In Pursuit of Academic Freedom: The Peer Evaluation Privilege

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IN PURSUIT OF ACADEMIC FREEDOM: THE PEER EVALUATION PRIVILEGE

I. INTRODUCTION

Faculty peer evaluation committees are charged with assessing applicants for tenured positions. Peer evaluations are necessary because they allow the universities of this country to create and maintain their standards of academic excellence. Courts are compelling these committees to reveal their findings in a number of discrimination suits brought by those recently denied tenure. This comment argues that it is inappropriate for the courts to compel the disclosure of the discussions and findings of these peer review committees through discovery.

Tenure is awarded to professors upon completion of a trial period and protects them from dismissal without cause. Tenured employment can be terminated "only for adequate cause except in the case of retirement for age or under extraordinary circumstances because of financial exigencies." The award of tenure is granted through a variety of mechanisms, depending upon the particular university. The tenure review

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1. See Johnson v. University of Pittsburgh, 435 F. Supp. 1328, 1346 (W.D. Pa. 1977); see also McKillop v. Regents of the Univ. of California, 386 F. Supp. 1270 (N.D. Cal. 1975). In McKillop, the court noted that the peer evaluation system at the University of California produced one of the finest schools in the country and certainly the finest state university system. Id. at 1275.

2. See generally Mobilia, Academic Freedom Privilege: A Sword or a Shield?, 9 VT. L. REV. 43 (1984). This article discusses the federal court's failure to grant an evidentiary privilege to peer evaluation committees where a civil rights violation is at issue. Although the author fails to propose a solution, she is squarely in favor of the use of privilege in this area. The author concludes freedom of thought and discussion are integral parts of academic scholarship and thus are fundamental to the very essence of the university function. It is primarily in this capacity that courts have chosen to identify an academic privilege in context of constitutional freedom. Id. at 67.


5. King v. Regents of Univ. of California, 138 Cal. App. 3d 812, 189 Cal. Rptr. 189 (1982). The University of California's procedure is typical. This system makes available four ranks: 1) instructor; 2) assistant professor; 3) associate professor; and 4) professor. Only the positions of associate and full professor are subject to tenure. The majority of assistant professors will undergo review for a tenured position at some point in their career. Id. at 814, 189 Cal. Rptr. at 190.
process involves evaluation on many levels. If the candidate’s request for tenure is denied, the candidate may request a summary of his or her review file and the reasons for the decision.

Tenure decisions are, in part, subjective evaluations based on academic excellence. It is difficult to shape objective guidelines in this area. The committee considers the quality of the candidate’s teaching, research and scholarship in the area of his or her specialty. Excellence, as opposed to competency, is the requirement. Each committee member has his or her own standards of excellence. The discussion and debate concerning these standards and their application are crucial to the decision-making process. The expression of opinions concerning personal standards and the application of these standards to the work of a colleague is more likely to be candid where confidentiality prevails.

Therefore, in order for peer evaluations to be effective, their contents must be kept confidential. However, the countervailing rights of those under review must also be considered. The confidentiality interest of the university is in direct conflict with the interests of those seeking the discovery of peer evaluations in an effort to prove the university’s discrimination. The questions which these suits pose are difficult to answer given the competing interests at stake.

6. Numerous parties are involved in the appraisal process. Among those called upon are: other faculty members of the department involved; outside experts in the candidate’s field; the department chair; the appropriate dean; an ad hoc review committee; a standing personnel committee of the academic senate; and the chancellor’s office.

7. In addition, the candidate may respond to the decision and appeal to a standing committee on privilege and tenure. That committee will hold a hearing to determine the existence of any procedural errors. Upon completion of the hearing, the committee will submit its recommendations to the chancellor.

8. See Sweeney v. Board of Trustees of Keene State College, 569 F.2d 169 (1st Cir. 1978).


10. Appellant was not adjudged incompetent in any respect. The decision in question was based on the considered opinion of scholars in each of the various areas of review that his research work did not meet the stringent standard of excellence required to achieve tenure. Failure to achieve unanimous praise as excellent does not equate with being judged incompetent.

11. McKillop, 386 F. Supp. at 1277. In McKillop, the court refused to support plaintiff’s contention that disclosure of the material sought would pose merely an insubstantial threat to the operation of the peer evaluation system.

12. Id.

This country seeks to foster the free and uninhibited discovery of all evidence.\textsuperscript{14} However, disclosure is but one interest requiring protection. Society also believes that certain relationships and communications should be encouraged and nurtured.\textsuperscript{15} Rules of privilege have been designed in an effort to protect these relationships and communications.\textsuperscript{16} Further, privileged communications are beyond the reach of discovery.\textsuperscript{17} Protection of these fundamental relationships justifies any restriction on the search for truth.

The universal tensions of privilege law are ever present in the context of peer evaluation. On the one hand, there is the need for confidentiality in the peer context, evaluating system, but on the other hand there is the need for the free flow of information which aids a plaintiff in proving his case. In California, courts have consistently refused to create an “academic privilege” to protect the confidentiality of peer evaluation procedures. California courts prefer to evaluate each situation by an \textit{ad hoc} balancing of the immediate interests in question.\textsuperscript{18}

This comment analyzes these competing interests and how the balancing approach applied by the courts tries to protect each interest. It looks at the flaws inherent in that balancing approach and proposes an absolute communication privilege protecting peer review evaluations.

The background provides the description of the problem, discussing the competing interests which the courts must identify and reconcile. The comment next analyzes the inconsistent state of the law in California, identifying the flaws with a view toward reform. Finally, the proposal suggests an absolute communication privilege as a viable solution to the problem.

\textsuperscript{14} \textit{In re} Dinnan, 661 F.2d 426, 427 (5th Cir. Unit B 1981), \textit{cert. denied}, 457 U.S. 1106 (1982). The court discussed the importance of truth to the justice system. The court believed that the search for truth should be free from impediments. \textit{Id.} at 427-28.

\textsuperscript{15} C. McCormick, \textit{on Evidence} 171, § 72 (1984). Current relationships which are considered privileged include: 1) attorney-client; 2) husband-wife; 3) psychotherapist-patient; and 4) clergyman-communicant. \textit{Id.}

\textsuperscript{16} \textit{Id.}

\textsuperscript{17} \textit{See Dinnan}, 661 F.2d at 428. Although the \textit{Dinnan} court recognized the importance of the search for truth, it also recognized the societal importance of privilege. The opinion contains a favorable discussion of the history of privilege and its traditional forms. \textit{Id.}

\textsuperscript{18} \textit{See} Board of Trustees v. Superior Court (Dong), 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981).
II. BACKGROUND

California courts refuse to create a rule of privilege which will effectively protect the confidentiality interests of universities' peer evaluation system. This refusal is based on the understandable failure to reconcile two equally important interests: academic freedom and equality for all people.

A. Types of Privileges

A topic privilege protects information. It reflects the recognition that certain information warrants complete protection against disclosure. A communication privilege prevents disclosure within certain relationships. A topic privilege protects certain information regardless of the existence of a protected relationship. A communication privilege protects all information within a protected relationship, regardless of its content.

A privilege will either be qualified or absolute. A qualified privilege may apply to topic or communication privileges. A qualified privilege against disclosure merely creates a rebuttable presumption which may be overcome by an overwhelming need for the requested information. An absolute privilege protects the information or relationship regardless of counterbalancing needs.

In the peer evaluation context, courts have chosen to evaluate the interests involved in a particular situation rather than apply privilege. Only if the plaintiff's need for discovery outweighs the injury caused by disclosure will the court grant full discovery.

B. Denial of Tenure and the Violation of Due Process

Denial of tenure does not result in the loss of a property or liberty interest. Absent such a loss, plaintiffs are unable to show a due process violation. Therefore, when a professor is denied tenure,

20. Id. at 149.
22. Lynn, 656 F.2d at 1347. In Lynn, the court held: "When determining whether tenure review files, including peer evaluations, are privileged, courts have balanced the university's interests in confidentiality, and the need which Title VII plaintiffs have for obtaining peer evaluations in their efforts to prove discriminatory conduct." Id.
25. Id. at 571.
on grounds other than discrimination, he or she is not afforded the same protections as those who have been denied due process.26

A number of California and United States Supreme Court cases continue to hold that, absent a contract right, there can be no denial of due process. For example, in Board of Regents v. Roth,27 the United States Supreme Court held that a non-tenured teacher possessed no liberty or property interest in reappointment other than those considerations made by contract or state law.28

The Roth Court held that in order to invoke a property interest in a benefit, a person must show more than an abstract need or desire for it.29 A property interest is created by independent sources, such as a contract or a state law.30 The Court noted that respondent had a right only to a one year position as specified by the employment contract,31 and suggested that absent damage to respondent's reputation and good name, no liberty interest was violated.32

In Grant v. Adams,33 the California Court of Appeal found a demotion from the position of principal to the position of classroom teacher devoid of either a property or a liberty interest and therefore found no violation of due process.34


27. 408 U.S. 564 (1972).

28. Id. at 578. In Roth, the petitioner was hired by Wisconsin State University for a contract term of one year. At the completion of that period, petitioner was not invited to return for the following academic year. There was no stipulation in the employment contract which entitled petitioner to any additional employment contracts. Id. at 566.

29. Id. at 578. The Court concluded: "In these circumstances, the respondent surely had an abstract concern in being rehired, but he did not have a property interest sufficient to require University authorities to give him a hearing when they declined to renew his contract of employment." Id. at 578.

30. Id. at 577. The Court stated that property interests were not created by the Constitution or unilateral expectations. Property interests are created and defined by existing rules that support a claim of entitlement. Id.

31. Id. at 578.

32. Id. at 573. The Court stated: "It stretches the concept too far to suggest that a person is deprived of liberty when he is simply not rehired in one job but remains as free as before to seek another." Id. at 575 (citing Cafeteria and Restaurant Worker v. McElroy, 367 U.S. 886, 895-96 (1961)).


34. Id. at 130-31, 137 Cal. Rptr. at 836. Appellant began his employment with the Jefferson Elementary School District of San Mateo County as vice principal for the school year 1966-67. He served as principal from 1967-74. On March 1, 1974 appellant was notified that he may not be reemployed in the position of principal for the succeeding year. In May, he was informed that he would be transferred to a teaching position. The school district cited financial conditions and administrative restructuring as its principal reasons for the transfer.
In *Perry v. Sinderman*, the United States Supreme Court held that even ten years of consecutive one year teaching contracts could not create a constitutionally protected property right. However, the Court did suggest that lack of tenurial or contract rights, taken alone, would not defeat a due process claim. However, in order to create the requisite property or liberty interest, the respondent must prove a binding understanding between the parties. The Court, in defining “binding understanding” relied upon the principles of contract law. Before tenure is granted, a binding understanding that a contract will be automatically renewed does not exist.

Where there is a mere denial of tenure or a failure to renew a contract, plaintiffs may not assume deprivation of property or liberty interests. A property interest is created from an independent source and will not be presumed. A liberty interest is created only where the plaintiff’s good name and reputation have been marred by the decision not to retain the individual in a particular position.

C. Proof of Discrimination

Where a property or liberty interest has been interfered with, the courts must consider whether due process has been violated. Due process, as guaranteed by the Constitution, provides the plaintiff the highest standards of protection. Free and open discovery is necessary to afford plaintiff every opportunity to prove his or her denial of due process. However, the courts have ruled that tenure is not a protected property right. The denial of due process is never at issue in these cases and therefore, absent other compelling interests, there is little need to protect the free flow of discovery.

However, where discrimination is alleged as the reason for de-

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35. 408 U.S. 593 (1972).
36. *Id.* The respondent taught in a state college system for ten years. Each year his one year contracts were consecutively renewed. However, at the end of ten years the college failed to renew respondent’s contract. *Id.* at 594-95.
37. *Id.* at 599.
38. *Id.* at 602.
39. *Id.* at 601. The Court stated that agreements not in writing could be implied, but such implications should be viewed “in light of the surrounding circumstances.” *Id.* at 602. Both the promisor’s words and conduct are given definition by “relating them to the usage of the past.” *Id.* The Court, in applying these principles, held that a binding understanding is more than a subjective expectancy, it is a claim supported by “the policies and practices of the university.” *Id.* at 603.
40. See U.S. CONST. amend. XIV, § 2.
41. See *Perry*, 408 U.S. 593 (1972); *Roth*, 408 U.S. 564 (1972); *Grant*, 69 Cal. App. 3d 127, 137 Cal. Rptr. 834 (1977).
nial of tenure, a violation of serious constitutional and statutory principles is at issue. The United States has sought to encourage access to the courts in order to vindicate claims of discrimination. These efforts were aided by The Civil Rights Act of 1964 (Title VII) which prohibits discrimination on the basis of sex, color, race, national origin or religion in any federally funded program. In 1972, The Equal Opportunity Act amended Title VII by removing the educational institution exemption. As a result, any plaintiff filing a discrimination claim against a university merits the heightened protections afforded litigants under Title VII.

Due to the important societal interest in unmasking decisions that are a pretext for discrimination, the courts have a heightened interest in discerning the truth behind such allegations. Discovery was designed to facilitate the search for truth. Therefore, where discrimination is alleged, courts have a heightened interest in the free flow of discovery. Privilege must not be used as a shield behind which discrimination may grow and flourish.

D. Academic Freedom

The very structure of academic life is rooted in the tenure system. Choosing qualified professors is essential to maintaining the expected high standards of education. "[T]he peer review system has evolved as the most reliable method for assuring promotion of the candidates best qualified to serve the needs of the institution." Absent a free system, the university is paralyzed in its decision making process. The failure to institute a "communication privilege" protecting the deliberations of peer review boards has been met with criticism by the academic community. Absent such protections, these peer review discussions become stifled. The fear that statements made within the private setting of an evaluation committee may, someday, become public knowledge could silence dissent. The courts continued failure to create a "communication privilege" is inconsis-

43. Dinnan, 661 F.2d at 431.
46. Dinnan, 661 F.2d at 427.
47. Id. at 431.
49. See Mobilia, supra note 2, at 66.
tent with their historical desire to extend to academia the freedoms necessary to freely pursue excellence.

In Sweezy v. New Hampshire,\textsuperscript{50} the United States Supreme Court derived academic freedom from the Constitutional protections of freedom of association and expression as protected by the Bill of Rights.\textsuperscript{51} The Court held that it was unnecessary for a professor at the University of New Hampshire to answer certain questions put to him by a committee investigating subversive activities.\textsuperscript{52} In addition, the Court refused to compel any answers concerning the contents of the professor's academic lecture.\textsuperscript{53}

Justice Frankfurter's concurrence set out four freedoms which he believed were essential to the growth of the academic community. He found it imperative that the university be free to determine for itself: 1) who may teach; 2) what may be taught; 3) how it shall be taught; and 4) who may be admitted to study.\textsuperscript{54}

In Regents of the University of California v. Bakke,\textsuperscript{55} the Court restated the four academic freedoms and concluded: "It is the business of the university to provide that atmosphere which is most conducive to speculation, experiment and creation . . . an atmosphere in which there prevails the four essential freedoms."\textsuperscript{56}

E. Privilege and the Balancing Approach Taken By the Federal Courts

The two fundamental interests at odds are the legitimate need to prove the existence of discrimination and the need to protect academic freedom. These two competing interests create difficulty in the privilege analysis.

Generally, the Federal Rules of Civil Procedure encourage full discovery of relevant, unprivileged information.\textsuperscript{57} This allows two major objections to discovery: relevance and privilege.

\textsuperscript{50} 354 U.S. 234 (1957).
\textsuperscript{51} Id. at 250.
\textsuperscript{52} Id. at 238. In 1951, New Hampshire passed a statute which had as its purpose the regulation of subversive activities. Subversive organizations were declared unlawful. Subversive persons were denied government employment. Those employed as teachers in public educational institutions were included in the ban. In 1953, the Legislature gave the attorney general the right to direct full investigations of any subversive activity. Petitioner was summoned to two such proceedings. Id.
\textsuperscript{53} Id. at 254.
\textsuperscript{54} Id. at 263.
\textsuperscript{55} 438 U.S. 265 (1978).
\textsuperscript{56} Id. at 312.
\textsuperscript{57} FED. R. CIV. PROC. 26(b).
The Federal Rules of Evidence originally proposed by the Advisory Committee and approved by the Supreme Court recognized nine defined privileges: required reports, attorney-client, psychotherapist-patient, husband-wife, clergyman-communicant, political vote, trade secrets, secrets of state and other official information, and identity of informer. However, Congress rejected this attempt to make the creation of new privileges impossible. The Federal Rules of Evidence, adopted by Congress, permitted the creation of new privileges where applicable.

Federal Rule of Evidence 501 states that, except where provided by the Constitution or an Act of Congress or in Supreme Court rules, the rules of privilege shall be governed by the common law. It further provides that where elements of the claim or defense are governed by state law, that privilege shall be determined in accordance with state law.

Therefore, California may implement state privilege law in accordance with current principles governing privilege. The principles which currently govern privilege law are in large part derived from elements established by Wigmore. Wigmore established four conditions as necessary for the establishment of a privilege against the disclosure of communications:

1) the communications must originate in a confidence that they will not be disclosed, 2) the 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, and 4) the injury that would inure to the relation by the disclosure of communications must be greater than the benefit thereby gained for correct disposal of litigation.

Both the federal courts and the California courts have refused to find these conditions applicable to peer evaluations in order to support the creation of a broad category of privileged communication in this area. Rather, noting the importance of these factors, they have chosen to look at the factors as they pertain to the particular facts surrounding each individual case.
The leading cases in the federal courts have produced opposite results. In *In re Dinnan*, the Fifth Circuit held no qualified privilege exists to protect peer evaluation information from disclosure. Asserting a qualified privilege to prevent the discovery of such information, a review board committee member refused to answer deposition questions concerning his vote on plaintiff’s application for promotion. The court held that the necessity of proving discrimination outweighed the benefits of academic freedom.

This balancing process produced an opposite result in *Gray v. Board of Higher Education, City of New York*, the court found in favor of protecting the confidentiality of the faculty peer review system. On appeal, the Second Circuit reversed, but noted that where a plaintiff has been provided with reasons for denial of tenure, the scale tips in favor of instituting a privilege. However, absent such a statement of reasons from the reviewing committee, the court ruled that uninhibited discovery should prevail. The ruling should encourage limited disclosure by the university prior to a lawsuit.

A continuance of this ad hoc balancing process appears to be the trend in the federal courts. Recent cases still weigh the plaintiff’s need for discovery against the university’s need for confidentiality. The courts have continued to apply Wigmore’s four conditions on an ad hoc basis, as opposed to an abstract application creating a privilege applicable to all peer evaluation cases.

California courts have failed to provide any clearer guidelines. Its constant refusal to provide a bright line rule on the subject has led to a patternless mixture of absolute privilege, partial discovery and full discovery.

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66. 661 F.2d 426, 429 (5th Cir. Unit B 1981).
67. Id.
68. Id. at 432-33.
70. Id. at 94.
71. *Gray*, 692 F.2d at 908.
72. Id.
73. *Zuustinsky*, 96 F.R.D. 622 (N.D. Cal. 1983). The Zuustinsky court refused to create an absolute privilege. However, the court stated that “materials in issue here are eligible for treatment as privileged confidential communications.” The court held that the question of privilege must be determined on “a case-by-case adjudication ‘in the light of reason and experience.’ ” Id. at 624 (quoting Trammel v. United States, 445 U.S. 40, 46-48 (1980)).
III. Analysis

The peer evaluation system has become an area of major concern to California courts. It is this confidentiality requirements of the system, and not the process itself have come into question. A refusal to order discovery could mean the end of a lawsuit, while an order to allow such discovery could deter open discussion of a candidate's qualifications, thereby weakening the factual basis of the peer evaluator's decisions.

The Balancing Process in California

California courts have refused to create a privilege. The decision to order disclosure is determined on a case by case basis. Consequently, leading California cases offer no coherent principles which could bind them together.

In King v. University of California, it was held that the denial of tenure does not deprive a professor of any significant property or liberty interest in employment. In discussing appellant's liberty interest, the court took the position that absent accusations of incompetence, no significant stigma is created simply by the denial of tenure. It held that the failure to achieve excellence is not equated with incompetence. The court demanded a showing that appellant's reputation was adversely affected in order for a liberty interest to be violated.

After denying the due process claim, the court focused its attention on the disclosure issue. Appellant contended that it was unfair to deny him access to his files and yet expect him to make a prima

74. See generally County of San Diego v. Superior Court (Tri-City Hosp. Dist.), 176 Cal. App. 3d 1009, 222 Cal. Rptr. 484 (1986); King, 138 Cal. App. 3d 812, 189 Cal. Rptr. 189 (1982); Dong, 119 Cal. App. 3d 516, 174 Cal. Rptr. 160 (1981); 138 Cal. App. 3d 812, 189 Cal. Rptr. 189 (1982). Appellant was hired as a lecturer in 1973. In 1976 he was promoted to assistant professor. Between 1979 and 1980, appellant was considered for tenure but tenure was not recommended. He petitioned the trial court for a writ of mandate to compel the university to conduct a full adversary hearing and to disclose the entire contents of his tenure file. The trial court denied the request and the court of appeal affirmed. Id. at 815, 189 Cal. Rptr. at 191.

75. Id. at 815, 189 Cal. Rptr. at 191. Appellant attempted to distinguish Roth, by stating Roth had been hired for only one year whereas appellant had been reappointed as assistant professor and had been employed for a total of eight years. The court believed the distinction to be without merit and added: "The issue has been extensively litigated. The unanimous conclusion is that a non-tenured professor has no cognizable property interest in the renewal of his employment." Id.

76. Id. at 816, 189 Cal. Rptr. at 192.

77. Id. at 816, 189 Cal. Rptr. at 192.

78. Id.

79. Id.
facie case of discrimination in order to obtain a hearing. The court rejected this contention.

After taking all interests into consideration, the court refused to order disclosure because the university's need to maintain confidentiality outweighed any benefit that the plaintiff could derive from disclosure. In addition, the court believed the plaintiff's interest in disclosure of information was sufficiently protected by the university's policy to provide each candidate with a summary of the information contained in his or her personnel file.

The court in King, somewhat mistakenly relied upon the Board of Trustees v. Superior Court (Dong). The King court erroneously concluded that the discovery in Dong had been limited. However, the Dong court released the plaintiff's file in its entirety, exempting only the names of the evaluators.

Although, the results were different in these two cases, the courts followed similar analyses. In Dong, the court sought to reconcile a strong policy in favor of discovery with the inalienable right to pursue and obtain privacy. The same policy consideration weighed heavily on the minds of the court in King.

However, the remedies afforded the professor in King and those afforded him in Dong were fundamentally different. In King, the plaintiff received a university prepared synopsis of the contents of his file and the court refused to order any further disclosure. In Dong, the court ordered the university to provide plaintiff with an exact duplication of the university's personnel files, absent only the identity of his evaluators. The King court provided the university with greater protection. Information prepared and made available by the

80. Id. at 818, 189 Cal. Rptr. at 193.
81. Id.
82. Id. at 819, 189 Cal. Rptr. at 194.
83. Id. at 812, 189 Cal. Rptr. at 190.
86. 119 Cal. App. 3d at 532, 174 Cal. Rptr. at 169.
87. Id. at 533, 174 Cal. Rptr. 169. The court stated: "We accordingly hold that Dr. Dong is entitled to discovery of his personnel file, subject to appropriate safeguarding of the rights of privacy of those who had furnished information therein concerning his qualifications for employment, promotion, additional compensation, or termination..." Id.
88. 138 Cal. App. 3d at 815, 189 Cal. Rptr. at 191. The appellant requested a copy of his personnel file. He received a summary provided for by university regulations. In addition, the appellant filed an appeal with the standing committee on privilege and tenure. The committee concluded that no violation of university policy had occurred. Id.
89. 119 Cal. App. 3d at 533, 174 Cal. Rptr. at 169. The court believed that Dr. Dong was entitled to the discovery of his personnel file and that the only protection necessary to safeguard the board members' right to privacy was the deletion of their names. Id.
university allowed it to control its own procedures. Control of its own processes is essential to academic freedom. Such control assures review boards the secrecy necessary to perform their function in an uninhibited manner.

The King court also relied on McKillop v. Regents of the University of California. The McKillop court explicitly denied the plaintiff's motion to compel production of documents. This is a greater protective stance than that taken by the Dong court. If the King court had wanted to fully endorse the Dong court's position, it could have referred to that case exclusively. However, the court's reliance on McKillop indicated its intention to afford the university greater confidentiality in its records.

Despite reliance on cases which create some type of privilege, the California courts have refused to develop a privilege applicable to state cases. They continue to rely upon the process of weighing and balancing competing interests.

This continued use of the balancing test was most recently illustrated in County of San Diego v. Superior Court. The court refused to grant plaintiff discovery of notes, transcripts or memoranda of committee members evaluating a hospital's qualifications as a trauma unit. After balancing the interests, the court concluded that the public's interest in maintaining quality health care outweighed any interest posed by the plaintiff. However, the court refused to find a privilege under any existing statute or code.

IV. PROPOSAL

Currently, peer review committees are given no solid ground on which to walk. Absent predictability, which could be provided by an absolute communication privilege, it is difficult for committee members to adequately anticipate the repercussions of their deliberation.

The most viable solution to this problem is the establishment of an absolute communication privilege, protecting the relationship among faculty evaluators. Several factors support such a conclusion. First, an absolute communication privilege is supported by the anal-

91. Id. at 1281. Petitioner was denied tenure at the University of California Davis. She requested the production of all papers, letters, forms, reports, and other documents included in personnel files of the university. Id. at 1271.
93. Id. at 1015, 222 Cal. Rptr. at 486.
94. Id.
95. Id. at 1024, 222 Cal. Rptr. at 492.
ysis underlying the Wigmore factors. Second, the privilege will not significantly harm litigants because the implementation of adequate university procedures should provide adequate protection to the plaintiff. Third, case analysis suggests that academic freedom protections should be extended to peer evaluation committees. Fourth, courts have made various attempts to protect peer evaluation material by constructing obstacles other than privilege.96

A. Supporting an Absolute Communication Privilege: The Wigmore Factors

The four Wigmore factors continue to play an essential role in the creation of privilege. An analysis of these four factors supports the creation of an absolute communication privilege.

First, a communication must "originate in confidence," if it is to be afforded privilege.97 Communications that "originate in confidence" are made with the assumption that they will be kept in confidence. When faculty members serve on a peer evaluation board, they serve with the assumption that their comments will be heard only by those colleagues present at such deliberations. If this assumption was not fundamental to the system, questions of discovery would never surface.

This assumption is supported by university policy as most universities refuse to disclose the information contained in peer review files. However, some universities have allowed disclosure limited to a statement of the reasons for denial.98

Second, such confidentiality must be essential to the full and satisfactory maintenance of the parties' relationship.99 This requires: 1) that the peer evaluation system be found essential to academic excellence; and 2) that confidentiality is found essential to the maintenance of the peer review committees.

Applying university standards is a matter of professional judgment.100 The universities of this country have chosen peer review evaluations as a means of regulating the quality of their faculties. In E.E.O.C. v. University of Notre Dame Du Lac101 the court commented on the peer review process: "It is clear that the peer review process is essential to the very lifeblood and heartbeat of academic

96. See supra note 64 and accompanying text.
97. 8 J. WIGMORE, supra note 19, § 2285.
99. Id.
100. Johnson, 435 F. Supp. at 1346.
101. 715 F.2d 331 (7th Cir. 1983).
excellence and plays a most vital role in the proper and efficient functioning of our nation's colleges and universities."

In order for these committees to accurately evaluate the abilities of their colleagues, their members must provide a frank and unrestrained critique. Tenure decisions are highly subjective. Spontaneity encourages faculty members to voice their subjective concerns. Confidentiality enhances free and spontaneous deliberation. Confidentiality also ensures that a member speak with candor, free from the fear that a subjective statement will later be misconstrued or taken out of context. Confidentiality is essential to the maintenance and the function of these committees.

A number of commentators believe that absent such confidentiality, committee members will be reluctant to criticize. The destruction of such confidentiality would have a chilling effect on the entire process, especially in smaller universities and departments where personal friendships and close ties naturally inhibit criticism.

Third, the relationship must be one which, in the opinion of the community, ought to be sedulously fostered. The guarantee of academic freedom is a reflection of society's desire to protect the quality of academic life. Americans regard education as a key to a prosperous future. The excellence of such education is the essence of its value. The United States Supreme Court in *Sweezy*, when reflecting upon the importance of education, commented: "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."

Fourth, Wigmore requires that injury to the relationship by disclosure of communications must be greater than the benefit gained from the correct disposal of litigation. The harm which would incur to the peer evaluation system could mean a failure of the entire system. On the other hand, failure to compel discovery in certain

102. *Id.* at 336.
103. *Id.*
104. *Id.* The court emphasized the importance of confidentiality throughout the decision making process. The court compared peer evaluation deliberations with both jury deliberations and the decision making procedures of government agencies. The court stated: "Just as a limited executive privilege is necessary for the executive branch of our government to function properly, and as confidential judicial and jury deliberations are essential to preserve the integrity of those processes, confidentiality is equally critical in faculty tenure selection process . . . ." *Id.* at 336-37.
105. 8 J. WIGMORE, *supra* note 19, § 2285.
107. 8 J. WIGMORE, *supra* note 19, § 2285.
situations may not signal the end of a lawsuit.

As the court in Dong suggested, requested material may often be available through other sources.\textsuperscript{108} If a privilege is created, the plaintiff would simply be forced to develop these other sources. Some requests have no specific purpose. A plaintiff may request all obtainable information in hopes of finding some small piece of information, possibly helpful, to his or her case. Some universities have responded to the legitimate need for information by voluntarily providing limited data concerning the decision making process. These procedures prevent overbroad requests for irrelevant information and yet provide plaintiffs with a source for information.

B. Supporting an Absolute Communication Privilege: University Implemented Disclosure Procedures

If an absolute communication privilege were erected, any negative effects could be alleviated by the implementation of disclosure procedures at the university level. The university could: 1) prepare a list of reasons for plaintiff's denial of tenure; or 2) prepare a summary of the plaintiff's entire personnel file; or 3) release the file in its entirety, deleting only the names of the reviewers.

Both federal and California courts have refused to order full disclosure, when the university discloses the reasons for the denial of tenure.\textsuperscript{109} The American Association of University Professors (AAUP) supports this solution. The AAUP was founded in 1915 specifically to protect academic freedom.\textsuperscript{110} The purpose of the AAUP, as expressed in its Constitution, is "to facilitate a more effective cooperation among teachers and research scholars . . . [and] to increase the usefulness and advance the standards, ideals and welfare of the profession."\textsuperscript{111} The AAUP focuses on the protection of both the academic profession as a whole, and its individual members.\textsuperscript{112}

Gray explicitly adopted the standard set forth in the American Association of University Professors brief.\textsuperscript{113} The AAUP's standard requires that: 1) an unsuccessful candidate for reappointment or ten-
ure receive a meaningful written statement of reasons from the peer review committee; and 2) an unsuccessful candidate be afforded proper intramural grievance procedures.\(^{114}\) The AAUP proposed that where such procedures are followed, the actual notes, memoranda and transcripts contained in the board’s file should be considered privileged.\(^{115}\)

However, the court explicitly rejected complete privilege, and felt that university controlled disclosure adequately met the court’s standard of fairness.\(^{116}\) The autonomy and academic freedom of the university is protected where the university controls its own disclosure procedures.

*Gray, King,* and *McKillop* suggest the feasibility of making a higher standard of protection available to universities. Although no court requires these types of limited disclosure procedures, they encourage them. Universities which implement disclosure procedures may better protect both their peer review boards and their faculty members.

However, there are negative repercussions which may result from the implementation of disclosure procedures. The most fatal of these is the creation of an entitlement.\(^{117}\) Such an entitlement could create a property or liberty interest.\(^{118}\) Property and liberty interests are subject to a higher standard of protection under the due process clause. However, the decision to furnish reasons for denial of tenure is a far cry from instituting a right to reappointment.\(^{119}\) Case law has not suggested that these procedures create a legal right to reappointment.\(^{120}\)

Increase in litigation is a secondary problem.\(^{121}\) However, it is arguable that knowledge may prevent a misguided lawsuit from finding its way into the courtroom.\(^{122}\) "An individual cut off from any willingness to explain has only the recourse of filing suit as the one

114. *Id.*
115. *Id.*
116. *Id.*
117. *Van Alstyne, Furnishing Reasons for a Decision against Reappointment: Legal Considerations,* 53 AAUP *Bulletin* 285-86 (Summer 1976). Professor William Van Alstyne is Perkins Professor of Law at Duke University. The comments being discussed were offered in response to a question from an AAUP chapter about potential legal obligations incurred in providing reasons for a decision not to reappoint. *Id.*
118. *Id.* at 285.
119. *Id.*
120. *See Perry,* 408 U.S. 593 (1972).
121. *Van Alstyne,* *supra* note 117, at 286.
remaining means of compelling an explanation.”

Universities which refuse to institute such procedures have failed to address properly the concerns of their teaching staffs. Limited disclosure can prevent hostility and distrust. If a decision is made behind closed doors, an aggrieved teacher is without a remedy. A professor denied tenure is unable to obtain the information necessary to adequately critique his or her performance. If a decision is made for proper reasons, the university has little to fear. Limited disclosure by the university prevents ill will and allows the professor to learn from his or her mistakes.

It is advantageous for the university to control its own disclosure. Peer review evaluations are highly subjective and are not easily amenable to judicial scrutiny. University control may prevent judicial second guessing of tenure decisions.

Universities interested in a fair and just balance of these interests should adopt some type of disclosure procedures. University prepared synopses are fundamental to the adoption of a hands-off approach by the courts.

C. Supporting an Absolute Communication Privilege: Academic Freedom

The courts have consistently indicated the importance of the confidentiality of the content of peer review discussions to the guarantee of academic freedom. The interests at stake have been discussed at length in other portions of this comment. Although there has been no explicit United States Supreme Court decision which directly addresses the protection of peer review evaluations, the principles endorsed in Sweezy and Bakke form a presumption favoring protection in this area. As stated by the Court in both cases, the concerns over academic freedom are, in part, satisfied when a university may determine for itself “who may teach.” Although neither case specifically addressed this issue, the Court found it appropriate to include “who may teach” as an element of academic freedom.

“Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always be free to inquire, to study and to evaluate, to gain new maturity and understanding; oth-

123. Van Alstyne, supra note 117, at 286.
124. Sweeney, 569 F.2d at 176.
125. See generally E.E.O.C. v. University of Notre Dame Du Lac, 715 F.2d 331 (7th Cir. 1983).
erwise our civilization will stagnate and die." An atmosphere of distrust and suspicion can be no greater than where one believes his or her confidences about a colleague may be disclosed.

The interests justifying an academic freedom privilege in Sweezy are applicable to a finding of academic privilege in the field of peer review evaluations. The Court stated that university life must be free from inhibition and stagnation. These concerns are applicable to all academic situations. The depth and importance of these interests was expressed in Keyishian v. Board of Regents, where the Court declared: "The vigilant protection of Constitutional freedoms is nowhere more vital than in the community of American schools."

The concerns expressed and protections instituted are equally applicable to all phases of the educational process. The contents of a course or a lecture should not be more protected than those deliberations concerning who may teach the course. The process of selecting students should not be more protected than the process of selecting faculty.

D. Supporting an Absolute Communication Privilege: Judicial Attempts to Protect the Peer Evaluation System

Both federal and state courts sought to provide the confidentiality required by the peer evaluation system. One of these techniques is the continued refusal to order full disclosure when a university has already provided some type of disclosure. But the courts have effectively prevented disclosure by requiring plaintiffs to establish a prima facie case of employment discrimination prior to disclosure.

In Zaustinsky v. University of California, the court applied Wigmore's four conditions. In applying the fourth condition regarding injury versus benefit, the court required the plaintiff, at

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127. Id. at 250.
129. Id. at 603.
133. See generally Gray, 692 F.2d 901 (2d Cir. 1982); King, 138 Cal. App. 3d 812, 189 Cal. Rptr. 189 (1982).
134. See Lynn, 656 F.2d 1337 (9th Cir. 1981).
136. Id. at 624-25.
some stage, establish a *prima facie* case of employment discrimina-
tion. Absent such a showing, injury resulting from disclosure is
greater than the benefit obtained from such disclosure.

In establishing a *prima facie* employment discrimination case,
the plaintiff must show:

1. that he belongs to a racial minority;
2. that he applied and was qualified for a job for which the employer was seeking applicants;
3. that, despite his qualifications, he was rejected; and
4. that after his rejection the position remained open and the employer continued to seek applications from persons of complainant's qualifications.

Given the particularly subjective nature of these decisions, showing the existence of these four elements could be difficult. The plaintiff must meet this burden prior to the issuance of any discovery order. These hurdles increase the plaintiff's burden. Such actions by the courts suggest their slant in favor of university confidentiality. If courts did not believe that the interests and arguments of the university were meritorious, they would refuse to place any obstacles in the way of free and open discovery. Their refusal to allow these interests to be overshadowed indicates a willingness to offer further protections to the peer evaluating system.

As the litigation in this area increases, it will become more difficult for courts to side-step the issue. Universities will demand an answer which stands on solid ground. Those serving on peer review boards will demand confidentiality. Where such confidentiality cannot be promised, silence will prevail. Where silence prevails, debate and criticism is lost. Where debate and criticism are silenced, academic excellence is forever in jeopardy.

V. CONCLUSION

This comment traced a problem currently faced by universities and colleges nationwide. Universities are haled into court by plaintiffs demanding the full and complete disclosure of peer review evaluations which, until recently, were held confidential. The result of this litigation has been a mass of contradiction. Neither plaintiff nor defendant can predict the outcome of a discovery request in this area.

Peer evaluation committees have as their task the selection of

137. *Id.* at 625.
139. *Id.*
applicants for available tenure positions. The peer review process has been referred to as the "lifeblood and heartbeat of academic excellence."\textsuperscript{140} Academic excellence is a cherished part of American life. Confidentiality is a necessary element for these committees to effectively function because it facilitates free and open debate. Where a committee member is faced with the threat that his or her comments may be made public such debate may be stifled.

The concerns of the university conflict with those of the tenure applicant. Traditionally, courts have sought to encourage free and open discovery. The uninhibited search for the truth has been the primary function of both the criminal and civil courts of this country.\textsuperscript{141} The plaintiff's need for full discovery is at its greatest where he or she alleges discrimination because equal opportunity has traditionally received stringent statutory and constitutional protection.

Only where a relationship is fundamentally important to society will the law of privilege protect values other than the search for truth. Universities nationwide have sought the protection provided by privilege in an attempt to protect the confidentiality of peer review evaluations.

The response by both federal and California courts is to determine each case on its own facts. The courts have chosen to use a balancing approach in determining the outcome of the particular litigation. The interests of the university are weighed and balanced against those of the plaintiff. \textit{Ad hoc} determination, rather than a concrete line, has led to confusion.

An absolute communication privilege would alleviate the confusion. Peer evaluation boards could function properly and efficiently, free from the fear of discovery orders. The proper functioning of these boards is essential to academic excellence.

A number of reasons support the creation of an absolute communication privilege protecting the content of the deliberation process undertaken by a peer review committee. But perhaps the call for an absolute communication privilege in this area can no better be supported than by the words of Chief Justice Warren:

\begin{quote}
The essentiality of freedom in the community of American universities is almost self-evident. No one should under estimate the vital role in a democracy that is played by those who guide
\end{quote}
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.\textsuperscript{142}

\textit{Kimberly S. Paul}

\textsuperscript{142} \textit{Sweezy}, 354 U.S. at 250. Although \textit{Sweezy} is not factually on point, the concerns expressed by the United States Supreme Court reflect the concerns of this comment. Chief Justice Warren was speaking in the context of subversive activity, yet he was speaking to a much broader concern. He spoke of protections not for the individual but of protections which are the very foundation of our educational system.