.D. Pa. 1976).

alleged that he was fired because of his political views and anti-war activities. The court accepted without question or further investigation the findings of the tenure committee and held that the committee's conclusion validly refuted plaintiff's allegations. The court stated:

> [T]his court should not and will not undertake a *de novo* review of plaintiff's academic performance and qualifications. This court is powerless to substitute its judgment for that of the University as to whether plaintiff's academic credentials are such that tenure should have been awarded. The judiciary is not qualified to evaluate academic performance. The courts do not possess the expert knowledge or have the academic experience which should enlighten an academic committee's decision. The courts will not serve as a Super-Tenure Review Committee. . . . The tenure decision has a rational basis and the *ad hoc* committee did not predicate its evaluation and decision on constitutionally impermissible factors. That is the extent of this court's power to review the *substance* of the tenure decision.[53]

Although both the *Faro* and *Keddie* courts claimed to find a rational basis for the decisions made by the universities, neither court thoroughly investigated the validity of the premise of the employment decisions: the university's judgment of the applicant's qualifications. The reluctance to overrule an expert evaluation of the plaintiff's qualifications is understandable. Courts usually confine their judgment to their own areas of expertise—in these cases, a determination of whether statutorily impermissible reasons were the true bases for dismissal or non-promotion. But to accomplish this task, the fact-finder must have access to evidence of possible impermissible grounds. By refusing to require the presentation of the criteria, evaluations, discussions, and vote of the tenure committee members whenever the defendant university deems this evidence to be confidential, a court neglects too much of its duty to safeguard the individual faculty member's interest of fair treatment in employment decisions.

Like *Faro* and *Keddie*, other courts have neglected their responsibility to protect employees and have instead elevated the concept of academic freedom. In another sex discrimination suit, *McKillop v. Regents of the University of California*,[54] the district court applied a state evidence statute which required that the plaintiff's need for the evidence be balanced against the necessity of confidentiality.[55] The court rejected plaintiff's contention that the information was absolutely necessary to her proof of discriminatory intent on the part of the university. The court disagreed with plaintiff's argument that

---

53. *Id.* at 1270. Similar statements are found in Megill v. Board of Regents of Fla., 541 F.2d 1073, 1077 (5th Cir. 1976); Cooper v. Ross, 472 F. Supp. 802, 810 (E.D. Ark. 1979); Lynn v. Regents of the Univ. of Cal., 21 Empl. Prac. Dec. ¶ 30, 558 (C.D. Cal. 1979); Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1354 (W.D. Pa. 1977).

54. 386 F. Supp. 1270 (N.D. Cal. 1975). A female art professor sought university personnel records, including evaluations of her qualifications, and the personnel files of all persons who had tenure, all who were in "tenure-track" positions, and all who had been in tenure-track positions and were denied tenure. The court rejected this request, based on an official information privilege available to the defendant as a state-supported university. *Id.* at 1272–78.

55. *Id.* at 1275. The court also held that discovery of the faculty evaluations was not essential for presentation of plaintiff's case and suggested that a less obtrusive alternative means of reviewing the tenure committee's judgment be employed, such as a review by an impartial academician. *Id.* at 1277–78.

full disclosure would result in more thoughtful and honest tenure evaluations, and ruled that, in the interest of preserving the excellence of the university, confidentiality must be maintained.[56] The court applied a balancing test to determine whether to keep the evaluations confidential. In so doing, the court distinguished two cases in which the Fifth Circuit Court of Appeals had held that interests of several factory workers outweighed the company's interest in continued confidentiality of personnel records:

> [In those cases] the concern was that disclosure would inhibit candid communications necessary to an effective job referral service. It appears to this court that society can better afford a sacrifice in the efficacy of job referrals for factory employees than it can a sacrifice in the efficacy of a tenure selection system which has as its goal and has produced a faculty of truly outstanding scholars.[57]

It is important to note that the *McKillop* court seemed to take judicial notice of the need for confidentiality in order to maintain accurate, candid evaluations. The court accepted affidavits submitted by the defendants as conclusive proof of the necessity of secrecy in the tenure selection process, while discounting plaintiff's evidence of disclosure of evaluations in other professional employment.[58] The court's conclusion that confidentiality is a *sine qua non* for the tenure process has the effect of unfairly tipping the scales in favor of the university every time. Such a conclusion has the same effect as recognizing a privilege based on academic freedom.

Other courts faced with similar questions of discoverability have exhibited *Faro*-like[59] caution and similarly struck the interest balancing test in favor of the university.[60] This tendency to defer to the institution's judgment became so prevalent in academic employment discrimination cases that the Second Circuit, in *Powell v. Syracuse Unversity,*[61] took great pains to restate and clarify what it had *really* meant by its caution in *Faro* against judicial intervention on campus. Although the court affirmed a finding that the defendant had not discriminated illegally,[62] the extent of its review of the tenure committee's decision went beyond what *Faro* would seem to allow. The court recognized that many jurisdictions had cited *Faro* for the proposition that courts should stay out of university employment controversies, and observed:

> This anti-interventionist policy has rendered colleges and universities virtually immune to charges of employment bias, at least when that bias is not expressed overtly. We fear, however, that the common-sense position we took in *Faro,* namely that courts must be ever-mindful of relative institutional competences, has been pressed beyond all reasonable limits, and may be employed to undercut the explicit legislative intent of [Title VII].[63]

---

56. *Id.* at 1275–78.
57. *Id.* at 1279 n.15 (citing Fears v. Burris Mfg. Co., 436 F.2d 1357 (5th Cir. 1971); Carr v. Monroe Mfg. Co., 431 F.2d 384 (5th Cir. 1970), *cert. denied,* 400 U.S. 1000 (1971)).
58. McKillop v. Regents of the Univ. of Cal., 386 F. Supp. 1270, 1276 n.10 (1975).
59. *See* note 48 *supra.*
60. *See* cases cited in note 53 *supra.*
61. 580 F.2d 1150 (2d Cir. 1978).
62. *Id.* at 1156–57.
63. *Id.* at 1153.

Perhaps the most reasonable exercise of the balancing test was used in an earlier case, *Keyes v. Lenoir Rhyne College*.[64] There the court found that because the confidential evaluations were not the basis for the university's decision, they would remain privileged.[65] In *Jepsen v. Florida Board of Regents*[66] the court used the *Keyes* reasoning to support its ruling to compel the discovery of faculty evaluations: since the university *did* base its decision on the confidential evaluations, the records should be examined for any evidence that the stated reasons for dismissal were pretextual. The *Jepsen* court remarked that though the evaluations could be introduced as evidence at trial, any threat to the confidentiality of irrelevant information could be eliminated by "carefully drawn protective provisions" invoked by the trial court.[67]

The trend toward increased judicial activism in Title VII cases against educational institutions culminates with the Third Circuit's decision in *Kunda v. Muhlenberg College*.[68] *Kunda* is the first instance of a court's overruling of a university's administration and invoking the remedy of awarding tenure to the plaintiff in addition to back salary.[69] In granting this remedy over the college's objection of "an unwarranted intrusion by the judiciary into the academic mission of an educational institution which . . . threatens academic freedom itself,"[70] the court took note of *Faro*'s caution but concluded that Title VII mandates judicial intervention in cases like *Kunda*, in which there is no dispute over the plaintiff's qualifications or ability:[71] "[A]cademic institutions and decisions are not ipso facto entitled to special treatment under federal laws prohibiting discrimination."[72]

Thus, the judiciary's willingness to fulfill its Title VII mandate in cases involving academics has increased, though somewhat erratically. The initial "hands off" attitude of *Faro* and the ready acceptance of university explanations for employment decisions in *Faro* and *Keddie* were rejected by the *Powell* court. *Powell* instead focuses on ensuring equal employment opportunity on campus, with a special effort to look behind the university's stated reasons for its employment actions. And as the *Kunda* court showed, the

---

64. 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977).

65. *Id.* at 581. The court wrote:

> [I]f the College had sought to justify any male-female disparity on the basis of these evaluations the plaintiff should have been granted the opportunity to use them to demonstrate that the explanation was pretextual. Here, however, the College did not resort to the evaluations for that purpose, and in the absence of some further showing on the part of the plaintiff, the district court's decision to protect these records from disclosure was not an abuse of its discretion.

Id. (citation omitted).

66. 610 F.2d 1379 (5th Cir. 1980).

67. *Id.* at 1384.

68. 621 F.2d 532 (3rd Cir. 1980).

69. *Id.* at 546–51.

70. *Id.* at 547.

71. The department's tenure committee unanimously approved Kunda's application, but the college's president did not recommend tenure because of Kunda's lack of an advanced degree. *Id.* at 537–38. There was evidence that males in the same position had been counseled about the necessity of a master's degree to attain tenure, but no mention was ever made to Kunda about this "requirement." *Id.* at 546, 548–49.

72. *Id.* at 545.

reviews conducted by the courts are no longer rubber stamps for the administration's decision.

The university's interest in confidentiality is adequately protected by the balancing test now employed by the courts. This protection, however, is one available to all defendants—to academic and nonacademic institutions alike—if the reasons behind the necessity for record confidentiality are sufficient.[73] The university need not be granted the blanket protection that would result from a special privilege based on academic freedom. The right to academic freedom is founded in the essence of the university, an interest that should carry much weight in any balancing test. But the recognition of an evidentiary privilege would turn the clock back to before 1972, when colleges had a statutory exemption from Title VII. The following sections illustrate why no real reason exists for providing special treatment for academia.

IV. Comparing Industry and Academia

Are jobs and promotional criteria within academia so different from those in private industry as warrant special treatment when reviewed by courts? Would the elimination of the confidentiality of faculty evaluations have a detrimental impact on academic employment?

Significant differences separate business and academic employment. In the promotion decision, the most obvious difference is the result: a promotion in industry carries added responsibilities and increased compensation, but grants no absolute job security; in academia, the award of tenure is tantamount to lifetime employment. Another difference is the kind of comparison made in the employment decision. There is usually a certain amount of competition between the applicants in industry, and the employer is able to compare the abilities of one prospect with those of another before making the decision. On the campus, however, the professor is judged on his or her merits alone, measured against some sort of "ideal." It truly is an evaluation of an individual's qualifications and not necessarily a matching of university needs with individual ability. The last difference, and most important for this discussion, is in review procedures—both how and by whom promotion decisions are made. In industry, the decision is made by a superior, or group of superiors, who evaluates the employee in terms of the requirements of the position and other more subjective criteria. In an academic situation, however, the trustees or regents have the last word on which professors are awarded tenure, but rely heavily on the judgment of the university president, who in turn relies on the recommendation of the tenure committee. This committee usually consists of the faculty member's peers—not administrative

73. *See, e.g.*, Fears v. Burris Mfg. Co., 436 F.2d 1357, 1362 (5th Cir. 1971); Carr v. Monroe Mfg. Co., 431 F.2d 384, 390 (5th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971).

superiors. For all practical purposes, then, the judgment of one's colleagues determines whether one is admitted to the tenured "fraternity."[74]

Although there are significant differences in academic and industrial jobs, as well as differences in the evaluation processes for each, the criteria relied on in hiring and promotion decisions for upper-level industrial positions are comparable to those relied on in academia. Contrary to the suggestion of the *McKillop* court,[75] the relevant industrial analogue is not the factory worker,[76] but rather the upper-level manager or professional. A comparison reveals that in both cases, subjective analysis of the qualifications of the employee or potential employee is very important. In one case, the decisional criteria are factors that contribute to overall management ability; in the other, overall teaching skill and scholarship. In one instance the question on the evaluator's mind is: How much will this person bring to the company in terms of business acumen, clients, or increased profit? In the other: How much will this person's skill or reputation as a scholar enhance the university's academic reputation?[77] Employees of either type will have their education, experience, and general background evaluated by the employer. And in either instance, one's personality and ability to get along with others (colleagues and clients or students) is important. The evaluaton of all these obviously subjective factors results in a personnel decision—either to promote or to grant tenure.

The similarity in evaluative criteria is important for a court to keep in mind when reviewing the tenure decision, for it is the criteria, process, and resulting judgment of the tenure committee that are being attacked by the claimant. The court's mission is not to determine whether the tenure committee's decision was "correct." Rather, the court's only job is to determine whether any statutorily impermissible prejudice entered into the committee's judgment. The court does this relatively freely in nonacademic cases. It should be allowed the same freedom of investigation when the decisional process is essentially the same and the only difference is that it takes place on a college campus.

---

74. Although it rejected this argument in applying national labor standards to a technical school, the First Circuit apparently recognized the importance of this relationship in NLRB v. Wentworth Inst., 515 F.2d 550 (1st Cir. 1975):

> An educational institution's goals of teaching and advancing knowledge are said to be so closely dependent upon each faculty member that the trustees and administration, who have ultimate authority, as a matter of course delegate to the faculty or its representatives varying amounts of authority and influence over educational policy and the government of the institution. This relationship is said to stand in contrast to the normal adversarial positions of employees and a monolithic management. . . . Collective bargaining by an exclusive faculty bargaining agent . . . will supposedly result in the erosion of academic freedom and meritocratic values, and in the substitution of adversarial attitudes for traditional collegiality and shared responsibility.

Id. at 556.

75. *See* note 54 *supra*.

76. *See* cases cited in note 57 *supra* and accompanying text.

77. *See* P. DRESSEL, HANDBOOK OF ACADEMIC EVALUATION 358–69 (1976).

V. THE NECESSITY OF ENFORCING TITLE VII ON CAMPUS

Although there are qualitative differences between employment in industry and employment in education, there is no hard evidence of the reason behind the immunity Congress initially granted educational institutions,[78] and only scant discussion of its reasons for lifting the immunity.[79] The congressional determination that Title VII should apply to educational employment seems to result from a conclusion that the primary interest involved in academic jobs is equal employment opportunity, and not academic freedom. By including educational institutions under Title VII's umbrella, Congress is apparently saying: What we have here are *jobs*—professional appointments that are ways to make a living; though the selection process may be different, the essential characteristic is that they provide for a person's economic well-being and status in society, and therefore the selection process must not allow discrimination on the basis of race, sex, or national origin. If that statement is correct it may be that the burden is on the educational institution to change the nature of the employment (*e.g.*, manner of promotion, term of employment contract, etc.), and not for society to bend its rules protecting individual rights to accommodate the uniqueness of academic employment.

That universities be treated as all other employers should not come as a shock to the academic community. Attitudes among the professoriat,[80] ex-

---

78. "There is nothing in the legislative background of Title VII, nor does any national policy suggest itself to support the exemption of . . . educational institution employees—primarily teachers—from Title VII coverage." H.R. REP. NO. 238, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2155.

A review of the legislative history of the Civil Rights Act of 1964 indicates that Congress had given no explicit justification for the prior exemption. *See generally* H.R. REP. 914, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. CODE CONG. & AD. NEWS 2391, 2391-2519.

79. There was no testimony heard regarding this provision of the 1972 Amendment to the Civil Rights Act of 1964. H.R. REP. NO. 238, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2138-39. It seems the basis for removing the exemption for educational institutions and public employees was a perception that these areas needed congressional prodding to exhibit better efforts to achieve equality in their employment practices. This perception is evident in the House Report on the Amendments:

> Discrimination against minorities and women in the field of education is as pervasive as discrimination in any other area of employment. In the field of higher education, the fact that black scholars have been generally relegated to all-black institutions, or have been restricted to lesser academic positions when they have been permitted entry into white institutions is common knowledge. Similarly, in the area of sex discrimination, women have long been invited to participate as students in the academic process, but without the prospect of gaining employment as serious scholars.
>
> When they have been hired into educational institutions, particularly in institutions of higher education, women have been relegated to positions of lesser standing than their male counterparts. In a study conducted by Theodore [Caplow] and Reece J. McGee, it was found that the primary factors determining the hiring of male faculty members were prestige and compatability, but that women were generally considered to be outside of the prestige system altogether.
>
> The committee feels that discrimination in educational institutions is especially critical. The committee can not imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their fuure [*sic*] development. To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination. Accordingly, the committee feels that educational institutions, like other employers in the Nation, . . . should be subject to . . . the Act.

H.R. REP. NO. 238, 92d Cong., 2d Sess. (1972), *reprinted in* [1972] U.S. CODE CONG. & AD. NEWS 2137, 2155.

80. L. LEWIS, SCALING THE IVORY TOWER: MERIT AND ITS LIMITS IN ACADEMIC CAREERS 161-65 (1975).

emplified by the recent instances of faculty attempts at unionization[81] and strikes, indicate the growing perception within the profession that the professor is in reality an employee of the university and not an independent scholar in residence. Indeed, though the merits of a particular faculty member may be evaluated by peers from the same department, the grant of tenure comes from the university itself. This being the case, the university must be ready to justify its tenure decision to the professor, and if need be, to the court, on more than general "lack of merit" grounds.

A question lurking in the background of this discussion demands an answer from the academic community: If the decision to deny tenure is truly based on merit, why not give the reasons justifying the decision to the professor at the time it is made? This would remove the hint of backstabbing in the closed tenure process and allow the professor the opportunity to improve on his or her deficiencies. University professors are accustomed to quantifying subjective evaluations when they assign grades to students and critique the works of fellow scholars at symposia or in scholarly journals, yet they hide behind the cloak of "academic freedom" when their evaluations result in the denial of tenure.

The observations of Lionel S. Lewis in *Scaling the Ivory Tower*[82] may explain the reason for this professorial reticence. Though Lewis himself advocates a system in which the only relevant consideration in the tenure process is merit,[83] his studies show that the grant of tenure under the present set-up often includes nonmeritorious considerations. Says Lewis:

> [T]he principle of merit perhaps does not guide academic men any more than it does those in other occupations. Sometimes ability is central in the assessment and rewarding of academic men, and sometimes other factors hold sway. . . . The argument is that academics are only human; they, like everyone else, respond from their strengths and weaknesses, pride and prejudices, to new facts and old, with passion and dispassion, with affection and enmity.[84]

Although this system is not unconscionable just because subjectivity enters into it, over the years it has developed into an "old-boy" system among academics similar to that infamous in business.[85] While women and minorities as groups can be benefited by affirmative action plans that will ultimately change the makeup of college faculties, individual plaintiffs should be per-

---

81. *See* NLRB v. Yeshiva Univ., 444 U.S. 672 (1980); Trustees of Boston Univ. v. NLRB, 575 F.2d 301 (1st Cir. 1978), *vacated and remanded*, 445 U.S. 912 (1980); NLRB v. Wentworth Inst., 515 F.2d 550 (1st Cir. 1975). *See generally* L. LEWIS, SCALING THE IVORY TOWER: MERIT AND ITS LIMITS IN ACADEMIC CAREERS 173–80 (1975).

82. L. LEWIS, SCALING THE IVORY TOWER: MERIT AND ITS LIMITS IN ACADEMIC CAREERS 13 (1975).

83. *Id.* at 201–09.

84. *Id.* at 13. *See also id.* at 18–76, for a discussion of the factors that are sometimes involved in evaluating teaching and publication and a discussion of typical tenure committee proceedings.

85. "Women and minorities tend to be excluded from the academic profession not always intentionally, and not solely because they have low prestige, but because they are outside the prestige system entirely. Fearing 'Bogi-Man' candidates who 'won't fit in,' departments invoke the so-called merit principle which assures their exclusion." Solomon and Heeter, *Affirmative Action in Higher Education: Towards a Rationale for Preference*, 52 NOTRE DAME LAW. 41, 72 (1976).

mitted to review the critiques of their ability and investigate any latent prejudices possessed by their critics. The Supreme Court's premise for intervening in a university's admissions program[86] applies equally to intervention in employment decisions: the university's discretion in the matter ends when there is a conflict with individual rights.

VI. CONCLUSION

In cases involving discrimination on campus, the courts' focus should be on the employment decision, with less consideration devoted to the special characteristics of academic jobs. Opening the hiring and promotion process of universities will lessen the elitism of the academic profession. It may then become less a closed fraternity and more an equal opportunity employer.

The academic freedom of the university or the tenure committee will not be abridged in any meaningful sense. Academic freedom serves primarily to permit freedom of expression on campuses.[87] Even Justice Frankfurter's expansion of the concept to include "four essential freedoms" was prefaced by the caveat that university decisions would be uninhibited as long as they were based "on academic grounds."[88] Since the only investigation by the courts involves whether the decision *was in fact* based on the applicant's merits, and is not a review of the correctness of the committee's findings, the contention of academicians such as Georgia's Professor Dinnan[89] comes down to a question of protecting the confidentiality of peer evaluations. A blanket privilege simply is not appropriate when the basic elements of academic freedom are not infringed. Rather, the confidentiality of peer evaluations can be adequately protected by the courts through their application of the balancing test used to grant or deny an evidentiary privilege based on a confidential relationship.[90] Judges confronted with concrete fact situations can best decide whether a plaintiff's statutory right to equal opportunity in employment outweighs any harm to the integrity of a college's tenure system.

John J. Byrnes

86. "Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded." Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 314 (1978).

87. *See* text accompanying notes 33–35 *supra*.

88. *See* text accompanying notes 43–44 *supra*.

89. *See* text accompanying notes 5–7 *supra*.

90. Here, the relevant relationship is university (employer) to evaluator. *See* note 27 *supra*.