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THE CHALLENGE TO ANTIDISCRIMINATION ENFORCEMENT ON CAMPUS: CONSIDERATION OF AN ACADEMIC FREEDOM PRIVILEGE

I. INTRODUCTION

Academia traditionally has been regarded as a stanchion of American society.¹ Similarly, "academic freedom"² has been recognized not only as an essential element of the nation's educational system, but also as a means of safeguarding and maintaining the basic structure of American society.³ Nevertheless, the judiciary has been faced with balancing the concept of academic freedom against the clearly enunciated ban against employment discrimina-

¹ *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (Americans "have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted"); see *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (America "is deeply committed to safeguarding academic freedom, which is of transcendent value").

² One commentator has described academic freedom as follows:

Academic freedom consists of the absence of, or protection from, such restraints or pressures chiefly in the form of sanctions threatened by state or church authorities . . . , faculties, or students of colleges and universities, but occasionally also by other power groups in society—as are designed to create in the minds of academic scholars (teachers, research workers, and students in colleges and universities) fears and anxieties that may inhibit them from freely studying and investigating whatever they are interested in, and from freely discussing, teaching, or publishing whatever opinions they have reached.

Machlup, *On Some Misconceptions Concerning Academic Freedom*, in *ACADEMIC FREEDOM AND TENURE* 178 (L. Joughin ed. 1969). According to Professor Robert MacIver:

Academic freedom is a right claimed by the accredited educator, as teacher and investigator, to interpret his findings and to communicate his conclusions without being subjected to any interference, molestation, or penalization because these conclusions are unacceptable to some constituted authority within or beyond the institution. Here is the core of the doctrine of academic freedom. It is the freedom of the student within his field of study.

R.M. MACIVER, *ACADEMIC FREEDOM IN OUR TIME* 6 (1955).

³ See *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). As Justice Brennan has observed: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* (quoting *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)); Note, *Judicial Review of the University-Student Relationship: Expulsion and Governance*, 26 *STAN. L. REV.* 95, 112 (1973) ("academic freedom is . . . a prerequisite to educational excellence and . . . to our survival as a civilization").

tion embodied in Title VII of the Civil Rights Act of 1964.⁴ In suits by professors against universities for denial of tenure on the basis of racial or sexual discrimination, for example, pretrial discovery aimed at revealing the votes of faculty review committees has met strong resistance from academics as an "intrusion" upon university autonomy.⁵ They have contended that in such situations, where the secrecy of the academic peer review system is at stake, faculty members should be entitled to invoke an evidentiary or first amendment qualified privilege against disclosure of their respective tenure determinations.⁶

Recently, two circuit courts of appeals have considered the efforts of the academic community to invoke "a confidential communication" privilege in the name of academic freedom. While the Fifth Circuit held that the creation of an academic freedom privilege was not warranted,⁷ the Court of Appeals for the Second Circuit determined that society's interest in protecting the peer review system of a university mandated the establishment of a qualified privilege.⁸ This Note initially examines the origin and nature of academic freedom and the general character of the current tenure system. This will be followed by a comparison of the approaches of the Second and Fifth Circuits with respect to the academic freedom privilege. After analyzing certain factors which must be evaluated in determining whether the privilege should exist, the Note concludes that strong policy considerations favoring antidiscriminatory employment practices preclude creation of an academic freedom privilege, and endorses the rationale employed by the Fifth Circuit in declining to embrace the privilege.

II. ACADEMIC FREEDOM

The modern concept of academic freedom evolved from the

⁴ See *Gray v. Board of Higher Educ.*, 692 F.2d 901, 902 (2d Cir. 1982); *In re Dinnan*, 661 F.2d 426, 430 (5th Cir. 1981), cert. denied sub nom. *Dinnan v. Blaubergs*, 102 S. Ct. 2904 (1982); see also Equal Opportunity Act of 1972, 42 U.S.C. §§ 1983, 2000-2(1) (1976).

⁵ See, e.g., Defendants' Memorandum of Law in Opposition to Magistrate's Findings on Plaintiffs' Motion to Compel Discovery at 13, *Gray v. Board of Higher Educ.*, 92 F.R.D. 87 (S.D.N.Y. 1981), rev'd, 692 F.2d 901 (2d Cir. 1982) (citing *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1048 (1968)).

⁶ See Note, *Preventing Unnecessary Intrusions on University Autonomy: A Proposed Academic Freedom Privilege*, 69 CALIF. L. REV. 1538, 1538-39 (1981).

⁷ *In re Dinnan*, 661 F.2d 426, 427 (5th Cir. 1981), cert. denied sub nom. *Dinnan v. Blaubergs*, 102 S. Ct. 2904 (1982).

⁸ *Gray v. Board of Higher Educ.*, 692 F.2d 901, 902 (2d Cir. 1982).

19th-century German notion of "Lehrfreiheit" or "freedom to teach."⁹ This special liberty, which enabled academicians to research and speak without fear, was a critical prerequisite to intellectual advancement in Germany's politically autocratic state.¹⁰ It was restricted, however, in that the freedom could be exercised only within the bounds of the university. Outside these confines, the intellectual was subject to the same laws, rules and restrictions as the rest of society.¹¹

Within the United States, the theory of academic freedom was more inclusive.¹² First, because the United States Constitution accorded all citizens the liberties traditionally enjoyed under the historical notion of academic freedom, academicians sought to expand the concept to include special safeguards for pursuits not related to professional activities, especially in the general exercise of their civil and political liberties.¹³ In America, therefore, one aspect of academic freedom is concerned with the right of a professor to engage in political activity unrelated to his academic specialty.¹⁴ In addition, the American concept of academic freedom encompasses the notion that the university itself is the embodiment of a collective effort to research, publish and teach,¹⁵ and that "university

⁹ Jones, *The American Concept of Academic Freedom*, in ACADEMIC FREEDOM AND TENURE, *supra* note 2, at 225. The German conception of academic freedom was twofold. *Id.* *Lehrfreiheit*, or "freedom to teach," was the right of professors to teach, conduct research, and report their research to their students without interference. Comment, *Academic Freedom—Its Constitutional Context*, 40 COLO. L. REV. 600, 600 (1968). *Lernfreiheit*, or "freedom to learn," envisioned the ability of students to roam from place to place in pursuit of knowledge, and encompassed their right to select their own curricula. *Id.* This second aspect of academic freedom generally has not been wholeheartedly embraced in the United States. *Id.*

¹⁰ See Searle, *Two Concepts of Academic Freedom*, in THE CONCEPT OF ACADEMIC FREEDOM 94 (E. Pincoffs ed. 1975); Comment, *supra* note 9, at 600-01.

¹¹ See Metzger, *The Age of the University*, in R. HOFSTADTER & W. METZGER, THE DEVELOPMENT OF ACADEMIC FREEDOM IN THE UNITED STATES 389 (1955).

¹² See Comment, *supra* note 9, at 601-03.

¹³ See Searle, *supra* note 10, at 94; Van Alstyne, *The Specific Theory of Academic Freedom and the General Issue of Civil Liberty*, in THE CONCEPT OF ACADEMIC FREEDOM, *supra* note 10, at 62. Advocates of expanding the scope of academic freedom claim that for educators to be truly unrestrained in their pursuit of knowledge, they require protection greater than the constitutional protections normally afforded under the first amendment; they not only need freedom of speech, but freedom to speak without fear of dismissal or retribution within the academic sphere. Machlup, *supra* note 2, at 180.

¹⁴ Searle, *supra* note 10, at 90-91. See generally Machlup, *supra* note 2, at 191-206.

¹⁵ See American Association of University Professors, *1958 Statement of Procedural Standards in Faculty Dismissal Proceedings*, in ACADEMIC FREEDOM AND TENURE, *supra* note 2, at 40-41 [hereinafter cited as AAUP].

autonomy" is necessary for the realization of these objectives.¹⁶ The university is considered beneficial to society since it represents not only a conduit by which essential knowledge is passed to succeeding generations, but also a tool for screening those who will teach and for critically examining the information which they eventually will impart.¹⁷ The well-being and independence of the university thus are deemed essential to the well-being of society as a whole.

The two distinct, yet overlapping, dimensions of academic freedom—the rights of the individual academician as well as university autonomy—have emerged in the case law.¹⁸ The first judicial recognition of academic freedom came in cases which dealt with the rights of the individual professor, and predominantly arose in situations where state law allegedly infringed upon individual conduct.¹⁹ Notwithstanding this judicial recognition, however, it has been somewhat equivocal whether academic freedom exists as a separate constitutional right or as merely a social value embracing rights which must be balanced against other important societal interests.²⁰ Although in *Meyer v. Nebraska*,²¹ the Supreme

¹⁶ See *id.* at 3. The concept of "autonomy" rests upon the necessity for academic institutions to exert control over their affairs. See Yurko, *Judicial Recognition of Academic Collective Interests: A New Approach to Faculty Title VII Litigation*, 60 B.U.L. REV. 473, 474 (1980); cf. *Sterling v. Regents of the Univ. of Mich.*, 110 Mich. 369, 374, 68 N.W. 253, 254 (1896) (Michigan's institutions of higher learning were not successful under the control and management of the Michigan Legislature). Autonomy also is an expression of academic custom and usage, H. EDWARDS & V. NORDIN, *HIGHER EDUCATION AND THE LAW* 3-4 (1979), and of the belief that only in an atmosphere of "liberty and independence" can academic communities prosper, *Greene v. Howard Univ.*, 271 F. Supp. 609, 615 (D.D.C. 1967). Moreover, autonomy formally may be bestowed by way of state constitutional mandate or through designation of a public university as a public trust, see W.A. KAPLAN, *THE LAW OF HIGHER EDUCATION* 368-69 (1978), or by way of legislation creating a Board of Regents to isolate state schools from political and governmental interference, *id.* at 368. Regardless of how it is attained, however, university autonomy has been viewed by the courts as a characteristic worth preserving. See *Greene v. Howard Univ.*, 271 F. Supp. at 615; *Williams v. Wheeler*, 23 Cal. App. 619, 138 P. 937, 939 (Dist. Ct. App. 1913).

¹⁷ AAUP, *supra* note 15, at 47-48; see *Wieman v. Updegraff*, 344 U.S. 183, 197 (1952) (Frankfurter, J., concurring); Finkin, *Toward a Law of Academic Status*, 22 BUFFALO L. REV. 575, 587 (1973).

¹⁸ Note, *supra* note 6, at 1546-47.

¹⁹ See, e.g., *Whitehill v. Elkins*, 389 U.S. 54, 55 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 591-92 (1967); *Beilan v. Board of Pub. Educ.*, 357 U.S. 399, 400 (1958); *Slochower v. Board of Higher Educ.*, 350 U.S. 551, 552-53 (1956); *Wieman v. Updegraff*, 344 U.S. 183, 184-85 (1952); *Adler v. Board of Educ.*, 342 U.S. 485, 491-92 (1952).

²⁰ See generally Murphy, *Academic Freedom—An Emerging Constitutional Right*, 28 LAW & CONTEMP. PROBS. 447, 447-51 (1963); Comment, *supra* note 9, at 604-05.

²¹ 262 U.S. 390 (1923).

Court determined that society's interest in independent education mandated recognition of an instructor's right to teach under the fourteenth amendment,²² academic freedom gradually was interpreted as being intertwined with the first amendment guarantees of freedom of thought and expression.²³ Moreover, Justice Frankfurter, concurring in *Sweezy v. New Hampshire*,²⁴ indicated that the nature of academic freedom extended beyond mere concern for the protection of first amendment rights of individual professors; it encompassed the institution of higher learning itself.²⁵ Justice Frankfurter suggested that a university be granted the freedom "to determine for itself on academic grounds [1] who may teach, [2] what may be taught, [3] how it shall be taught, and [4] who may be admitted to study."²⁶ Subsequently, in *Regents of the University of California v. Bakke*,²⁷ the Court, in examining an institution's entrance policy, referred to Justice Frankfurter's "four freedoms," and stated that "[a]cademic freedom, though not a specifically enumerated constitutional right, has long been viewed as a special concern of the First Amendment."²⁸ In *Bakke*, however, the right of the university to fashion its own selection process was subject to the enforcement of individual constitutional rights.²⁹ Thus, academic freedom, while frequently deemed to be "of constitutional significance,"³⁰ is not accorded absolute first amendment

²² *Id.* at 400. *Meyer* involved a Nebraska statute which prohibited the teaching of any modern foreign language to a child who had not completed grammar school. *Id.* at 397. A private school teacher had been convicted of teaching German to a 10-year-old boy. *Id.* at 396-97. The Supreme Court reversed the conviction, holding that the teacher's right to teach and the right of the parents to engage him were "within the liberty of the [fourteenth] amendment." *Id.* at 400.

²³ See *Keyishian v. Board of Regents*, 385 U.S. 589, 602-03 (1967).

²⁴ 354 U.S. 234 (1957).

²⁵ *Id.* at 262-63 (Frankfurter, J., concurring). In his concurrence, Justice Frankfurter stated:

In a university knowledge is its own end, not merely a means to an end. A university ceases to be true to its own nature if it becomes the tool of the Church or State or any sectional interest. . . . This implies the right to examine, question, modify or reject traditional ideas and beliefs.

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation.

Id. (Frankfurter, J., concurring) (quoting *The Open Universities in South Africa* 10-12).

²⁶ 354 U.S. at 262-63 (Frankfurter, J., concurring) (quoting *The Open Universities in South Africa* 10-12).

²⁷ 438 U.S. 265 (1978).

²⁸ *Id.* at 312.

²⁹ *Id.* at 314.

³⁰ *Gray v. Board of Higher Educ.*, 92 F.R.D. 87, 91 (S.D.N.Y. 1981), *rev'd*, 692 F.2d 901

protection, but rather, stands as a value to be encouraged, supported and protected only in relation to other vital interests of society.³¹

III. THE COURTS AND ACADEMIC EMPLOYMENT PRACTICES

The tenure system has been described as the most effective method through which ultimate academic freedom can be attained.³² For the faculty member, tenure is the primary means of achieving both job security and freedom from the restraints and pressures which inhibit independent thought and action.³³ The American Association of University Professors (AAUP) recommends a system under which, "[a]fter the expiration of a probationary period, [teachers or investigators] should have permanent or continuous tenure. . . ."³⁴ Their service, under the AAUP scheme, may be terminated "only for adequate cause, except in the case of retirement for age, or under extraordinary circumstances because of financial exigencies."³⁵ The AAUP also urges that faculty have first-hand involvement in determining its own membership,³⁶ and that faculty assist in the establishment, administra-

(2d Cir.), *cert. denied*, 102 S. Ct. 2904 (1982).

³¹ *Parducci v. Rutland*, 316 F. Supp. 352, 355 (M.D. Ala. 1970); see Note, *Academic Freedom and Federal Regulation of University Hiring*, 92 HARV. L. REV. 879, 883 (1979).

³² *Jones*, *supra* note 9, at 231. Professor Jones explained that "[t]enure, or the right, after a probationary period, to hold one's professional post continuously until age of retirement, is the bulwark of academic freedom. It guarantees freedom of teaching, freedom of research, and freedom in extramural activities." *Id.*

³³ See *Byse*, *Academic Freedom, Tenure, and the Law: A Comment on Worzella v. Board of Regents*, in THE CONSTITUTIONAL STATUS OF ACADEMIC TENURE 304, 305 (W. Metzger ed. 1977).

³⁴ *Academic Tenure Today*, in FACULTY TENURE 2 (AAUP 1973) [hereinafter cited as *Tenure Today*]. The typical probationary period is between 3 and 7 years. *Id.* at 5.

³⁵ American Association of University Professors, 1940 Statement of Principles on Academic Freedom and Tenure, *reprinted in* ACADEMIC FREEDOM AND TENURE 36-37 (L. Joughin ed. 1969). A limited number of occurrences may constitute adequate cause for dismissal of a tenured professor. The AAUP's 1964 statement on extramural utterances states that "[a]n administration may file charges . . . if it feels that a faculty member['s] . . . extramural utterances raise grave doubts concerning his fitness for his position." AAUP, *supra* note 15, at 64 (citing 1940 Statement of Principles on Academic Freedom and Tenure); see *Bradford v. School Dist. No. 20*, 244 F. Supp. 768, 772 (E.D.S.C. 1965), *aff'd*, 364 F.2d 185 (4th Cir. 1966). A tenured faculty member also may be dismissed for acts of moral turpitude, *Perry v. Sindermann*, 408 U.S. 593, 601 n.3 (1972); see *Pettigrew*, "Constitutional Tenure: Toward a Realization of Academic Freedom", 22 CASE W. RES. L. REV. 475, 478 (1971), or for breach of professional ethics, see *Van Alstyne*, *supra* note 13, at 74. Falsification of research or false representations of academic investigations constitutes such a breach. See *Academic Tenure Tomorrow*, in FACULTY TENURE 75 (AAUP 1973) [hereinafter cited as *Tenure Tomorrow*].

³⁶ See AAUP, *supra* note 15, at 40-41.

tion and enforcement of the university's tenure rules and regulations.³⁷ The decision to grant or deny tenure is arrived at through a multi-level peer review process that is based upon the principle that "peers" are best able to evaluate teaching ability, overall contribution to scholarship, and ability to harmonize with the rest of the academic community.³⁸

Once tenure has been obtained, sophisticated grievance and appeal mechanisms are available to the professor in order to ensure that his due process rights have not been infringed.³⁹ The nontenured teacher, however, does not enjoy the same rights to procedural due process.⁴⁰ Rather, a nontenured teacher easily

³⁷ See *Tenure Tomorrow*, *supra* note 35, at 25. According to the authors of the AAUP's 1915 Declaration of Principles, "[i]t is . . . unsuitable to the dignity of a great profession that the initial responsibility for the maintenance of its professional standards should not be in the hands of its own members. It follows that university teachers must be prepared to assume this responsibility themselves." *Id.* at 43. Indeed, the faculties of some universities are given virtually total control over faculty hiring, tenure, and termination. See *NLRB v. Yeshiva Univ.*, 444 U.S. 672, 686 n.23 (1980).

³⁸ See Machlup, *supra* note 2, at 187; *Tenure Tomorrow*, *supra* note 35, at 43-44. The AAUP recommends that the tenure decision process begin with a recommendation from the teacher's department. *Tenure Tomorrow*, *supra* note 35, at 60. Realizing, though, that the department may desire "doctrinal conformity" and therefore would be likely to consider personality and other traits, the AAUP further recommends that a review mechanism be established that would

- (1) involve faculty members from outside the department and . . . not be merely an administrative review;
- (2) ensure reasonable conformity with general institutional policies and procedures, within limits of variation the institution has decided to permit;
- (3) monitor [the department's professional] judgment in terms of broad professional standards

Id. at 60-61. Typically, the review culminates with a recommendation to the president who, in turn, makes his own recommendation to the Board of Trustees. Yurko, *supra* note 16, at 475. At each review level, the faculty is warned that they are ethically responsible to recommend for tenure only those teachers who are of the highest integrity and ability. Machlup, *supra* note 2, at 187.

³⁹ See generally Joughin, *Academic Due Process*, 28 LAW & CONTEMP. PROBS. 573, 578-98 (1963). The Joughin article advocates that an initial "informal conciliation" be held to discuss the institution's grievances against a particular professor. *Id.* at 578. In addition, the ACLU advocates that a professor be accorded a preliminary hearing at which the administration should present him with a concise statement of the charges against him and the university's hearing and appeal procedures. *Id.* at 580. The professor has the responsibility of marshalling the evidence he intends to present and of disclosing all possible witnesses he intends to call. *Id.* Gradually, the procedure becomes more adversarial in nature. See Pettigrew, *supra* note 35, at 478-79. A hearing usually is held before a committee of colleagues. Joughin, *supra*, at 584. The burden of proof is upon those who are bringing the charges. *Id.* at 593. Additionally, an appeal procedure providing for the governing board of the college or university to hear the controversy is recommended. *Id.* at 597.

⁴⁰ See *Board of Regents v. Roth*, 408 U.S. 564, 573, 577 (1972); *Perry v. Sindermann*,

could find himself in a situation in which the university, in its discretion, arbitrarily declines either to renew his contract, to promote him to a higher level teaching position, or to grant him tenure.⁴¹ The basis for this precarious status is the aforementioned probationary period, which allows the institution to evaluate the teacher's instructional ability, his potential for scholastic contribution, and his compatibility with existing faculty prior to committing itself to a lifelong relationship.⁴²

Courts have been inclined to accord universities great latitude in formulating and implementing their policies regarding hiring, promotion, salary, and tenure, and have been reluctant to intervene when it appeared that judicial standards would displace those of the institution.⁴³ For instance, in *Sweeny v. Board of Trustees*,⁴⁴ a sex discrimination suit, the court recognized "that hiring, promotion, and tenure decisions require subjective evaluation most appropriately made by persons thoroughly familiar with the academic setting."⁴⁵ Notwithstanding this historical judicial aversion to involvement with internal academic decision processes, the courts are, for most untenured professors, the sole source of redress.⁴⁶

This dependence upon the judiciary may have contributed to the apparent movement away from the deference traditionally accorded universities.⁴⁷ In a recent title VII case, *Kunda v. Muhlenberg College*,⁴⁸ the Third Circuit, though stressing that academic

408 U.S. 593, 599 (1972); accord *Clark v. Holmes*, 474 F.2d 928, 932 (7th Cir.), cert. denied, 411 U.S. 972 (1973).

⁴¹ Sartorius, *Tenure and Academic Freedom*, in *THE CONCEPT OF ACADEMIC FREEDOM* 138 (E. Pincoffs ed. 1972); cf. Davis, *Academic Freedom, Academic Neutrality, and the Social Systems*, in *THE CONCEPT OF ACADEMIC FREEDOM* 29 (E. Pincoffs ed. 1972) (it is difficult to protect adequately the academic freedom of untenured faculty members).

⁴² See Joughin, *supra* note 39, at 594. The American Civil Liberties Union has stated: "American educational practice permits great fluidity in the testing of [probationary] teachers as to their permanent usefulness in a particular institution." *Id.* (quoting ACLU, *ACADEMIC DUE PROCESS* 7-8 (1954)).

⁴³ See, e.g., *Smith v. North Carolina*, 632 F.2d 316, 345 (4th Cir. 1980); *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1353 (W.D. Pa. 1977).

⁴⁴ 569 F.2d 169 (1st Cir.), vacated and remanded per curiam, 439 U.S. 24 (1978), *aff'd*, 604 F.2d 106 (1st Cir. 1979), cert. denied, 444 U.S. 1045 (1980).

⁴⁵ 569 F.2d at 176.

⁴⁶ See Pettigrew, *supra* note 35, at 484-86; *Tenure Tomorrow*, *supra* note 35, at 32-33. The AAUP has observed that faculty's resort "to the courts testifies to the absence or failure of institutional and professional standards and procedures." *Id.* at 33.

⁴⁷ See Note, *Title VII on Campus: Judicial Review of University Employment Decisions*, 82 COLUM. L. REV. 1206, 1216 (1982).

⁴⁸ 621 F.2d 532 (3d Cir. 1980).

freedom is entitled to maximum protection,⁴⁹ nonetheless stated that it could not shirk its obligation to enforce rigorously the congressional policy of remedying employment discrimination in academic institutions.⁵⁰ Similarly, in *Powell v. Syracuse University*,⁵¹ the Second Circuit observed that, "far from taking an anti-interventionist position with respect to the academy, the Congress has instructed [the courts] to be particularly sensitive to evidence of academic bias."⁵² It is submitted that the judicial response to the confrontation between pretrial discovery and university independence must be measured with reference to these decisions, since they represent the judiciary's own perception of its obligation to provide a forum for individuals who allegedly have suffered injuries at the hands of academic institutions.

IV. DISCOVERY—THE ATTACK ON THE IVORY TOWER

Rule 26(c) of the Federal Rules of Civil Procedure authorizes the issuance of protective orders against "abusive," "burdensome," or "oppressive" discovery.⁵³ Without considering whether an academic freedom privilege exists, courts, pursuant to their discretionary authority under this provision, previously disallowed discovery of the internal communications of educational institutions. For example, in *Keyes v. Lenoir Rhyne College*,⁵⁴ a case involving a title VII sex discrimination suit, the college argued that the expectation of confidentiality permitted honest and candid evaluations of faculty members by their peers, and requested that the confidentiality of the faculty evaluation records be protected under rule 26(c).⁵⁵ Without resorting to any inherent privilege, the Fourth Circuit, after declaring that the confidentiality interest of the college should be balanced against the plaintiff's need to obtain the

⁴⁹ *Id.* at 547.

⁵⁰ *Id.* at 551.

⁵¹ 580 F.2d 1150 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

⁵² 580 F.2d at 1154.

⁵³ FED. R. CIV. P. 26(c). Rule 26(c), which delineates the scope of discovery under the Federal Rules of Civil Procedure, states:

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including . . . : (1) that the discovery not be had

Id.

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

⁵⁵ *Id.* at 581.

records, concluded that the district court had not abused its discretion in finding that the interest of the college outweighed the plaintiff's showing of need.⁵⁶ The court also stated, however, that if the college had sought to justify any male-female disparity on the faculty on the basis of these evaluations, then the plaintiff would have been granted access to the evaluation records in order to demonstrate that the college's explanation was pretextual.⁵⁷

Clearly, rule 26(c) objections have been found useful by parties asserting them in cases involving document discovery. In addition, they have enabled courts to evaluate the confidentiality interest of universities on a case-by-case basis, without having to determine the absolute significance of that interest. Recently, however, two discrimination cases have arisen in which discovery was sought through the depositions of members of the faculty review committee. The faculty members in each case refused to answer certain questions, asserting not a discovery limitation, but rather an academic confidentiality privilege.

*In re Dinnan*⁵⁸ involved an action, brought pursuant to Title VII of the Civil Rights Law and section 1983 of Title 42 of the United States Code, in which the University of Georgia allegedly discriminated on the basis of sex in declining to promote the plaintiff to the position of associate professor.⁵⁹ According to the university's established procedure, all promotion and tenure decisions were to be made through a system of peer review, and were to be based upon teaching ability, scholarship, and public service.⁶⁰ Professor Dinnan was a member of the "Promotion Review Committee" which voted to deny the plaintiff's promotion.⁶¹ During the discovery stage of the proceeding, the plaintiff deposed several

⁵⁶ *Id.* at 580.

⁵⁷ *Id.* at 581.

⁵⁸ 661 F.2d 426 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 2904 (1982).

⁵⁹ *Id.* at 431; Statement of Interested Persons at 1, *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981). The Tenure Committee contended that their decision to deny Ms. Blaubergs' tenure was due to her not having "done enough high-quality research." *N.Y. Times*, Sept. 14, 1980, at 62, col. 1. Ms. Blaubergs believed, however, that the denial of tenure was due to her participation in the University's women's studies program. *Id.*

⁶⁰ Statement of Interested Persons at 2-3, *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981).

⁶¹ 661 F.2d at 427. The "Promotion Review Committee" constituted the middle tier of a 5-level review process. Statement of Interested Persons at 3, *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981). Their vote against granting tenure was 6 to 3. *Id.* A written reason for their vote was supplied to Ms. Blaubergs. *Id.* An administrative appeal of their decision was entered, but it subsequently was rejected. *Id.*

members of the committee,⁶² including Professor Dinnan, who refused to disclose his position on the plaintiff's application for promotion.⁶³

The plaintiff then moved to compel discovery.⁶⁴ Granting the motion, the lower court explained that the promotion review committee may be held accountable since "there is what appears to be a genuine question concerning the basis for what [it did]."⁶⁵ Nevertheless, Professor Dinnan continued to decline to respond, and was found in contempt.⁶⁶ He thereafter appealed to the Fifth Circuit, urging recognition of an academic-freedom privilege.⁶⁷

The Fifth Circuit Court of Appeals rejected the invitation to endorse the proposed privilege on "the basis of fundamental principles of law and sound public policy."⁶⁸ The *Dinnan* court preliminarily and summarily disposed of any question that the claimed privilege had constitutional dimensions, and held that the issue was evidentiary, not constitutional, in nature.⁶⁹ While acknowledging the "paramount" value placed on academic freedom by the Supreme Court,⁷⁰ the court distinguished the prior cases as involving attempts by the government to suppress the expression of ideas.⁷¹ Thus, the court concluded, the reasoning employed in those decisions is inapplicable to the circumstance in which a private plaintiff attempts to enforce his constitutional and statutory rights in an employment discrimination suit.⁷²

With respect to the establishment of a new evidentiary privilege under Federal Rule 501, the court noted that privileges are not in accord with the concept that "the public . . . has a right to every man's evidence."⁷³ Consequently, privileges must be construed strictly and accepted only if they foster a public good which transcends "the normally predominant principle of utilizing all

⁶² Statement of Interested Persons at 3, *In re Dinnan*, 661 F.2d 426 (5th Cir. 1981).

⁶³ 661 F.2d at 427.

⁶⁴ *Id.*

⁶⁵ *Dinnan v. Blaubeurgs*, No. 80-7441 (M.D. Ga. May 6, 1980) (order granting motion to compel discovery).

⁶⁶ 661 F.2d at 427.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 430.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 429.

rational means for ascertaining truth.'"⁷⁴ Addressing the argument that two societal interests, academic freedom and the secret ballot process, mandate the creation of a privilege, the court first emphasized that academic freedom is a circumscribed concept.⁷⁵ Its boundaries, according to the court, extend only to academic decisions, and thus, a decision rendered on other than academic grounds does not fall within its parameters.⁷⁶ With regard to the damage incurred by the peer review system as a result of the failure to protect the secret ballot, the court stated that such protection has been afforded only in the context of the political process or parallel instances.⁷⁷ Indeed, reasoned the court, members of faculty review committees, unlike mere voters, occupy positions of responsibility within the university such that they should be held accountable for their decisions.⁷⁸ The court therefore concluded that the potential danger of a secret ballot to constitutional rights posed "a much greater threat to our liberty and academic freedom" than judicially enforced discovery.⁷⁹

The case of *Gray v. Board of Higher Education*⁸⁰ presented circumstances similar to those found in *Dinnan*. Following Dr. S. Simpson Gray's nonappointment for the 1979-1980 academic year, he filed suit under sections 1981, 1983 and 1985 of Title 42 of the United States Code, seeking a permanent injunction against LaGuardia Community College's alleged acts of "covert and overt" racial discrimination.⁸¹ As in *Dinnan*, Doctor Gray sought to depose two of the faculty members sitting on the review committee,

⁷⁴ *Id.* at 429 (quoting *Trammel v. United States*, 445 U.S. 40, 49 (1980)).

⁷⁵ 661 F.2d at 430-31. The court, while recognizing the importance of academic freedom, stated that the judiciary also must realize the limit of that freedom. *Id.* at 431.

⁷⁶ *Id.* at 431. The court explained that this case "precisely" presented the circumstances in which the judiciary should intervene. *Id.* (citing *Kunda v. Muhlenberg College*, 621 F.2d 532, 547-48 (3d Cir. 1980)).

⁷⁷ 661 F.2d at 431-32. The court declared that *Dinnan* simply involved an "employment decision, which by no stretch of the imagination deserves the protection that is accorded to individual participation in the political process." *Id.* at 432.

⁷⁸ *Id.*

⁷⁹ *Id.* at 431-32.

⁸⁰ 692 F.2d 901 (2d Cir. 1982).

⁸¹ *Id.* at 902. Doctor Gray was hired in 1974 as an instructor in the Business Administration and Management Section of the Business Division of LaGuardia Community College. *Id.* The peer evaluations in his first year of teaching were satisfactory and his student evaluations were excellent. *Id.* In Gray's second year, however, he received an unsatisfactory rating and thus was placed on probation. *Id.* His appointment subsequently was changed to "unconditional" after a grievance was filed. *Id.*

but both refused to disclose how they voted.⁸² While Gray maintained that the content of the votes would aid him in proving bias and would enable him to meet his burden of proof under section 1983, the university contended that the confidentiality of peer judgments demanded a protective privilege.⁸³

In examining the claim of privilege, the district court noted its ability, under Rule 501 of the Federal Rules of Evidence, to develop rules of privilege on a case-by-case basis, and looked to Professor Wigmore's "four fundamental conditions" to the establishment of a privilege against disclosure of communications.⁸⁴ According to Wigmore, in order to be afforded a privilege, the communications must originate in a confidence that they will not be disclosed, "the element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties," the relationship, in the community's opinion, must be one which should be fostered persistently, and the injury that the relation would suffer by virtue of the disclosure must be greater than the benefit that would be gained from compelling disclosure.⁸⁵ The court then weighed the adverse consequences to the faculty peer review system against the benefit that would inure to the individual litigant as a result of the disclosure.⁸⁶ It was concluded that since disclosure of the defendants' individual votes was "not the sole avenue" by which Professor Gray could prove that his rights had been violated, the balance tipped toward protection of the confidentiality of the faculty peer review system.⁸⁷

⁸² *Id.* at 901-02. The plaintiff sought to depose Dean Moed as to his vote with respect to the plaintiff's reappointment for the 1979-1980 academic year. Report and Recommendation of Magistrate Washington, *Gray v. Board of Higher Educ.*, No. 79-0062, at 6 (S.D.N.Y. April 7, 1981). As to Professor Miller, the plaintiff sought to ascertain how he voted on the plaintiff's request for promotion to Assistant Professor, as well as his vote on the reappointment issue. *Id.* LaGuardia College consistently had denied the plaintiff's bids for promotion beginning in 1977. *Id.* Doctor Gray suspected that Professor Miller, the Chairman of the Accounting-Managerial Studies Department, was the guiding force behind his promotion denial. *Id.*

⁸³ *See Gray v. Board of Higher Educ.*, 92 F.R.D. 87, 92 (S.D.N.Y. 1981), *rev'd*, 692 F.2d 901 (2d Cir. 1982). With respect to the university's contention, David B. Rigney, Vice Chancellor for Legal Affairs, asserted that the city university's policy requires that "the 'substance or even the nature of the discussion' at meetings of college or department promotion and budget committees be held in strict confidence by the members. It is professional misconduct for a member of such a committee to reveal such information." *Id.* at 92.

⁸⁴ *Id.* at 90.

⁸⁵ *Id.* (quoting J. WIGMORE, EVIDENCE § 2285, at 531 (3d ed. 1940)).

⁸⁶ 92 F.R.D. at 93.

⁸⁷ *Id.*

On appeal, the Second Circuit approved the district court's recognition of the academic freedom privilege and adopted the balancing approach employed by the district judge.⁸⁸ The court, however, balanced the relevant factors differently and declined to find the privilege applicable under the circumstances present in *Gray*.⁸⁹ In explicating when the academic privilege should apply, the Second Circuit adopted the AAUP's position that "[i]f an unsuccessful candidate for reappointment or tenure receives a meaningful written statement of reasons from the peer review committee and is afforded proper intramural guidance procedures, disclosure of individual faculty votes should be protected by a qualified privilege."⁹⁰ The court lauded this approach as one which maintains the appropriate balance between the Supreme Court's articulated concerns for academic freedom and the individual's right to protection from discriminatory employment practices,⁹¹ and as one which reflects sensitivity to the special nature of academic institutions.⁹² Setting forth a simple rule of thumb for invoking the privilege, Judge Oakes stated that, "absent a statement of reasons, the balance tips toward discovery and away from recognition of privilege."⁹³ After noting that an institution's compliance with AAUP procedures will avoid the need for disclosure,⁹⁴ the court indicated that this rule would result in minimal intrusion upon academic freedom and would not endanger the peer review system and faculty interaction, which, according to the court, were accorded too little weight in the *Dinnan* decision.⁹⁵

The *Dinnan* decision stands in line with *Powell* and *Kunda*

⁸⁸ 692 F.2d at 902.

⁸⁹ *Id.*

⁹⁰ *Id.* at 907 (quoting Brief for AAUP at 23).

⁹¹ 692 F.2d at 907. The court observed that the AAUP position sought to mitigate "the confusion that can occur between the limited rights of probationary faculty members and the due process rights guaranteed to tenured faculty." *Id.*

⁹² *Id.* at 907-08. The court believed that the AAUP standard preserved the distinction between private commercial enterprises and academic institutions. *Id.* at 908.

⁹³ *Id.* The court was under the impression that a rule of absolute disclosure would be "in reckless disregard" of the university's need for confidentiality, while a rule of absolute privilege would hinder prosecution of reasonable claims. *Id.* The court noted that under its newly-formulated rule, past peer review decisions for which no reasons had been given would be discoverable, but not actionable. *Id.*

⁹⁴ *Id.* The court anticipated that the university's compliance with the AAUP statement would eliminate, in many cases, the need for court-ordered discovery of sensitive information. *Id.* The court thus observed that most of the risk of a "chilling effect" on the peer review system would be averted. *Id.*

⁹⁵ *Id.* at 904 n.6, 908-09.

insofar as it marks an intolerance for the use of academic freedom as a shield against scrutiny of employment practices.⁹⁶ The *Gray* decision, on the other hand, maintains a cautious approach, which is in accord with traditional judicial hesitancy to become involved in faculty appointments.⁹⁷ Indeed, by adopting the AAUP statement, the Second Circuit has given universities an explicit process by which they may avoid disclosure in advance.⁹⁸ Presenting a tenure-denied faculty member with "a detailed statement" may be nothing more than an advance copy of a university's position paper in preparation for litigation.⁹⁹ The following section of this Note analyzes a number of factors which undermine this type of deferential nod by the courts to academic institutions.

V. THE PROPER BALANCING APPROACH: EQUAL OPPORTUNITY VS. AN ACADEMIC CONFIDENTIALITY PRIVILEGE

The *Gray* court suggested that when a university complies with the principles and procedures of the AAUP statement, a qualified peer review privilege may be invoked.¹⁰⁰ Relying upon the strong societal interest in preserving academic freedom, the court stated that a policy of absolute disclosure of faculty committee

⁹⁶ See *supra* notes 47-52 and accompanying text.

⁹⁷ See *supra* notes 43-46 and accompanying text.

⁹⁸ See 692 F.2d at 907-08. It is submitted that the rule formulated by the Second Circuit encourages the university to establish a procedure by which a written, detailed statement of reasons is given upon request to a faculty member who is denied reappointment or tenure. Although the AAUP statement recommends that the procedure include both a written statement of reasons and the opportunity for review by a second faculty body, the court endorsed only the requirement that a statement of reasons be given, expressing no view as to the requirement for further review. See *id.* at 907 n.12. The court believed that compliance with the statement of reasons procedure would obviate the need for court-compelled discovery of faculty votes. *Id.* at 908. In order for universities to take advantage of this procedure, however, it appears that a substantial change in peer review systems must be implemented. Indeed, the Second Circuit itself noted that the City University of New York has a fixed policy against giving such reasons. *Id.* at 903 n.3.

⁹⁹ *Id.* at 908. The Second Circuit's acquiescence in the university's explanation for denying tenure as that which tips the scale in favor of a privilege assumes the veracity of the university's disclosure. More importantly, it presumes that the statement of reason would open a sufficient path for the plaintiff to follow in presenting evidence of discrimination, thereby obviating the need for further discovery. It is submitted that the court's approach disregards the fact that discrimination on campus is no less insidious and subtle than it is in other occupations or in business, and that the plaintiff may need to continue investigating the personal latent prejudices of the decisionmaking body. See L. LEWIS, *SCALING THE IVORY TOWER* 13 (1975); Comment, *Academic Freedom v. Title VII: Will Equal Employment Opportunity be Denied on Campus?*, 42 OHIO ST. L.J. 989, 1003-04 (1981).

¹⁰⁰ 692 F.2d at 907-08.

votes would have a chilling effect upon the peer review process.¹⁰¹ The Second Circuit thus concluded that in employment discrimination cases against universities, courts must strike a balance between discovery and privilege.¹⁰² It is submitted, however, that the right to academic freedom refers only to a university's freedom to render decisions upon academic grounds.¹⁰³ When a decision is premised upon other than academic considerations, it is suggested that the concept of academic freedom no longer may be invoked.¹⁰⁴ The policies against racial and sexual discrimination demand judicial sensitivity to the realities of educational employment,¹⁰⁵ and broad discovery appears necessary to carry out the compelling societal interest in deterring discrimination in this context. Moreover, if a plaintiff is required to bear the additional burden of facing a privilege against disclosure of key aspects of the employment process, any concern for the chilling effect on the peer review process seemingly is outweighed by the concomitant adverse impact upon antidiscrimination enforcement.¹⁰⁶

A privilege is designed to protect an interest, the significance

¹⁰¹ *Id.* at 908.

¹⁰² See *supra* notes 86-95 and accompanying text.

¹⁰³ See *In re Dinnan*, 661 F.2d 426, 431 (5th Cir. 1981), *cert. denied sub nom. Dinnan v. Blaubeurg*, 102 S. Ct. 2904 (1982). The *Dinnan* court articulated examples of decisions made on "other than academic grounds." *Id.* A pro-abortion tenure committee, for instance, might attempt to stop the promotion of right-to-life professors. *Id.* The court perceived that in such situations, the academic freedom privilege would be raised even though the underlying decisions were not based upon academic grounds. *Id.*

¹⁰⁴ Cf. Fuchs, *Academic Freedom—Its Basic Philosophy, Function, and History*, 28 LAW & CONTEMP. PROBS. 432, 436-37 (1963) (teacher's right to academic freedom does not extend to utterances which would serve to aid and comfort the enemy in time of war).

¹⁰⁵ The admonition to faculty review committees against employing other than professional standards in evaluating a teacher's performance does not prevent a "coincidence of prejudices . . . [from operating] against the faculty member at every level . . ." Van Alstyne, *supra* note 13, at 75; see Machlup, *supra* note 2, at 185 ("[t]here is no reliable way of separating a judgment of comparative competence and integrity from judgments of many other personal traits, social graces, congeniality, [and] professional likemindedness") (emphasis in original).

¹⁰⁶ See Pettigrew, *supra* note 35, at 498, 508-09. The "chilling effect" theory apparently fails to take into account that sanctions may be imposed for a less than conscientious evaluation of a professor. To be sure, an employer may find his federal contract cancelled, terminated or suspended as a result of less than full candor. Note, *A Balanced Approach to Affirmative Action Discovery in Title VII Suits*, 32 HASTINGS L.J. 1013, 1028-29 (1981); see Exec. Order No. 11,246, 30 Fed. Reg. 12,319 (1965), amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (1967). Similarly, federal funding may be terminated for failure to comply with federally authorized affirmative action guidelines. Note, *supra* note 31, at 879-80. Thus, it appears likely that a faculty review committee would conduct its affairs in a candid and conscientious manner, notwithstanding its inability to claim an academic freedom privilege.

of which outweighs the necessity for disclosure,¹⁰⁷ and therefore, in measuring the value of a new privilege, it is suggested that courts must undertake a comprehensive balancing approach, weighing the general concern for academic confidentiality against the overall importance of equal protection.¹⁰⁸ The remainder of this Note considers various factors which militate against the creation of an academic confidentiality privilege.

A. *The Antidiscrimination Policy of the United States*

Historically, an infringement upon individual rights due to unequal treatment was considered a breach of the fourteenth amendment right to equal protection.¹⁰⁹ In the context of employment, this national policy favoring equal opportunity demands that a person may not be refused a position on the basis of sex, race, religion or national origin, nor may terms or conditions of employment be varied on these bases.¹¹⁰ Accordingly, the Civil Rights Act of

¹⁰⁷ See *United States v. Nixon*, 418 U.S. 683, 709 (1974).

¹⁰⁸ Cf. *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring) (balancing first amendment rights against the interest in enforcement of civil and criminal statutes). The issue before the *Branzburg* Court was whether the first amendment rights of freedom of speech and press provided a privilege for newspapermen to withhold testimony when called to appear before state or federal grand juries. *Id.* at 667. The facts centered around a newspaperman's refusal to identify the source of his information. *Id.* at 668, 670. The Court addressed the question whether the newspaperman could abdicate his responsibility as a citizen to answer questions relevant to a criminal investigation, *id.* at 682, and held that the first amendment does not shield the press from general obligations arising from the enforcement of civil or criminal statutes, *id.* On this basis, the Court declined to create a first amendment privilege precluding the discovery of confidential sources. *Id.* at 690.

¹⁰⁹ The fourteenth amendment provides, in pertinent part: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. This amendment was enacted to establish negroes as citizens of the United States. See *The Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 71 (1872). Its scope, however, extends to an individual's right to be free from gender discrimination as well. See *Marshall v. Kirkland*, 602 F.2d 1282, 1298 (8th Cir. 1979). Furthermore, even though the fourteenth amendment, by its terms, only covers actions by the state, that term has been expanded to include administrative agencies of the states, *Dixon v. State*, 224 Ind. 327, 335, 67 N.E.2d 138, 141 (1946), municipal corporations, *George v. City of Portland*, 114 Or. 418, 422, 235 P. 681, 683 (1925), and public universities and colleges, *Branden v. University of Pittsburgh*, 392 F. Supp. 118, 124-26 (W.D. Pa. 1975), *aff'd*, 552 F.2d 948, 963 (3d Cir. 1977). The extent to which a university is an alter ego of the state depends upon "[t]he degree of state control . . . , the manner in which it is founded, and whether it is separately incorporated." *Henry v. Texas Tech Univ.*, 466 F. Supp. 141, 145 (N.D. Tex. 1979) (quoting Note, *Damage Remedies Against Municipalities for Constitutional Violations*, 89 HARV. L. REV. 922, 931 n.57 (1976)).

¹¹⁰ See *Jaroch v. Board of Regents*, 372 F. Supp. 106, 108 (E.D. Wis. 1974); *Yurko*, *supra* note 16, at 535.

1964¹¹¹ provides a statutory remedy for these types of infringements.¹¹² Although the legislature originally did not subject educational institutions to these provisions,¹¹³ Congress in 1972 expanded the scope of title VII of the Act to afford faculty members, who were victims of discriminatory practices, meaningful access to the courts.¹¹⁴ Within this legislative scheme, the private litigant was to be a “‘private attorneys-general,’”¹¹⁵ “vindicat[ing] the important congressional policy against discriminatory employment practices” while proving his own injury.¹¹⁶ This strong public policy against discrimination is reflected in the broad discretion granted to the judiciary in title VII cases to “fashion appropriate remedies.”¹¹⁷ Hence, in a manner similar to section one of the Civil

¹¹¹ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1965) (current version at 42 U.S.C. §§ 2000a-2000g (1976)).

¹¹² 42 U.S.C. § 2000a-3 (1976).

¹¹³ Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 255 (1965); see Powell v. Syracuse Univ., 580 F.2d 1150, 1154 (2d Cir. 1978); H.R. REP. No. 238, 92d Cong., 2d Sess. 20, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155.

¹¹⁴ Equal Employment Opportunity Act of 1972, 86 Stat. 103, 104 (1973); see H.R. REP. No. 238, 92d Cong., 2d Sess. 20-21, reprinted in 1972 U.S. CODE CONG. & AD. NEWS 2137, 2154-55. In addition to expanding title VII, Congress in 1972 also enacted Title IX of the Education Amendments Act, which prohibited sex discrimination in all phases of student treatment, including admissions. Education Amendments Act of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 235, 373 (1973). Four months later, Congress added sex discrimination to the jurisdiction of the United States Commission on Civil Rights. Act of Oct. 14, 1972, Pub. L. No. 92-496, § 3, 86 Stat. 813, amending 42 U.S.C. § 1975c(a) (1957).

¹¹⁵ Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 518-19 (S.D.N.Y. 1973) (quoting Jenkins v. United Gas Corp., 400 F.2d 28, 31-32 (5th Cir. 1968)), appeal dismissed, 496 F.2d 1094 (2d Cir. 1974). The term “private attorneys-general” envisions the rectification of discriminatory practices by the informal efforts of laymen. 59 F.R.D. at 519 n.5. It is submitted that this aspect of congressional intent necessitates a broad view of the permissible discovery and other trial preparations to be taken by complainants. Cf. *id.* (“dismissal of Title VII suits for procedural irregularities not favored”).

¹¹⁶ Alexander v. Gardner-Denver Co., 415 U.S. 36, 45 (1974).

¹¹⁷ Franks v. Bowman Transp. Co., 424 U.S. 747, 763-64 (1976); see 118 CONG. REC. 7168 (1972) (statement of Sen. Williams). By its terms, title VII recognizes such injunctive and affirmative relief as hiring, reinstatement, payment of back wages, and “any other equitable relief as the court deems appropriate.” 42 U.S.C. § 2000e-5(g) (1976). The Supreme Court, in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), adjudged that:

Congress did not intend by Title VII . . . to guarantee a job to every person regardless of qualifications. In short, the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group. . . . What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification.

Id. at 430-31.

Rights Act of 1871,¹¹⁸ title VII is intended to permit full vindication for the infringement of civil rights.¹¹⁹

Implicit in the prohibition of discrimination in educational institutions is society's interest in creating within the academic community a diverse faculty and student body. Such diversity is a source of "improved understanding and personal growth" in the educational environment.¹²⁰ This sentiment clearly is evident in the concern voiced by Congress that "[t]o permit discrimination [in educational institutions] would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination."¹²¹ It thus appears that the national policy against discriminatory practices should, in the context of the educational system, weigh heavily against the right of a university to withhold its employment decisions from scrutiny.¹²²

¹¹⁸ Act of April 20, 1871, ch. 22, § 1, 17 Stat. 13 (current version at 42 U.S.C. § 1983 (1976)). The requirement of state involvement under the Civil Rights Act of 1871 has been construed as equivalent to the state action prerequisite set forth in the fourteenth amendment. *Luria Bros. & Co. v. Allen*, 452 F. Supp. 732, 736 (W.D. Pa. 1978), *aff'd in part, rev'd in part*, 672 F.2d 347 (3d Cir. 1982); *Poirier v. Hodges*, 445 F. Supp. 838, 841-42 (M.D. Fla. 1978); *supra* note 109. The basic purpose of section 1983 was to provide a method of enforcing the fourteenth amendment by providing citizens with a remedy for injuries suffered as a result of unconstitutional actions. See *Thompson v. New York*, 487 F. Supp. 212, 226 (N.D.N.Y. 1979); *Poirier v. Hodges*, 445 F. Supp. 838, 842 (M.D. Fla. 1978). It also was intended to be a rehabilitative rather than a compensatory scheme, hinging upon the hope that legal action would induce states to abandon discriminatory practices. See *Miller v. Smith*, 431 F. Supp. 821, 826-27 (N.D. Tex. 1977), *aff'd in part, rev'd in part*, 625 F.2d 43 (5th Cir. 1980). It should be noted that substantive rights are not created by section 1983, but rather, the rights conferred are purely remedial. *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 618 (1979).

¹¹⁹ See Jaron, *The Threat of Personal Liability Under the Federal Civil Rights Act: Does it Interfere with the Performance of State and Local Government?*, 13 URB. LAW. 1, 2 (1981).

¹²⁰ See *Regents of the University of Calif. v. Bakke*, 438 U.S. 265, 312 n.48 (1978) (quoting Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)). In *Bakke*, the Court, quoting the president of Princeton University, stated:

[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed . . . "People do not learn very much when they are surrounded only by the likes of themselves."

438 U.S. at 312 n.48.

¹²¹ H.R. REP. No. 238, 92d Cong., 2d Sess. 20-21, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 2137, 2155.

¹²² See *Kunda v. Muhlenberg College*, 621 F.2d 532, 550-51 (3d Cir. 1980).

B. *Difficulty in Proving a Discrimination Suit*

A number of avenues of redress are available to a person who allegedly suffered some form of discrimination, including the fourteenth amendment of the Constitution,¹²³ sections 1981¹²⁴ and 1983¹²⁵ of Title 42 of the United States Code, and the Education Amendments to Title VII of the Civil Rights Act of 1964.¹²⁶ These actions are not mutually exclusive, but rather, may be joined in a single suit.¹²⁷ The burden of proof, however, differs according to

¹²³ See *supra* note 109 and accompanying text.

¹²⁴ 42 U.S.C. § 1981 (1976). Entitled "Equal Rights Under the Law," section 1981 provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Id.

¹²⁵ 42 U.S.C. § 1983 (Supp. III 1979). Section 1983 provides that a general cause of action exists for state interference with constitutionally protected rights. See *id.* It specifically states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Id.

¹²⁶ 42 U.S.C. §§ 2000a-2000g (1976). The relevant section of Title VII of the Civil Rights Act states:

(a) 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

Id. § 2000e-2(a)(1).

¹²⁷ See *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975). "The legislative history of Title VII manifests" the intent of Congress to permit a person "to pursue independently his rights under both Title VII and other applicable state and federal statutes." *Id.* (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48 (1974)). There are, however, differences as to the applicability of the statutes to various types of discrimination. Section 1981, for example, applies solely to instances of alleged racial discrimination, see *Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377, 1384-85 (4th Cir.) (Dupree, J., concurring in part, dissenting in part), *cert. denied*, 409 U.S. 982 (1972), while the scope of section 1983 extends to allegations of unconstitutional treatment under, *inter alia*, the fourth, eleventh, and fourteenth amendments of the Constitution, see, e.g., *Marrero v. City of Hialeah*, 625 F.2d 499, 514 (5th Cir. 1980) (fourth amendment); *Davidson v. Koerber*, 454 F. Supp. 1256, 1261 (D. Md. 1978) (fourteenth amendment); *Flesch v. Eastern Pa. Psychiatric Inst.*, 434 F. Supp. 963, 977 (E.D. Pa. 1977) (eleventh amendment). Courts therefore have

the particular theory of recovery. For instance, when the complainant alleges disparate treatment under the fourteenth amendment, the complainant is required to establish that he is a member of a protected class, that a person with comparable attributes was treated differently, and that the defendant acted with a discriminatory intent or motive.¹²⁸ When, however, the complainant alleges that a statutory or administrative rule has a disparate impact, he must show that he was deprived of equal treatment by reason of the university's action.¹²⁹ It should be noted that the standard of scrutiny employed by courts in determining whether a violation of the fourteenth amendment has occurred depends upon the type of discrimination involved. While racial classifications are considered inherently suspect and thus subject to "strict scrutiny," gender classifications are treated according to the lesser standard of "heightened scrutiny."¹³⁰

held that the remedies available under the various statutes, though related, nevertheless are "separate, distinct and independent." *Johnson*, 421 U.S. at 461; *accord Scott v. University of Del.*, 601 F.2d 76, 79 n.2 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979).

¹²⁸ See *Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 (5th Cir. 1980). When there is an allegation of disparate treatment, proof of discrimination invariably entails comparing the plaintiff's qualifications with those of more successful candidates. *Yurko*, *supra* note 16, at 533; see *Faro v. New York Univ.*, 502 F.2d 1229, 1231-32 (2d Cir. 1974). Generally, a plaintiff will assert that, but for the bias of the employer, he would have been chosen for the particular position. 502 F.2d at 1231-32. In *Faro*, the court found that such an allegation "would require a faculty committee charged with recommending or withholding advancements or tenure appointments to subject itself to a court inquiry at the behest of unsuccessful and disgruntled candidates as to why the unsuccessful was not as well qualified as the successful." 502 F.2d at 1232.

¹²⁹ Courts have recognized that, for purposes of an action brought under the fourteenth amendment or under section 1981, 1982 or 1983, the term "State" embraces the public educational institution. See *Branden v. University of Pittsburgh*, 477 F.2d 1, 4-6 (3d Cir. 1973). Furthermore, the rules, regulations and procedures employed by these institutions are deemed quasi-statutory in character. See *Rosenblum*, *Legal Dimensions of Tenure*, in *FACULTY TENURE* 161 (AAUP 1973).

¹³⁰ Generally, the courts have employed a rational basis test when faced with completely nonsuspect legislation. See *Allied Stores v. Bowers*, 358 U.S. 522, 527 (1959). Gender classifications, however, are quasi-suspect and thus are given heightened scrutiny, which, to uphold the classification, requires a finding that the classification serves important educational objectives, and that it substantially relates to the achievement of those objectives. *Orr v. Orr*, 440 U.S. 268, 278-80, *remanded*, 374 So. 2d 895 (Ala.), *cert. denied*, 374 So. 2d 898 (Ala. 1979), *cert. denied*, 444 U.S. 1060 (1980).

Classifications based upon race, national origin, or alien status are deemed inherently suspect because of the history of unequal treatment of persons of minority origin. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-24 (1978). The purpose of "strict scrutiny" is to subject the specific government action to close inspection, so as to preserve individual equality and autonomy. See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-53 n.4 (1938) (*dictum*).

In contrast to the elements which must be shown in order to establish a violation of the fourteenth amendment, section 1983 requires the complainant to prove that the university acted under color of state law and that he was deprived of a constitutional right.¹³¹ A claim of disparate treatment in violation of section 1983 also requires proof of intent or motive to discriminate.¹³² With respect to suits brought under section 1981, however, it has remained unsettled whether a finding of discriminatory intent is necessary.¹³³ Finally, as the Second Circuit in *Gray* emphasized, a title VII action does not require actual proof of discrimination in order to make out a prima facie case.¹³⁴ A minimal burden is placed upon the complainant who alleges disparate treatment to show that (i) "he belongs to a racial minority;" (ii) "he applied and was qualified for a job for which the employer was seeking applicants;" (iii) "despite his qualifications, he was rejected;" and (iv) "after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications."¹³⁵ Establishment of a prima facie case of disparate treatment, however, simply gives rise to an inference of discriminatory motive,¹³⁶

¹³¹ *Jones v. Hopper*, 410 F.2d 1323, 1326-27 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *accord Smith v. Losee*, 485 F.2d 334, 338 (10th Cir. 1973), *cert. denied*, 417 U.S. 908 (1974); *Taylor v. Nichols*, 409 F. Supp. 927, 933-34 (D. Kan. 1976), *aff'd*, 558 F.2d 561 (10th Cir. 1977).

¹³² *See Bronze Shields, Inc. v. New Jersey Dep't of Civil Servs.*, 488 F. Supp. 723, 726 (D.N.J. 1980), *aff'd in part, rev'd in part*, 667 F.2d 1074 (3d Cir. 1981); *Vanguard Justice Soc'y, Inc. v. Hughes*, 471 F. Supp. 670, 701-03 (D. Md. 1979).

¹³³ *Gray v. Board of Educ.*, 692 F.2d 901, 905 (2d Cir. 1982).

¹³⁴ *Id.*; *see Marshall v. Kirkland*, 602 F.2d 1282, 1299 (8th Cir. 1979).

¹³⁵ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Although *McDonnell Douglas* involved racial discrimination, the Court's decision may be equally applicable to instances of gender discrimination. *See Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1358 (W.D. Pa. 1977). Moreover, its application to educational institutions has been approved consistently. *See, e.g., Kunda v. Muhlenberg College*, 621 F.2d 532, 541-43 (3d Cir. 1980); *Whiting v. Jackson State Univ.*, 616 F.2d 116, 120-21 (5th Cir. 1980); *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1382-83 (5th Cir. 1980); *Sweeney v. Board of Trustees*, 604 F.2d 106, 108 (1st Cir. 1979), *cert. denied*, 444 U.S. 1045 (1980); *Davis v. Weidner*, 596 F.2d 726, 729-31 (7th Cir. 1979); *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154-56 (2d Cir.), *cert. denied*, 439 U.S. 984 (1978).

¹³⁶ *Kunda v. Muhlenberg College*, 621 F.2d 532, 546 (3d Cir. 1980); *Flowers v. Crouch-Walker Corp.*, 552 F.2d 1277, 1282 (7th Cir. 1977). The inference arising from a *McDonnell Douglas* case, *see supra* note 135 and accompanying text, is analogous to a presumption of fact, as it signifies that the plaintiff has produced sufficient evidence entitling him to a directed verdict if the defendant fails to meet his burden of production. *Flowers*, 552 F.2d at 1283 n.4. The directed verdict is based upon the deduction that the employer's decision was, "more likely than not," motivated by bias. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978). In a title VII case, motive is essential to the establishment of a disparate

which in turn may be rebutted by the educational institution's mere introduction of a nondiscriminatory basis for its decision.¹³⁷ Assuming there is a sufficient articulation of reason, the complainant then must establish that the university's statement was merely a pretext for discrimination.¹³⁸

It seems clear that in title VII suits, a plaintiff most likely will need the type of information which the academic privilege promoted by the Second Circuit shields from disclosure. Furthermore, the invocation of an academic privilege against discovery in cases where the plaintiff is required to prove motive, intent, or pretext would, as the *Gray* court itself recognized, place a difficult burden upon the plaintiff.¹³⁹ Even in suits where discriminatory intent need not be shown, or in which statistical evidence is relied upon, the delicate balance of proof may well be tipped by a direct showing of actual discrimination.¹⁴⁰ In these instances, it is abundantly clear that detailed disclosure is necessary for a complainant to advance the remedies which so resolutely have been accorded him.¹⁴¹

treatment claim, since the case invariably involves an accusation that the employer's unequal treatment stemmed from impermissible considerations. *Mendez, Presumptions of Discriminatory Motive in Title VII Disparate Treatment Cases*, 32 STAN. L. REV. 1129, 1129 n.3 (1980).

¹³⁷ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). With respect to title VII cases, the seminal decision defining what constitutes introduction of a nondiscriminatory reason sufficient to rebut a complainant's prima facie case is *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978). The standard pronounced therein is that the employer must show merely that his employment decision was based upon a legitimate consideration. *Id.* at 577. The wisdom of the employer's decision is not at issue, and he need not prove absence of discriminatory motive. *Kunda v. Muhlenburg College*, 621 F.2d 532, 543 (3d Cir. 1980). In fact, "[i]t is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981).

¹³⁸ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973). In order to establish pretext in either the disparate treatment or impact context, the plaintiff must show that the employer's proffered reason for its employment decision flowed from the nature of its purposes, structure, and interests, and was not unbiased. *See Yurko, supra* note 16, at 533.

¹³⁹ 692 F.2d at 905-06. It should be noted that motive, though not essential to the establishment of a prima facie title VII case, is nevertheless a critical element in proving the employer's wrongful conduct. *See, e.g., Evans v. Central Piedmont Community College*, 475 F. Supp. 114, 117 (W.D.N.C. 1979), *cert. denied*, 449 U.S. 1125 (1981).

¹⁴⁰ 692 F.2d at 905. The *Gray* court stated that "[c]loser examination of the elements of *Gray's* case . . . makes *Gray's* need for the votes transparently evident." *Id.* The Second Circuit further explained that the plaintiff initially would have to know the votes of the faculty review committee in order to prove those causes of action requiring proof of discriminatory intent. *Id.* at 906.

¹⁴¹ *See Waintroob, The Developing Law of Equal Employment Opportunity at the White Collar Professional Level*, 21 WM. & MARY L. REV. 45, 86 (1979); *cf. Scott v. University of Del.*, 455 F. Supp. 1102, 1130 (D. Del. 1978) ("[w]hile . . . a plaintiff in a disparate-

In addition to the difficulties arising from the various standards of proof, the victim of a discriminatory practice may find it extremely onerous to document a charge of discrimination. Proof of such practices is rarely direct.¹⁴² General statistics reveal little about the motives of the department or the operation of the decisionmaking process and, therefore, frequently are insufficient to support the plaintiff's theory of recovery.¹⁴³ Indeed, absent the existence of gross disparities, courts seldom have found statistical evidence sufficient to establish a *prima facie* case.¹⁴⁴ Furthermore, educational institutions themselves often have acquired enough data to rebut the statistical information presented by a complainant in a lawsuit,¹⁴⁵ and the stronger the evidence offered by a defendant to meet its burden of production, the more persuasive the evidence for the complainant must be on his own rebuttal.¹⁴⁶ It

impact case is entitled to rely solely on statistics, the absence of any identified victim is nevertheless significant"), *aff'd in part, rev'd in part on other grounds*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979).

¹⁴² See Yurko, *supra* note 16, at 492-93. More often than not, a plaintiff must resort to statistical indices, such as comparisons with those similarly situated, and expert testimony in order to prove their claims of discrimination. See generally Waintroob, *supra* note 141, at 47.

¹⁴³ See, e.g., *Presseisen v. Swarthmore College*, 442 F. Supp. 593, 600-01 (E.D. Pa. 1977), *aff'd mem.*, 582 F.2d 1275 (3d Cir. 1978). Statistics come in infinite varieties. Their relevance to a particular issue is a function of the methodology employed, the surrounding facts and circumstances of the litigation and the comparisons being made. For example, traditionally, general population statistics, which assume standardization of the personal characteristics of people throughout society, were pervasively accepted by the courts. *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971); Waintroob, *supra* note 141, at 69. Such statistics, however, are more relevant to cases of disparate impact than to disparate treatment because no claim of an effect on an individual is being made. Waintroob, *supra* note 141, at 70-75. Courts are now retreating from their endorsement of general population statistics and are requiring that the plaintiff prove that the challenged practices have had an effect on the plaintiff. More suited to this inquiry are indices of applicant flow, and internal statistics and promotion ratios. *Id.* at 81-82.

¹⁴⁴ *Johnson v. University of Pittsburgh*, 435 F. Supp. 1328, 1361 (W.D. Pa. 1977). The statement of statistical evidence of discrimination usually leads to the need for an explanation before a *prima facie* case will be held to have been made out. This hesitancy on the part of the judiciary to place total confidence on statistics may arise from the absence of large pools of similarly situated persons to sample and the subjective qualitative differences which exist between applicants. Yurko, *supra* note 16, at 494.

¹⁴⁵ See *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1345 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 53 (1982).

¹⁴⁶ A plaintiff is better able to bolster his statistical allegations of discrimination with corroborating testimony of individual instances of discrimination. See Waintroob, *supra* note 141, at 86; cf. *Scott v. University of Del.*, 455 F. Supp. 1102, 1129-30 (D. Del. 1978), *aff'd in part, rev'd in part on other grounds*, 601 F.2d 76 (3d Cir.), *cert. denied*, 444 U.S. 931 (1979) (despite statistical data from which disparate impact on blacks may be inferred, the absence of an injured individual is fatal to the action).

therefore is submitted that judicial recognition of an academic privilege would geometrically compound a complainant's difficulty in obtaining essential evidence.¹⁴⁷

This becomes more alarming when a teacher's critical interest in proving the true reasons for his dismissal is realized. To be sure, those who impermissibly are denied tenure may suffer irreparable, unjustifiable harm to their careers.¹⁴⁸ The difficulty in finding subsequent employment within the educational system after being labeled academically unworthy of tenure is indeed oppressive.¹⁴⁹

C. *Will an Academic Confidentiality Privilege Protect a University's Claimed Interest?*

Universities and faculty members claim that compelled disclosure of academic communications will have a "chilling effect" upon candid evaluations and faculty participation in the peer review process.¹⁵⁰ As the *Dinnan* court stated, however, no national, or, for that matter, collegial interest is advanced by promoting discriminatory practices.¹⁵¹ Indeed, protection of discriminatory practices serves to undermine, rather than promote, legitimate academic freedom.¹⁵² Thus, since academic institutions are not entitled to special protection under federal law, the doctrine of academic freedom seemingly should not extend to all university activities and decisions.

Notwithstanding the social benefits that may derive from the peer review process, there appears to be no significant basis upon which to believe that compelled disclosure significantly will temper candor or negatively affect a good faith selection process. Nevertheless, the candor of faculty members participating in the peer review process can be assured other than by the creation of an aca-

¹⁴⁷ See *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1345 (9th Cir. 1981).

¹⁴⁸ See, e.g., *Johnson v. University of Pittsburgh*, 359 F. Supp. 1002, 1010 (W.D. Pa. 1973).

¹⁴⁹ *Id.*

¹⁵⁰ It has been contended that there "is little likelihood that leaders in the world of scholarship and college teaching will give us the benefit of their candid opinions of colleagues in their fields if they cannot be assured of confidentiality." *Gray v. Board of Higher Educ.*, 92 F.R.D. at 92 (quoting Affidavit of David B. Rigney, Vice Chancellor for Legal Affairs of the City University of New York).

¹⁵¹ *In re Dinnan*, 661 F.2d at 431; *Powell v. Syracuse Univ.*, 580 F.2d 1150, 1154 (2d Cir.), cert. denied, 439 U.S. 984 (1978); see *Yurko*, *supra* note 16, at 525-26.

¹⁵² See *In re Dinnan*, 661 F.2d at 431 (possibility that tenure committee decision based upon unconstitutional grounds might be shielded from disclosure poses "a much greater threat to our liberty and academic freedom than the compulsion of discovery").

demographic confidentiality privilege. Many governmental agencies indemnify their officials when judgments are rendered against them, thereby substantially reducing any "chilling effect" upon their activities which may be produced by the fear of litigation.¹⁶³ It is suggested that universities may do likewise for faculty personnel who are members of peer review committees.

VII. CONCLUSION

The Second Circuit in *Gray* held that the strong social interest in protecting the confidentiality of university tenure systems requires recognition of a qualified academic freedom privilege. The Fifth Circuit's rejection of the privilege in *Dinnan*, however, properly emphasizes the national policy against discrimination in universities, and is more consonant with the emerging trend away from complete deference to academic institutions. Consideration of additional significant factors which arise in discrimination suits supports the Fifth Circuit's conclusion that the establishment of an academic freedom privilege is not warranted. It is hoped that the academic confidentiality privilege will be recognized by the courts as both unnecessary and unduly burdensome for teachers victimized by discriminatory practices.

Joanne F. Catanese

¹⁶³ Jaron, *supra* note 119, at 21.