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# The Case for Candor

## APPLICATION OF THE SELF-CRITICAL ANALYSIS PRIVILEGE TO CORPORATE DIVERSITY INITIATIVES

*Pam Jenoff*

### INTRODUCTION

In July 2009, newspaper headlines across the country detailed a high-profile incident in which a white state trooper in Cambridge, Massachusetts had responded to a report of a possible midday break-in at a Harvard Square residence by “two males, unknown race.”<sup>1</sup> As the trooper, Sergeant James Crowley, approached the residence, the dispatcher radioed him that the two men were black.<sup>2</sup> Crowley confronted the men, one of whom turned out to be Henry Gates, a highly respected Harvard professor and the owner of the house, in the foyer.<sup>3</sup> When Crowley asked Gates to step onto the porch and produce identification, Gates refused.<sup>4</sup> The confrontation between the men escalated and Gates was arrested, taken from his own home in handcuffs, and charged with disorderly conduct.<sup>5</sup>

Allegations of racial discrimination followed from local, national, and international media. Everyone from the Reverend Jesse Jackson to President Barack Obama weighed in, and tempers flared. The controversy seemed inevitably destined to escalate.<sup>6</sup> However, a full-scale crisis was averted when Obama invited Gates and Crowley to the White House to discuss the

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<sup>1</sup> Don Van Natta, Jr. & Abby Goodnough, *After Call to Police, 2 Cambridge Worlds Collide in an Unlikely Meeting*, N.Y. TIMES, July 27, 2009, at A13.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> Peter Baker & Helene Cooper, *President Tries to Defuse Debate over Gates Arrest*, N.Y. TIMES, July 25, 2009, at A1.

incident over drinks.<sup>7</sup> This so-called “Beer Summit” produced two positive results. First, Gates and Crowley were able to engage in a difficult but candid dialogue, both at the White House and on a subsequent occasion in Cambridge, which helped them to appreciate how the misunderstanding between them had arisen.<sup>8</sup> Second, a task force was formed to study police-community relations on a broader level, with the goal of long-term reform.<sup>9</sup>

The situation that transpired in Cambridge is evocative of scenarios that play out daily in workplaces across the United States. Employees raise allegations of discrimination and/or harassment, based on race, gender, age, or other protected classifications, as a result of interactions with or treatment by supervisors or colleagues. In response, companies investigate and attempt to address these individual concerns. They also seek to improve diversity and workplace relations at-large through various types of initiatives. First, using either internal resources or outside consultants, companies undertake assessments of their workforce demographics, including objective factors such as employee composition, recruitment, promotion, compensation, and retention.<sup>10</sup> These assessments can also evaluate subjective elements such as employee morale, perceptions, and concerns, and look at the efficacy of equal employment and antidiscrimination policies.<sup>11</sup> Armed with the results of such audits, companies can provide diversity training and organize diversity councils or committees in order to improve workplace relations<sup>12</sup>

Yet despite the similarities in the tensions and issues giving rise to the impetus for dialogue and reform in these two scenarios, these workplace diversity initiatives face a significant barrier that the Beer Summit did not: corporate efforts to assess, discuss, and improve diversity are often met with resistance from a company’s legal department. Counsel—

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<sup>7</sup> Helene Cooper & Abby Goodnough, *In a Reunion Over Beers, No Apologies, but Cordial Plans to Have Lunch Sometime*, N.Y. TIMES, July 31, 2009, at A10.

<sup>8</sup> *Id.*

<sup>9</sup> Meghan E. Irons, *National Panel Picked to Review Gates Arrest; Police Procedure Among the Topics*, BOSTON GLOBE, Sept. 11, 2009, at B3; Krissah Thompson, *Group to Review Henry Gates Incident*, WASH. POST, Sept. 10, 2009, at A4.

<sup>10</sup> Michael Delikat, *The Texaco Case and Lessons to Learn: How Can Corporations Manage Diversity Effectively?*, in LITIGATING EMPLOYMENT DISCRIMINATION CASES 181, 197 (Practicing Law Inst. 1997).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

concerned about the very real possibility that documents and conversations regarding diversity shortfalls and corrective measures may subsequently be used as evidence by plaintiffs in discrimination lawsuits—often discourage, limit, or in some cases veto outright the implementation of diversity studies and programs.<sup>13</sup> Ironically, these objections preclude diversity initiatives that might reduce the amount of employment litigation faced by a company in the long run. They also result in a culture where open dialogue on diversity issues is stymied to the detriment of employee relations and morale at-large.

One possible solution to this problem is the application of the self-critical analysis privilege to documents and other information regarding corporate diversity initiatives. The self-critical analysis, also called the self-evaluative privilege, has developed through the federal common law for exactly this purpose—to permit organizations to engage in candid self-examination that has institutionally and socially desirable benefits.<sup>14</sup> It has been recognized by courts in other contexts, such as aviation safety reports,<sup>15</sup> industrial safety team minutes,<sup>16</sup> and environmental compliance reports.<sup>17</sup> Applying the privilege to employment documents such as corporate diversity studies would allow companies to undertake rigorous self-assessment with the goal of improving workforce demographics and relations, without the fear of discovery in litigation.

However, courts have been largely unwilling to recognize the self-critical analysis privilege in the employment context.<sup>18</sup> This has left companies with uncertainty as to whether the privilege will apply and a general presumption that it will not—a situation that provides virtually no incentive to engage in self-examination of workforce issues beyond the bare minimum required by law, and to do little other than put a best face on the results of any studies undertaken.

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<sup>13</sup> *Id.* at 203; *see also* *Holt v. KMI-Cont'l, Inc.*, 95 F.3d 123 (2d Cir. 1996); *Stender v. Lucky Stores, Inc.*, 803 F. Supp. 259 (N.D. Cal. 1992); *Hardy v. New York News Inc.*, 114 F.R.D. 633 (S.D.N.Y. 1987).

<sup>14</sup> *See Johnson v. United Parcel Serv.*, 206 F.R.D. 686, 688-89 (M.D. Fl. 2002) (explaining the self-critical analysis privilege generally).

<sup>15</sup> *Tice v. Am. Airlines, Inc.*, 192 F.R.D. 270, 273 (N.D. Ill. 2000).

<sup>16</sup> *Hickman v. Whirlpool Corp.*, 186 F.R.D. 362, 363-64 (N.D. Ohio 1999).

<sup>17</sup> *Joiner v. Hercules, Inc.*, 169 F.R.D. 695, 699 (S.D. Ga. 1996).

<sup>18</sup> *See Deana A. Pollard, Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913, 993-96 (1999).

Moreover, the fact that diversity documents and other information may ultimately wind up in litigation has a chilling effect on workplace discourse, as individual employees may be reticent to come forward and speak freely for fear of disclosure. For example, courts have declined to recognize the application of the privilege for documents containing the conclusions of a voluntary diversity committee regarding corporate diversity efforts<sup>19</sup> and also with respect to employee statements regarding diversity in employee relations surveys.<sup>20</sup> If employees are left to fear that their comments made in contexts such as these may be subject to scrutiny in litigation, they are surely less likely to participate in such initiatives with full candor. The net effect is that cultural change is stifled and the impetus toward improvement is lost at the expense of costly litigation.

This article argues that courts' reluctance to recognize the privilege can be attributed to three factors. First, courts have erroneously relied upon *University of Pennsylvania v. Equal Employment Opportunity Commission*,<sup>21</sup> a case in which the Supreme Court declined to apply the self-critical analysis privilege to peer reviews conducted as part of the faculty tenure process, as a signal that the self-critical analysis privilege should not be applied generally in the employment context. This approach ignores the significant factual differences between *University of Pennsylvania* and other employment cases, such as those involving corporate diversity documents, as well as the narrow language of the Court's holding construing the issue in this fact-specific context.

Second, courts have misapplied the criteria that must be assessed to determine whether the self-critical analysis privilege should apply in employment cases. Specifically, they have favored bright-line tests that consider whether the documents were created voluntarily or as part of mandatory government reporting, and whether the information contained in the documents is of objective or subjective nature.<sup>22</sup> Reliance upon these artificial distinctions at the expense of the more nuanced balancing test that is at the heart of the privilege

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<sup>19</sup> Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 386 (N.D. Ga. 2001); Vanek v. Nutrasweet Co., No. 92 C 0115, 1992 WL 133162, at \*3 (N.D. Ill. June 11, 1992).

<sup>20</sup> Davis v. Kraft Foods N. Am., No. 03-6060, 2006 WL 3486461, at \*3 (E.D. Pa. Dec. 1, 2006); Johnson v. United Parcel Serv., 206 F.R.D. 686, 689-90 (M.D. Fl. 2002).

<sup>21</sup> 493 U.S. 182 (1990).

<sup>22</sup> See *infra* Part III.B.

analysis unduly excludes documents from protection and is inconsistent with the purpose of the privilege itself.

Third, and perhaps most fundamentally, courts have failed to recognize the changing nature of employment law, as reflected in more recent Supreme Court cases, which emphasizes the primacy of preventative and remedial measures by employers in effectuating the purpose of federal antidiscrimination laws.<sup>23</sup> This framework shift provides a basis for recognizing that self-examination, such as diversity studies and initiatives, is fundamental to the proactive measures in which the Court has mandated that employers engage, and that application of the self-critical analysis privilege to such endeavors is both necessary and appropriate.

This article examines the need for the self-critical analysis privilege in employment cases to protect documents such as diversity studies. Part I begins by defining the critical role that diversity plays in corporate culture today and explaining the ways companies seek to assess and improve diversity. Part II then chronicles the evolution of the self-critical analysis privilege in the employment context. Part III examines the historic reasons for its rejection and presents the three factors enumerated above as the reasons underlying courts' reluctance to recognize the privilege.

Part IV demonstrates that by revisiting outdated and flawed assumptions regarding the respective roles of prevention and remediation in employment discrimination law as articulated in more recent Supreme Court jurisprudence,<sup>24</sup> courts can and should recognize the self-critical analysis privilege for employment documents such as workplace diversity initiatives. This article concludes by proposing that by engaging in a nuanced balancing test that weighs the relative benefits and harms that would arise from disclosure of the documents in a particular case, courts can create a well-tailored and clearly defined privilege on which companies can rely, thereby encouraging corporate self-examination that will improve diversity and employee relations at-large, while still ensuring that plaintiffs have access to the information they need to pursue their claims.

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<sup>23</sup> Kolstad v. Am. Dental Ass'n, 527 U.S. 526, 545 (1999); Faragher v. City of Boca Raton, 524 U.S. 775, 805-06 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998).

<sup>24</sup> See sources cited *supra* note 23.

## I. UNDERSTANDING CORPORATE DIVERSITY INITIATIVES

Diversity has become an increasingly important part of American corporate culture in the past several decades.<sup>25</sup> Federal laws, such as Civil Rights Act of 1964 (commonly known as “Title VII”),<sup>26</sup> the Americans with Disabilities Act,<sup>27</sup> and the Age Discrimination in Employment Act,<sup>28</sup> protect employees from discrimination on the basis of such factors as race, disability, or age. However, companies have come to realize that recruiting and retaining a diverse workforce is more than just a legal obligation—it is essential for successful business operations.<sup>29</sup> As one commentator noted, “Managing diversity has been defined as ‘a desire to recognize, respect and capitalize on different strands and backgrounds in American society, like race, ethnic origin and gender.’”<sup>30</sup>

Thus, companies spend a significant amount of time and resources developing initiatives designed to assess and improve diversity. They regularly retain outside consultants and/or create high-level positions, and in some cases entire departments, devoted to analyzing and addressing diversity issues.<sup>31</sup> Corporations tout their diversity programs internally as a means of improving workplace morale and promote such initiatives outside the company to help recruitment, community relations, and reputation among peer entities.

Moreover, such diversity programs are well received by federal and state agencies charged with monitoring and enforcing equal employment opportunity and nondiscrimination laws, which generally regard such initiatives as examples of responsible corporate citizenship.<sup>32</sup> For example, the Equal Employment Opportunity Commission (EEOC) Task Force on Best Practices for Private Sector Employers noted in its report:

[A]s work progressed on the submissions made by various companies, it became clear that a number of them had done

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<sup>25</sup> Christopher Reynolds & Jane Howard-Martin, *Corporate Diversity Initiatives and Programs—Between a Rock and a Hard Place*, in 33RD ANNUAL INSTITUTE ON EMPLOYMENT LAW 39, 41 (Practicing Law Inst. 2004).

<sup>26</sup> 42 U.S.C. § 2000e-1 to -17 (2006).

<sup>27</sup> *Id.* §§ 12101-12213.

<sup>28</sup> 29 U.S.C. §§ 621-634 (2006).

<sup>29</sup> Delikat, *supra* note 10, at 196.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 197-98.

<sup>32</sup> Reynolds & Howard-Martin, *supra* note 25, at 41.

outstanding work in formulating comprehensive EEO and diversity strategies. Further, these companies impressed the Task Force with their ability to integrate workplace EEO and diversity into their basic business plans. The latter concept, i.e., that in a diverse nation and in a diverse world, having a diverse workforce is, at least, a business asset and, more likely, a business necessity, is the primary revelation of the work done by the Task Force.<sup>33</sup>

Diversity programs generally operate on two levels: first, persons charged with diversity matters conduct audits of various components of workplace diversity. These may include a snapshot of the demographic composition of the workforce overall, as well as an examination of protected groups in comparison with the larger population with respect to factors such as recruitment, promotions, compensation, and retention.<sup>34</sup> They also evaluate the efficacy of relevant company policies and procedures and may look at the history of discrimination and harassment complaints made both internally and to outside agencies.<sup>35</sup> Additionally, such studies also assess subjective issues, including employee opinions, concerns, and morale, through surveys, interviews, and focus groups.<sup>36</sup>

Diversity studies may reveal institutional problems such as disparities in compensation, trends with respect to certain types of discrimination complaints, or endemic perception issues. Armed with the results of the audit, companies then embark upon the second component of most diversity programs: remediation and improvement.<sup>37</sup> (Of course, companies may also undertake training and other initiatives without the benefit of diversity studies; however, the results of such self-examination enable an organization to custom tailor a diversity program and direct resources to the areas with the greatest need.) Initiatives may include reassessment of practices and policies, as well as training of supervisors and the workforce at-large.<sup>38</sup>

In addition, many companies seek to implement a diversity committee or council to improve workplace relations.<sup>39</sup>

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<sup>33</sup> EQUAL EMP'T OPPORTUNITY COMM'N, BEST PRACTICES FOR PRIVATE SECTOR EMPLOYERS (2009), available at [http://www1.eeoc.gov/eeoc/task\\_reports/best\\_practices.cfm?renderforprint=1](http://www1.eeoc.gov/eeoc/task_reports/best_practices.cfm?renderforprint=1).

<sup>34</sup> Delikat, *supra* note 10, at 197-98.

<sup>35</sup> *Id.* at 199.

<sup>36</sup> *Id.* at 198-99.

<sup>37</sup> *Id.* at 200-01.

<sup>38</sup> *Id.*

<sup>39</sup> *See id.* at 202.

Such an entity, generally made up of a wide range of employees representing various demographic groups and job levels, may engage in numerous activities, from informal discussions of prejudices and stereotypes they perceive within the company or larger society, to role playing and exercises, and even crafting suggestions for corporate reform.<sup>40</sup> Indeed, such dialogues may also be useful in revealing previously undisclosed biases that need to be addressed.<sup>41</sup>

Attempts to undertake the aforementioned diversity initiatives are greatly limited, however, by concerns over potential legal liability. In-house counsel, or in some cases outside counsel acting in a policing function, may restrict or reject diversity assessments and dialogues out of concern that problems revealed in the self-audit or the comments made in diversity discussions may be discoverable and used against the company as evidence of discrimination or harassment in subsequent employment litigation. Where assessments are permitted to proceed, the scope and rigor of the analysis, as well as the content of the final results, may be severely constrained by these liability concerns.<sup>42</sup>

## II. HISTORY OF THE SELF-CRITICAL ANALYSIS PRIVILEGE IN THE EMPLOYMENT CONTEXT

Evidentiary privileges are, by definition, the narrow exceptions to the rule that plaintiffs are entitled to unfettered discovery of “every man’s evidence.”<sup>43</sup> They reflect societal choices that certain relationships (such as those between husbands and wives) or activities (such as seeking legal or medical advice) should be valued above others.

The concept of privilege, which dates back to the sixteenth-century institution of compulsory appearance at court in the English common law system, evolved from two

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<sup>40</sup> See *id.* at 200.

<sup>41</sup> See Pollard, *supra* note 18, at 947.

<sup>42</sup> See Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN’S L. REV. 191, 271-74 (1989) (noting attorneys’ propensity to sanitize advice where privilege is not available). Conversely, this study found that in the scenario where a well-established privilege such as the attorney-client privilege could be relied upon, two-thirds of attorneys surveyed indicated that they had specifically raised the privilege as a means of encouraging candid discourse. *Id.* at 243.

<sup>43</sup> *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN HENRY WIGMORE, EVIDENCE § 2192 (3d ed. 1940)); see also John Louis Kellog, *What’s Good for the Goose...Differential Treatment of the Deliberative Process and Self-Critical Analysis Privileges*, 52 WASH. U. J. URB. & CONTEMP. L. 255, 256 (1997).

different theoretical schools.<sup>44</sup> Early notions of privilege were grounded in a humanist rationale, which based the justification for withholding certain information from discovery upon normative human values such as honor and privacy.<sup>45</sup>

However, modern privilege law derives primarily from a second, instrumentalist theory, which explains that “the primary justification for privileges is that if confidential communications or documents are subject to discovery in litigation, this lack of complete confidentiality will negatively affect numerous socially-useful functions and relationships.”<sup>46</sup> Thus, under an instrumentalist conception, society needs privileges because in their absence, individuals will be discouraged from engaging in certain socially desirable behavior.<sup>47</sup>

The instrumentalist rationale was codified by John Henry Wigmore, who, in his treatise on evidence, set forth four fundamental criteria necessary for the establishment of a privilege:

- (1) The communications must originate in a *confidence* that they will not be disclosed.
- (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
- (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.
- (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for correct disposal of the litigation.<sup>48</sup>

These considerations generally underpin the application of modern privilege theory, including that of the self-critical analysis privilege.

#### A. *The Employment Context*

As a preliminary matter, it is significant to note that the majority of employment cases are brought pursuant to the federal nondiscrimination statutes, such as Civil Rights Act of 1964 (commonly known as “Title VII”),<sup>49</sup> the Americans with Disabilities Act,<sup>50</sup> and the Age Discrimination in Employment

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<sup>44</sup> EDWARD J. IMWINKELREID, *THE NEW WIGMORE: A TREATISE ON EVIDENCE* 98 (Richard D. Friedman ed., 2002).

<sup>45</sup> *Id.* at 105.

<sup>46</sup> *Id.* at 108-09.

<sup>47</sup> *Id.* at 110-12; see also Pollard, *supra* note 18, at 998.

<sup>48</sup> JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* 527 (Little, Brown & Co. 1961).

<sup>49</sup> 42 U.S.C. § 2000e-1 to -17 (2006).

<sup>50</sup> *Id.* §§ 12101-12213.

Act.<sup>51</sup> Thus, the battle over the self-critical analysis privilege in the employment context has been fought primarily in the federal courts.

It is also important to recognize that the debate over the self-critical analysis privilege in the employment context initially arose with respect to affirmative action plans, and the cases have largely focused on that issue.<sup>52</sup> Employers who are awarded government contracts are generally required under Executive Order 11246 to submit to the Office of Federal Contract Compliance Programs (OFCCP) annual Equal Employment Opportunity and Affirmative Action reports. These reports detail objective data as to the hiring, termination, compensation, and promotions of candidates in protected groups in comparison to the workforce at-large, and subjective analysis as to how the employer assesses its own performance and intends to improve in the coming year.<sup>53</sup> Plaintiffs in employment litigation have sought access not only to the empirical data submitted to the government with respect to affirmative action, but also to the subjective portions of the reports in which employers are required to address deficiencies and propose plans to improve same.<sup>54</sup>

The discoverability of mandatory affirmative action plans prepared for the OFCCP, while informative from a historical perspective, is not the focus of this article. First, since only companies with government contracts are required to submit affirmative action reports, the discussion of that issue alone has narrow application. Moreover, the peculiarities of OFCCP affirmative action programs, in terms of their mandatory nature and specific reporting requirements, render them inapposite for the present discussion of diversity initiatives, most of which are voluntary. Most fundamentally, the continued reliance on these programs as the primary vehicle for debate is misplaced. Before the development of the present-day diversity management culture, the self-analysis

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<sup>51</sup> 29 U.S.C. §§ 621-634 (2006).

<sup>52</sup> See generally Ellen Deason, *The Self-Critical Analysis Privilege and Discovery of Affirmative Action Plans in Title VII Suits*, 83 MICH. L. REV. 405 (1984); see also Donald P. Vandegrift, Jr., *The Privilege of Self-Critical Analysis: A Survey of the Law*, 60 ALB. L. REV. 171, 180 (1996) ("In general, the battleground [for the self-critical analysis privilege] in equal employment cases is the affirmative action plan.").

<sup>53</sup> 41 C.F.R. § 60-1.7 (2006).

<sup>54</sup> See, e.g., *Witten v. A.H. Smith & Co.*, 100 F.R.D. 446 (D. Md. 1984), *aff'd*, 785 F.2d 306 (4th Cir. 1986); *Dickerson v. U.S. Steel Corp.*, 14 Fair Empl. Prac. Cas. (BNA) 1448 (E.D. Pa. 1976).

done as part of the OFCCP process was once the predominant means by which companies assessed workforce diversity. Today, however, it is largely ancillary to the myriad other tools of self-assessment and self-improvement that companies seek to undertake voluntarily as a business best practice with respect to diversity initiatives globally and not just those required by government contracts.

*B. Origins of the Self-Critical Analysis Privilege*

For the many employment discrimination lawsuits that arise under the numerous federal statutes protecting employees from discrimination, federal evidentiary privileges will apply. Federal Rule of Evidence 501 provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.<sup>55</sup>

Thus, the Federal Rules of Evidence grant authority to federal courts to recognize privileges as they evolve and develop in the common law. By enacting Rule 501 rather than specific privilege rules, Congress's purpose was "to provide the courts with the flexibility to develop rules of privilege on a case by case basis."<sup>56</sup>

The self-critical analysis privilege is such a privilege, created not by the Constitution, Congress, or the Supreme Court, but rather through federal jurisprudence of the past four decades. The foundation for the privilege was laid by the District Court for the District of Columbia in 1970.<sup>57</sup> In *Bredice v. Doctors Hospital, Inc.*, the court held that the defendant hospital's meeting minutes and reports regarding a patient's death were not subject to discovery in a medical malpractice action.<sup>58</sup> The court did not specifically mention the self-critical analysis privilege, but noted that "[t]here is an overwhelming public interest in having those staff meetings held on a

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<sup>55</sup> FED. R. EVID. 501.

<sup>56</sup> 120 CONG. REC. 40,891 (1974).

<sup>57</sup> *Bredice v. Doctors Hosp., Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); *see also* Vandegrift, *supra* note 52, at 178.

<sup>58</sup> *Bredice*, 50 F.R.D. at 251.

confidential basis so that the flow of ideas and advice can continue unimpeded. . . . These committee meetings, being retrospective with the purpose of self improvement, are entitled to a qualified privilege on the basis of this overwhelming public interest.”<sup>59</sup> The court also observed that “[c]onstruc-tive professional criticism cannot occur in an atmosphere of apprehension” that such materials might be used against the organization in subsequent litigation.<sup>60</sup>

Thus in *Bredice*, a court recognized for the first time that there was a strong public interest in allowing the free discussion of information in socially useful critical self-examination, and that if discovery of such materials were allowed, the flow of information would halt.

### 1. Early Recognition in the Employment Context

Consideration of the self-critical analysis privilege in the employment context soon followed in a 1971 case before a Georgia district court.<sup>61</sup> In *Banks v. Lockheed-Georgia Co.*, the defendant company in a race discrimination action sought to withhold the reports of an internal team appointed to study affirmative action issues, the results of which were incorporated into the company’s formal submission to the Department of Defense Contracts Compliance Program.<sup>62</sup> The court held that plaintiffs were not entitled to the team reports

when such reports have been made in an attempt to affirmatively strengthen the Company’s policy of compliance with Title VII and Executive Order 11246. The Court looks on this as an important issue of public policy and feels it would be contrary to that policy to discourage frank self-criticism and evaluation in the development of affirmative action programs of this kind.<sup>63</sup>

Other courts in the years immediately following the *Banks* case similarly declined to require disclosure of internal assessments that companies had undertaken as part of their affirmative action reporting requirements. For example, in *Dickerson v. U.S. Steel Corp.*, a Pennsylvania district court held that corporate documents containing goals and timetables

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<sup>59</sup> *Id.*; see also Brad Bacon, *The Privilege of Self-Critical Analysis: Encouraging Recognition of the Misunderstood Privilege*, 8 KAN. J.L. & PUB. POL. 221, 221 (1999).

<sup>60</sup> *Bredice*, 50 F.R.D. at 250.

<sup>61</sup> *Banks v. Lockheed-Georgia Co.*, 53 F.R.D. 283, 284 (N.D. Ga. 1971).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 285.

for affirmative action programs that were prepared in conjunction with federal reporting requirements were not discoverable, noting, “[d]isclosure of such subjective information could discourage employers from making the candid internal evaluations that the affirmative action program envisions. . . . Under these circumstances we hold that the public policy against disclosure outweigh the plaintiffs’ need for these materials.”<sup>64</sup>

Similarly, in *Sanday v. Carnegie Mellon University*, another Pennsylvania district court held that the defendant’s affirmative action plans were not discoverable and observed, “[i]n view of governmental requirements which foster candid reflection and internal evaluation we firmly believe that such policy determinations, while possible [sic] relevant, should not be made available to party litigants for the simple reason that the primary purpose behind such regulation may be destroyed.”<sup>65</sup>

In *Stevenson v. General Electric*, an Ohio district court likewise held that affirmative action reports were not discoverable in a discrimination suit. In reaching this conclusion, the court noted, “[t]he public policy behind these enactments mandates frank self-criticism and evaluation.”<sup>66</sup> The court acknowledged the decisions of other courts that had applied the privilege to such documents: “The courts determined that to allow discovery of these reports would deter this policy. We find the reasoning of these latter courts cogent and persuasive.”<sup>67</sup>

Thus, employment documents appeared on track to enjoy equal footing with respect to the self-critical analysis privilege.

## 2. The *Webb/O’Connor* Retreat

However, in 1978, the courts began an abrupt pattern of reversal and retreat. In *Webb v. Westinghouse Electric Corp.*, a Pennsylvania district court held that various employer documents—including notes from meetings where affirmative action and racial issues were discussed and internal studies

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<sup>64</sup> 14 Fair Empl. Prac. Cas. (BNA) 1448, 1449 (E.D. Pa. 1976).

<sup>65</sup> 12 Fair Empl. Prac. Cas. (BNA) 101, 103 (W.D. Pa. 1975).

<sup>66</sup> *Stevenson v. Gen. Elec. Co.*, No. C-1-77-122, 1978 WL 150, at \*2 (S.D. Ohio Oct. 4, 1978).

<sup>67</sup> *Id.*; see also *McClain v. Mac Trucks, Inc.*, 85 F.R.D. 53, 58 (E.D. Pa. 1979) (holding that affirmative action plans were privileged and not discoverable); *Rosario v. N.Y. Times Co.*, 84 F.R.D. 626, 631 (S.D.N.Y. 1979).

assessing race discrimination in various phases of employment—were discoverable.<sup>68</sup>

In reaching this conclusion, the *Webb* court delineated a three-part test to be used in determining whether the self-critical analysis privilege applied to employment documents.<sup>69</sup> First, the court held that in order to be privileged, the documents must have been prepared as part of reporting that was mandated by the government, such as OFCCP affirmative action reports.<sup>70</sup> Second, the court held that with respect to such mandatory reports, the privilege would only protect subjective portions of the analysis, and not any objective data contained therein.<sup>71</sup> Finally, the test required that in determining the applicability of the privilege, courts should weigh the relative harm and benefit to be derived from disclosure, and deny discovery only where the detrimental effects of disclosure clearly outweighed the plaintiff's need for the documents.<sup>72</sup> The court admonished that, in undertaking this balancing test, it was necessary to be "sensitive to the need of the plaintiffs for such materials."<sup>73</sup> Applying the three factors to the documents at issue, the *Webb* court refused to find that those documents were privileged based on the fact that the company's reports had been undertaken voluntarily and were not of the same mandatory nature as the OFCCP submission related documents in the earlier cases.<sup>74</sup>

Though *Webb* began the retreat from recognition of the self-critical analysis privilege in the employment context, this retreat came to full force in 1980 with the decision of a Massachusetts district court in *O'Connor v. Chrysler Corp.*<sup>75</sup> In *O'Connor*, the court held that the defendant employer in a sex discrimination case was required to disclose portions of both its affirmative action report and supporting documents that were based on objective data, as well as any subjective evaluations of fact that had been elsewhere disclosed.<sup>76</sup> However, the

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<sup>68</sup> 81 F.R.D. 431, 435 (E.D. Pa. 1978).

<sup>69</sup> *Id.* at 434.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 434-35; *see also* *Roberts v. Nat'l Detroit Corp.*, 87 F.R.D. 30, 32 (E.D. Mich. 1980) (applying the *Webb* criteria and holding that only subjective portions of mandatory affirmative action reports are privileged).

<sup>75</sup> 86 F.R.D. 211 (D. Mass. 1980).

<sup>76</sup> *Id.* at 218.

*O'Connor* court went further, holding that where documents combined objective data and critical self-evaluation, the employer would have the burden of creating new separate documents to disclose objective factual portions of those documents withheld.<sup>77</sup>

In reaching its conclusion, the *O'Connor* court purported to adopt the three-part analysis established in *Webb*, acknowledging as a threshold matter that the documents at issue were mandatory government reports.<sup>78</sup> The court also conceded that portions of the documents contained subjective analysis, thus meeting the second criteria for application of the privilege.<sup>79</sup> The court then turned to the *Webb* balancing analysis, considering whether equal employment opportunity would be better served by maintaining the confidentiality of the documents or requiring their disclosure.<sup>80</sup> The court recognized that “[a] lack of confidentiality almost inevitably will result in some cramping of the investigative process, simply because the incentives for any institution to engage in self-evaluative investigation pale considerably with the knowledge that the results may be used against it.”<sup>81</sup>

However, the court appeared to discount any value that maintaining confidentiality might have, noting, “subjecting the evaluative conclusions contained in [affirmative action plans] to discovery would not necessarily greatly deter future self-evaluations or substantially reduce their thoroughness.”<sup>82</sup> The court reasoned that since the evaluations undertaken for affirmative action reporting were mandatory, they would still occur even with the knowledge the information would be disclosed.<sup>83</sup> Further, while acknowledging that the possibility of disclosure might decrease the incentives for candid reporting, the court concluded that such concerns were not sufficient to justify withholding the documents because there were other deterrents to candor in self-evaluation, even absent discovery.<sup>84</sup>

*Webb* and *O'Connor* represent a significant break from the earlier recognition of the self-critical analysis in the

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<sup>77</sup> *Id.* at 219.

<sup>78</sup> *Id.* at 217.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 217-18.

<sup>82</sup> *Id.* at 217.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

employment context. Armed with these decisions, courts began to reject the self-critical analysis privilege for employment documents. For example, in *Resnick v. American Dental Association*, a federal district court in Illinois held that a personnel practices study performed by an outside consulting firm and documents produced by defendant's employee relations committee were not privileged.<sup>85</sup>

Courts also began to reject application of the privilege to the subjective portion of mandatory affirmative action reports, which had been consistently recognized as privileged in the jurisprudence before that point. For example, in *Witten v. A.H. Smith & Company*, a federal district court in Maryland held that the subjective portions of an affirmative action submission were not privileged.<sup>86</sup> The court first purported to consider the *Webb* analysis.<sup>87</sup> However, despite the mandatory and subjective nature of the documents at issue, the court turned to the *O'Connor* holding to quickly conclude that, in light of the other deterrents to candid reporting that may exist, there was little value in maintaining confidentiality of affirmative action reports.<sup>88</sup> Similarly, in *Hardy v. New York News, Inc.*, a federal district court in New York held that documents prepared in conjunction with affirmative action reporting, even where subjective, were not protected.<sup>89</sup>

### C. *The Supreme Court Weighs In*

Twenty years after the recognition of the self-critical analysis privilege in *Bredice*, the Supreme Court addressed the issue for the first time in *University of Pennsylvania v. Equal Employment Opportunity Commission*.<sup>90</sup> Focused narrowly on the facts of the case, which are not analogous to the claims and documents at issue in the majority of employment discrimination cases, the Supreme Court's holding in *University of Pennsylvania* did little to clearly define the privilege or even confirm its existence. Notwithstanding the limited utility of this decision, courts have embraced it as the rule with respect to the self-critical analysis privilege in the

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<sup>85</sup> 95 F.R.D. 372, 374-75 (N.D. Ill. 1982).

<sup>86</sup> 100 F.R.D. 446, 453-54 (D. Md. 1984), *aff'd*, 785 F.2d 306 (4th Cir. 1986).

<sup>87</sup> *Id.* at 450-51.

<sup>88</sup> *Id.* at 451, 453.

<sup>89</sup> 114 F.R.D. 633, 643 (S.D.N.Y. 1987).

<sup>90</sup> 493 U.S. 182 (1990).

employment context, with the majority of courts interpreting the case to reject the privilege wholesale.

In the case, which involved a sex discrimination claim by a faculty member who was denied tenure, the EEOC demanded production of peer review statements contained in tenure files, and the university sought modification of the EEOC subpoena based on the “intrusive effects” that disclosure of such materials would have.<sup>91</sup> The EEOC denied the request and applied to the district court for enforcement of its subpoena, which the court ordered and the Third Circuit affirmed.<sup>92</sup> The Supreme Court took the question of whether, as urged by the university, it should “recognize a qualified common-law privilege against disclosure of confidential peer review materials . . . necessary to protect the integrity of the peer review process, which in turn is central to the proper functioning of many colleges and universities.”<sup>93</sup>

The Court held that such documents were not protected by privilege.<sup>94</sup> In reaching this conclusion, the Court noted that it does not recognize a new “evidentiary privilege unless it ‘promotes sufficiently important interests to outweigh the need for probative evidence . . . .’”<sup>95</sup> The Court further observed that “Congress, in extending Title VII to educational institutions and in providing for broad EEOC subpoena powers, did not see fit to create a privilege for peer review documents.”<sup>96</sup>

Despite the unique factual circumstances and narrow language of the Court’s holding, lower courts seemed to take *University of Pennsylvania* as a broad mandate to reject the self-critical analysis privilege in the employment context. In the years since the decision, courts declined to recognize the self-critical analysis privilege with respect to a broad spectrum of employment documents, including: affirmative action reports and supporting documents;<sup>97</sup> assessments prepared by outside consultants in support of affirmative action reports;<sup>98</sup>

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<sup>91</sup> *Id.* at 186.

<sup>92</sup> *Id.* at 187.

<sup>93</sup> *Id.* at 188-89.

<sup>94</sup> *Id.* at 189.

<sup>95</sup> *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

<sup>96</sup> *Id.*

<sup>97</sup> *Aramburu v. Boeing Co.*, 885 F. Supp. 1434, 1440 (D. Kan. 1995); *Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 185 (S.D. Iowa 1993); *Martin v. Potomac Elec. Power Co.*, 58 Fair Empl. Prac. Cas. (BNA) 355, 358 (D.D.C. 1990).

<sup>98</sup> *Abdallah v. Coca-Cola Co.*, No. CIV. A1:98CV3679RWS, 2000 WL 33249254, at \*7 (N.D. Ga. Jan. 25, 2000).

conclusions of a voluntary diversity committee regarding diversity efforts;<sup>99</sup> investigations into internal complaints of discrimination;<sup>100</sup> materials related to the development of a sexual harassment policy;<sup>101</sup> employee statements regarding diversity in employee relations surveys;<sup>102</sup> documents related to the impact of a reduction in force;<sup>103</sup> an affirmative action study on compensation;<sup>104</sup> and charts analyzing disciplinary actions by demographics.<sup>105</sup>

Despite the strong trend toward rejection of the self-critical analysis privilege in the employment context, a small number of courts continue to recognize the validity of the privilege with respect to employment documents. For example, in *Flynn v. Goldman Sachs & Co.*, a federal district court in New York held that documents from a consultant's study on barriers to women in the workplace, including interviews with employees and the final report to the client company, were privileged.<sup>106</sup> The court observed that:

[C]ommunications [with] . . . the interviewed employees were made with the understanding that any comments would be kept confidential and anonymous . . . [and] that such confidentiality is critically important to eliciting candid responses from employees about their concerns. Dissemination . . . even in redacted form, would have a chilling effect on the future willingness of employees . . . to speak candidly about sensitive topics . . . .<sup>107</sup>

With respect to the final report, the court observed, “[f]ew, if any companies would risk commissioning a candid . . . report if these reports could later be used against the company in litigation. The goal of eliminating any barriers . . . is well served by encouraging such self-critical assessments.”<sup>108</sup>

Similarly, in *Sheppard v. Con Edison*, another federal district court in New York held that documents voluntarily

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<sup>99</sup> Reid v. Lockheed Martin Aeronautics Co., 199 F.R.D. 379, 386 (N.D. Ga. 2001); Vanek v. Nutrasweet Co., No. 92 C 0115, 1992 WL 133162, at \*2 (N.D. Ill. June 11, 1992).

<sup>100</sup> Reilly v. Metro-North Commuter R.R. Co., No. 93 Civ. 7317, 1995 WL 105286, at \*1 (S.D.N.Y. Mar. 13, 1995).

<sup>101</sup> Roberts v. Hunt, 187 F.R.D. 71, 77 (W.D.N.Y. 1999).

<sup>102</sup> Johnson v. United Parcel Serv., 206 F.R.D. 686, 693 (M.D. Fl. 2002); Davis v. Kraft Foods, Civ. A. No. 03-6060, 2006 WL 3486461, at \*3 (E.D. Pa. Dec. 1, 2006).

<sup>103</sup> Freiermuth v. PPG Indus., Inc., 218 F.R.D. 694, 698 (N.D. Ala. 2003).

<sup>104</sup> Davis, 2006 WL 3486461, at \*3.

<sup>105</sup> Id.

<sup>106</sup> No. 91 Civ. 0035, 1993 WL 362380, at \*1-2 (S.D.N.Y. Sept. 16, 1993).

<sup>107</sup> Id. at \*2.

<sup>108</sup> Id. (citation omitted).

studying affirmative action and reflecting employee comments on same were privileged, noting, “[s]uch a practice would not only curtail the flow of such information, but may also diminish the value of the information if companies are too skeptical of memorializing their analysis and thus fail to circulate the information . . . .”<sup>109</sup>

The handful of other courts that continue to recognize the privilege in the employment context have echoed these policy rationales.<sup>110</sup> As one court noted in holding that an internal study was privileged, “[t]his is precisely the type of evaluative and analytical exercise in which the public has a strong interest in encouraging corporations to engage . . . .”<sup>111</sup>

### III. REASONS UNDERLYING THE CONTINUING REJECTION OF THE SELF-CRITICAL ANALYSIS PRIVILEGE

Despite the fact that a few courts have continued to recognize the application of the self-critical analysis privilege with respect to employment documents such as diversity studies, the trend in the past thirty years has been one of overwhelming rejection. The present situation with respect to the self-critical analysis privilege in the employment context may be described as tenuous and uncertain at best. The inability of companies to rely upon the privilege has significant and wide-ranging implications for diversity initiatives, and ultimately for workforce relations.

To understand the scope of the problem, it is necessary to revisit the purpose of the privilege: If consistently recognized, the self-critical analysis privilege would permit companies to engage in rigorous self-examination, with an eye toward detection and prevention of potential problems, remediation of existing issues, and proactive implementation of new initiatives. This would result in an enhancement in diversity, in terms of both demographics and culture, as well as improvements in workplace relations and morale.<sup>112</sup> However, when the privilege is unavailable or uncertain, as it is now, companies are less likely to undertake voluntary assessments that may reveal

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<sup>109</sup> 893 F. Supp. 6, 8 (E.D.N.Y. 1995).

<sup>110</sup> *Trezza v. Hartford, Inc.*, No. 98 Civ. 22205, 1999 WL 511673, at \*2 (S.D.N.Y. July 20, 1999); *Troupin v. Metro. Life Insur. Co.*, 169 F.R.D. 546, 548-49 (S.D.N.Y. 1996).

<sup>111</sup> *Trezza*, 1999 WL 511673, at \*2.

<sup>112</sup> See Delikat, *supra* note 10, at 197-200.

problems, and are reluctant to engage in the deeper levels of assessment that could result in institutional reform.<sup>113</sup>

Given the ambiguous state of the law, employers are left unable to predict with any certainty whether materials will be protected. This uncertainty leaves them with the necessary assumption that they will not. In the absence of the privilege, companies face a dilemma: Should they engage in the self-examination needed to affect change and improve employee relations, but risk creating a trail of documents and evidence that could wind up in court as evidence against them? Confronted with this Hobson's choice, companies will generally choose to protect themselves from litigation, doing the minimally required amount of self-analysis, refraining from asking the hard questions, and putting a gloss on the data and results.<sup>114</sup> Thus, they are greatly hindered, or in some cases deterred outright, from engaging in self-examination of a nature and scope that could result in meaningful change.<sup>115</sup>

A further effect of the rejection of the self-critical analysis privilege in favor of blanket disclosure is to stifle discourse in the workplace. Companies are reluctant to allow employee groups to have candid dialogue where the discussions and any documents resulting from them are then fair game in subsequent employment law suits. Additionally, the chilling effect extends beyond the corporate decision makers to individual employees, who may be reticent to come forward and speak freely if they fear disclosure.<sup>116</sup> Thus, the complaints of a few litigious individuals are allowed to stymie the larger dialogue that can benefit the workforce as a whole.

The deep and far-reaching implications of this problem demand remediation of the current state of the law.

In order to address the problems that arise from the failure to recognize the self-critical analysis privilege in the employment context, it is first necessary to understand the causes of the rejection. The first is courts' undue and overly broad reliance on the Supreme Court's decision in *University of Pennsylvania*, a case that, upon closer examination, proves to be factually distinguishable from the issue of self-critical

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<sup>113</sup> See David P. Leonard, *Codifying a Privilege for Self-Critical Analysis*, 25 HARV. J. ON LEGIS. 113, 118 (1988).

<sup>114</sup> See Bacon, *supra* note 59, at 232.

<sup>115</sup> See *id.*; Leonard, *supra* note 113.

<sup>116</sup> Leonard, *supra* note 113.

analysis, with a holding that is narrow in scope and therefore of limited value to the larger issue of employment documents.

Second, the courts' rejection of the self-critical analysis privilege may be attributed to a preference for bright-line distinctions that protect only documents that are prepared pursuant to mandatory government reporting and that contain only subjective analysis. Such misapplication ignores the need for the more nuanced balancing test required by the Wigmore privilege analysis and unduly excludes a large number of documents from protection.

Third, and perhaps most fundamentally, the current state of the law with respect to self-critical analysis privilege fails to recognize the changes that have taken place in employment law over the last two decades, through which preventative measures, self-identification of issues, and prompt remediation of the same have become some of the most important weapons in combating discrimination. This framework shift, which has been expressly sanctioned by the Supreme Court in more recent cases stressing the importance of preventative measures, necessitates recognition of the self-critical analysis privilege for documents such as diversity studies in order to enable employers to study and ferret out potential organizational issues without fear that their initiatives will increase liability.

By looking at these cases, as well as the faulty assumptions underpinning the lower courts' rationale in the existing cases addressing self-critical analysis, it becomes clear that the privilege can—and should—be recognized in the employment context.

A. *Undue Reliance on University of Pennsylvania v. EEOC*

The genesis of the courts' present widespread rejection of the self-critical analysis privilege in the employment context can be traced to the Supreme Court's decision in *University of Pennsylvania v. EEOC*.<sup>117</sup> As set forth more fully below in Section II.B.3.d, the court in that case rejected the university's argument that peer assessments that were conducted as part of a tenure review process and later were challenged in a race and sex discrimination case should be protected as privileged from

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<sup>117</sup> 493 U.S. 182 (1990).

an EEOC subpoena.<sup>118</sup> In the absence of other, more explicit instruction on the issue, courts have taken this decision as a signal that the self-critical analysis privilege should not be recognized with respect to employment documents generally, even those that relate to diversity.

However, a closer look at the case makes clear that its application to the broader issue of the self-critical analysis privilege in the employment context is of limited utility. First, *University of Pennsylvania* involved a dispute over peer reviews related to one faculty member's candidacy for tenure.<sup>119</sup> These documents, which are in essence performance evaluations of an individual employee, are in no way equivalent to the corporate diversity documents containing self-examination of institutional demographics generally at issue in employment discrimination cases.

Moreover, in the *University of Pennsylvania* case, the peer reviews sought by the plaintiff reflected in part the employer's justification for the very employment decision alleged in the case to be discriminatory, that is, the decision not to grant tenure.<sup>120</sup> Thus, they were highly relevant to the plaintiff's individual claim. Conversely, the diversity documents that companies typically seek to protect by invoking the self-critical analysis privilege in employment cases tend to be circumstantial evidence at best, sought by the plaintiff to show an institutional pattern or practice of discrimination. They are typically only tangentially related to the specific issues in the case and marginally relevant.

Thus, the facts of the *University of Pennsylvania* case are so inapposite as to render the case of limited applicability to the broader question of whether the self-critical analysis privilege should be recognized with respect to employment documents such as diversity studies. The Court implicitly recognized these significant differences in the narrow language of its holding: "With all this in mind, we cannot accept the University's invitation to create a new privilege against the disclosure of peer review materials."<sup>121</sup> Courts, however, have misperceived the lack of alternative guidance as to how the

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<sup>118</sup> *Id.* at 196-202.

<sup>119</sup> *Id.* at 185-86; see also Hon. Arlene R. Lindsay & Lisa C. Solbakken, *Dispelling Suspicions as to the Existence of the Self-Evaluative Privilege*, 65 BROOK. L. REV. 459, 472 (1999).

<sup>120</sup> 493 U.S. at 185.

<sup>121</sup> *Id.* at 189.

self-critical analysis privilege should be applied in the employment context and have failed to recognize this case for what it is—a tangential guidepost that does not squarely address the issue of employment documents.

*B. Discomfort with the Wigmore Balancing Test*

A second reason for the courts' reluctance to apply the self-critical analysis privilege in the employment context is discomfort with the balancing test it requires. In his test for determining the applicability of a privilege, Wigmore articulated four criteria to be considered: (1) the communications must have been made in confidence; (2) confidentiality must be essential to the relationship between the parties; (3) the relation must be one which the community seeks to foster; and (4) the injury that would ensue to the relationship by disclosure of the communication must be greater than the benefit thereby gained.<sup>122</sup> Instead of adopting this test, many courts have employed the *Webb* analysis in applying the privilege to employment documents. However, as established below, the *Webb* test is a flawed and problematic way to assess the applicability of the privilege.

Applying the first three Wigmore factors to employment documents such as diversity studies, it is clear that the self-critical analysis privilege should be recognized in most cases. First, diversity studies, if they are undertaken with any serious value or intent, must be confidential in order to capture full and accurate information about a company's issues. Additionally, confidentiality is essential, as employees are unlikely to speak candidly without assurances of such discretion. Further, improved workforce relations and diversity are goals that society seeks to encourage.

The only question, then, is to the fourth factor, the harm-versus-benefit balancing analysis. While the first three criteria may be contemplated with respect to diversity studies generally, this final factor must be assessed on a case-by-case basis, the outcome dependent upon the nature of the documents sought, their function within the company and the relationship to a plaintiff's claims. Thus, the heart of the court's role with respect to a privilege determination lies in considering this balancing test and weighing the relative

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<sup>122</sup> WIGMORE, *supra* note 48, at 527.

benefit and harm that would result from disclosure of the documents—that is, analyzing whether the societal aims would be better preserved in a particular case by disclosing the information or preserving the confidential relationship.

The balancing test for the self-critical analysis privilege does not differ significantly from that which courts undertake when assessing other qualified privileges. However, when applying other privileges, courts are armed with decades of well-established precedent and policy rationale, which provide guideposts as to the situations in which the privilege should apply. The self-critical analysis privilege is comparatively new and the cases applying it are sparse and inconsistent. In the employment context, the lack of clear guidance is exacerbated by the changing landscape of the law and competing aims of providing plaintiffs with access to material with which to redress their grievances while ensuring that other means of promoting nondiscrimination, such as self-examination and open dialogue, are preserved.

The complex nature of applying this balancing analysis to the determination of self-critical analysis in the employment context has resulted in courts defaulting to other, more bright-line tests, most notably the criteria set forth by the district court in *Webb*. The *Webb* analysis requires a court to consider somewhat different factors than Wigmore's analysis. Specifically, *Webb* provides that in order for the privilege to apply in the employment context: (1) the documents must have been prepared for mandatory government reports; (2) the documents must contain subjective analysis rather than objective facts or data; and (3) courts should be "sensitive" to the needs of the plaintiffs for such material and deny discovery only where the policy favoring exclusion of the materials clearly outweighed the plaintiff's need.<sup>123</sup>

Courts have embraced the *Webb* analysis as a way to assess the applicability of the privilege to employment documents such as diversity studies. However, it is not at all clear that application of the criteria articulated by the *Webb* court is relevant or appropriate. Indeed, a closer examination reveals that this test is flawed on a number of levels.

First, the consideration of whether the documents in question were drafted voluntarily or pursuant to mandatory government analysis is an artificial distinction. It runs

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<sup>123</sup> *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978).

contrary to the very purpose of the self-critical analysis privilege—to encourage candid self-examination. Voluntary self-assessment is exactly the type of behavior that the privilege is entitled to foster, even more so than self-examination mandated by laws or regulations, which already contain incentives in the form of penalties for noncompliance. Conversely, voluntary self-assessment requires the cloak of privilege; otherwise the reward is little, the risk great, and the incentive none.

Whether the decision to undertake an analysis is made voluntarily or required by law, the privilege should apply. Candor is an essential element of self-analysis—it is essential not only to the desire to undertake analysis, but also to the quality and rigor of the analysis. Without the certainty of a privilege, the depth of such studies will surely be reduced to a level that is essentially worthless.

The second criteria articulated by the *Webb* court, that the documents for which protection is sought must contain subjective analysis in order to be privileged, also fails to survive scrutiny. Proponents of such a distinction claim that the subjective analysis is the only truly self-critical portion of the documents and that the objective data are just numbers and statistics that should be available to litigants.<sup>124</sup>

This distinction is invalid for a number of reasons. First, the division between objective data and subjective analysis worked adequately when the documents at issue were primarily OFCCP affirmative action reports, such that the types of data sought were mandated by the government reporting requirements. However, in corporate diversity studies, the decision as to which data to compile—that is, which aspects of the business have the need for study and improvement—is left to the company to decide. Because that initial determination is intrinsically self-critical and subjective, that determination should be privileged.

Additionally, when OFCCP reports were the primary documents at issue, it was relatively easy to parse out the objective data from the subjective analysis based on the required reporting structure. This is hardly the case with corporate diversity analyses, in which the distinctions blur and the objective and subjective portions of studies comingle. The

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<sup>124</sup> See generally Deason, *supra* note 52; James F. Flanagan, *Rejecting a General Privilege for Self-Critical Analysis*, 51 GEO. WASH. L. REV. 551, 559 (1983).

approach some courts have taken to this problem has been that which originated in the *O'Connor*<sup>125</sup> case: requiring companies to create new documents parsing out the objective data from diversity studies.<sup>126</sup> This “solution” imposes a burden well beyond the scope of that which is permitted by the Federal Rules of Civil Procedure.<sup>127</sup>

Notwithstanding the flawed assumptions underlying these first two criteria, many courts applying the *Webb* analysis have based their determination of privilege on one or both.<sup>128</sup> Not surprisingly, they have frequently concluded that employment documents such as diversity studies are not protected by the self-critical analysis privilege, either because they were not prepared pursuant to government mandate or because they contain objective data.<sup>129</sup> By reaching this conclusion based on the first two criteria, courts have managed to avoid the need to engage in the third portion of the analysis—weighing the harm of disclosure against the benefits of disclosure—altogether. However, this preference for a black-and-white determination over the balancing analysis is a misstep that undermines the very nature and purposes of the privilege.

Moreover, even where courts do get to the third prong of the *Webb* analysis, their utilization of the balancing test articulated in that case, which purports to consider the same relative harm-versus-benefit of disclosure required by Wigmore, still results in erroneous conclusions. Using the *Webb* test is problematic because it places a higher burden on the party seeking to invoke the privilege. Under the Wigmore conceptualization, the party seeking to keep the documents privileged must show that the harm from disclosure is greater than the benefit.<sup>130</sup> However, *Webb* has raised the standard to require a court to conclude that the harm from disclosure “clearly outweighed” the benefit.<sup>131</sup> This heightened standard, coupled with the *Webb* court’s admonition that courts must be “sensitive” to the needs of the plaintiffs, results in rejection of the privilege with undue frequency.

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<sup>125</sup> *O'Connor v. Chrysler Corp.*, 86 F.R.D. 211 (D. Mass. 1980).

<sup>126</sup> *Id.* at 218.

<sup>127</sup> FED. R. CIV. P. 26(b).

<sup>128</sup> *Hardy v. N.Y. News Inc.*, 114 F.R.D. 633, 641-43 (S.D.N.Y. 1987); *Martin v. Potomac Elec. Power Co.*, 58 Fair Empl. Prac. Cas. (BNA) 355, 358 (D.D.C. 1990).

<sup>129</sup> *Hardy*, 114 F.R.D. at 643; *Martin*, 58 Fair Empl. Prac. Cas. at 359.

<sup>130</sup> WIGMORE, *supra* note 48, at 527.

<sup>131</sup> *Webb v. Westinghouse Elec. Corp.*, 81 F.R.D. 431, 434 (E.D. Pa. 1978).

C. *Failure to Recognize the Changing Landscape of Employment Law*

Perhaps the most fundamental reason for the courts' rejection of the self-critical analysis privilege is their failure to recognize the changing landscape of employment law. Courts rejecting the privilege rationalize that, if it is recognized, big companies will use it as a shield to prevent individuals from obtaining the evidence necessary to seek redress of their claims. However, by relying upon this model (Goliath-company-versus-David-plaintiff in litigation), courts are ignoring the important developments that have occurred in the realm of employment discrimination jurisprudence in the past several decades.

First, it is clear that litigation is not the only, or even the primary, means of redress. Indeed, it is estimated that only three to four percent of employment discrimination cases ever go to trial.<sup>132</sup> The overwhelming majority are resolved through settlement, mediation, or other nonbinding resolution.

More importantly, the courts' assumption ignores the fact that most discrimination issues, if properly handled, need not ever get to the litigation stage. Rather, in recent years there has been increased emphasis on the employer's affirmative steps to prevent and remediate discrimination. This is reflected in a trio of Supreme Court cases from the late 1990s: *Faragher v. City of Boca Raton*,<sup>133</sup> *Burlington Industries v. Ellerth*,<sup>134</sup> and *Kolstad v. American Dental Association*.<sup>135</sup> In these cases, the Court placed a strong emphasis on exactly the types of preventative and remedial measures that self-critical analysis privilege is intended to, and can most effectively, foster.<sup>136</sup>

The first two decisions arose out of a federal circuit court split over the standard for employer liability in hostile work environment claims, with some courts holding that employers were strictly liable for such claims, and others requiring actual or constructive knowledge of the unlawful

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<sup>132</sup> Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 123 n.60 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 438-39 (2004).

<sup>133</sup> 524 U.S. 775 (1998).

<sup>134</sup> 524 U.S. 742 (1998).

<sup>135</sup> 527 U.S. 526 (1999).

<sup>136</sup> *Faragher*, 524 U.S. at 777, 807; *Ellerth*, 524 U.S. at 768, 770; *Kolstad*, 527 U.S. at 528, 545-46.

conduct.<sup>137</sup> In *Burlington Industries v. Ellerth*, a former employee claimed she was sexually harassed by her supervisor.<sup>138</sup> The district court dismissed—holding that because the plaintiff had never complained, the company neither knew nor should have known about the harassment—and the Seventh Circuit reversed, finding the company liable.<sup>139</sup> The Supreme Court held that, with respect to a hostile work environment claim, the employer may utilize a two-pronged defense to liability by establishing “(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.”<sup>140</sup>

Similarly, in *Faragher v. City of Boca Raton*, a part-time lifeguard alleged that two of her three supervisors subjected her to a sexually hostile atmosphere, which included inappropriate comments, uninvited touching, and offensive speech.<sup>141</sup> As in *Ellerth*, the plaintiff did not complain.<sup>142</sup> However, in this case, the company had failed to distribute its harassment policy.<sup>143</sup> The district court found in favor of the plaintiff on the basis that the supervisors were acting as agents of the employer, but the Eleventh Circuit reversed, determining that the harassers were acting outside of the scope of their employment.<sup>144</sup> The Supreme Court found that the city had not exercised reasonable care in preventing harassing conduct on the part of its supervisors, basing this holding on the district court’s determination that the city “had entirely failed to disseminate its [sexual harassment] policy [and] . . . made no attempt to keep track of the conduct of [its] supervisors.”<sup>145</sup> The Court also held that the harassment policy was inadequate because it did not provide a means for employees to bypass their supervisors when making complaints.<sup>146</sup>

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<sup>137</sup> Erin Arndale, *Employer Liability for Sexual Harassment in the Wake of Faragher and Ellerth*, 9 CORNELL J. L. & PUB. POL’Y 585, 591-93 (2000).

<sup>138</sup> 524 U.S. at 747.

<sup>139</sup> *Id.* at 749.

<sup>140</sup> *Id.* at 765.

<sup>141</sup> 524 U.S. at 780-81.

<sup>142</sup> *Id.* at 782.

<sup>143</sup> *Id.*; Arndale, *supra* note 137, at 595.

<sup>144</sup> *Faragher*, 524 U.S. at 783.

<sup>145</sup> *Id.* at 808.

<sup>146</sup> *Id.*

The Court concluded that since the city did not exercise reasonable care, it could not exercise a defense to liability.<sup>147</sup>

*Faragher* and *Ellerth* made clear for the first time that an employer had an affirmative duty to prevent, investigate, and remediate allegations of discrimination, and indeed that in doing so it could provide itself with an affirmative defense to discrimination suits. These principles were reiterated by the Supreme Court the following year in *Kolstad v. American Dental Association*.<sup>148</sup> In *Kolstad*, a female employee sued the American Dental Association for promoting a male colleague over her, and demonstrated that the employee in charge of the promotion decision made sexually offensive jokes and remarks.<sup>149</sup> The district court found for Kolstad but refused to instruct the jury on punitive damages and she appealed.<sup>150</sup> The D.C. Circuit held that the jury should have been instructed on punitive damages based on the lower court's finding that the employer had acted with malice or reckless indifference.<sup>151</sup> The appellate court reheard the case en banc and again affirmed the district court's holding, concluding that in order to award punitive damages, there must have been egregious conduct.<sup>152</sup>

The Supreme Court considered the issue and held 7-2 that conduct need not be egregious in order to support a punitive damages award.<sup>153</sup> Rather, a plaintiff only need show that an employer acted, "in the face of a perceived risk that its actions will violate federal law to be liable in punitive damages."<sup>154</sup> However, the Court created a good faith compliance defense under which punitive liability can be avoided by showing that the employer implemented measures to prevent, detect, and remediate discrimination and harassment.<sup>155</sup> The Court noted that "[d]issuading employers from implementing programs or policies to prevent discrimination in the workplace is directly contrary to the

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<sup>147</sup> See Nancy R. Mansfield & Joan T.A. Gabel, *An Analysis of the Burlington and Faragher Affirmative Defense: When Are Employers Liable?* 19 LAB. L. 107, 113 (2003).

<sup>148</sup> 527 U.S. 526, 545 (1999).

<sup>149</sup> *Id.* at 530-31.

<sup>150</sup> *Id.* at 532.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 533.

<sup>153</sup> *Id.* at 547.

<sup>154</sup> *Id.* at 536; see also David D. Powell, Jr. & Catherine C. Crane, *Complying with the Mandate of Kolstad: Are Your Good Faith Efforts Enough?*, 36 TULSA L.J. 591, 597 (2001).

<sup>155</sup> *Kolstad*, 527 U.S. at 545-46; see also Tamara Schiffner, *Employment Law: The Employer Escape Chute from Punitive Liability Under Kolstad v. American Dental Ass'n*, 54 OKLA. L. REV. 181, 189-90 (2001).

purposes underlying Title VII. The statute's 'primary objective' is 'a prophylactic one' . . . .<sup>156</sup>

These cases represent an express recognition by the Supreme Court that Title VII was intended to encourage preventive, conciliatory measures over litigation.<sup>157</sup> As the Court observed in *Faragher*, "[a]lthough Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination, its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm."<sup>158</sup> The Court went on to point to the regulations that instruct employees on how to raise complaints, observing:

It would therefore implement clear statutory policy and complement the Government's Title VII enforcement efforts to recognize the employer's affirmative obligation to prevent violations and give credit here to employers who make reasonable efforts to discharge their duty. Indeed, a theory of vicarious liability for misuse of supervisory power would be at odds with the statutory policy if it failed to provide employers with some such incentive.<sup>159</sup>

Thus, the Supreme Court's guidance in these cases makes clear that preventative measures are a primary objective of federal antidiscrimination law.

These cases had significant impact on employers; indeed, it is not an overstatement to say that they reshaped the landscape of employment law. With this trilogy of decisions, the Supreme Court extended the protection afforded to employers who made good faith efforts to comply with federal discrimination laws by recognizing such proactive measures as both a defense to liability and punitive damages. This greatly increased the incentive for employers to implement preventive measures such as nondiscrimination policies and training. Courts following *Kolstad* have considered several factors as elements of the good-faith defense, such as: (1) a comprehensive nondiscrimination/nonharassment policy, which includes a complaints mechanism that is well-publicized and readily available; coupled with (2) mandatory training for

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<sup>156</sup> *Kolstad*, 527 U.S. at 545 (emphasis added) (quoting *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975)).

<sup>157</sup> Amy L. Blaisdell, *A New Standard of Employer Liability Emerges: Kolstad v. American Dental Ass'n Addresses Vicarious Liability in Punitive Damages*, 44 ST. LOUIS U. L.J. 1561, 1573 (2000).

<sup>158</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998) (emphasis added) (quoting *Albermarle*, 422 U.S. at 417-18).

<sup>159</sup> *Id.* at 806.

managers on their duty to act swiftly when they have knowledge of claims; (3) prompt investigation of all complaints; and (4) remedial measures where complaints are substantiated.<sup>160</sup> Thus, employers are tasked not only with ensuring that a comprehensive antiharassment policy is implemented, but also that preventative and remedial measures are effective.<sup>161</sup>

Thus, preventative measures as endorsed by the Court have become imbedded as an integral part of corporate culture.<sup>162</sup> Such measures can most effectively be tailored when they are based on an organization's assessment of its issues and needs. However, companies can not engage in this self-analysis with the rigor that is warranted in order to make it effective unless they can do so with the certainty that the results are not going to wind up in litigation.

These cases set up a framework to encourage employers to engage in self-examination in order to minimize liability and to detect and fix problems before they arise. In light of this guidance, courts need to reevaluate the importance of providing confidentiality by way of the self-critical analysis privilege. The courts' unwillingness to infer the privilege should therefore be reexamined.

#### IV. RECOGNITION OF THE SELF-CRITICAL ANALYSIS PRIVILEGE IN THE EMPLOYMENT CONTEXT

To remedy courts' mistaken rejection of the self-critical analysis privilege in the employment context, the narrow confines of *Webb* should be rejected in favor of the precedent set by more recent and applicable Supreme Court precedent. Critics argue that the privilege is unnecessary and obstructs employee and government efforts to address discrimination. However, unlike the protections of the existing recognized privileges, the self-critical analysis privilege recognized in the employment context ultimately supports the larger goal of preventing employee discrimination.

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<sup>160</sup> Powell & Crane, *supra* note 154, at 594-95, 619-20.

<sup>161</sup> Richelle Wise Kidder, *A Conciliatory Approach to Workplace Harassment: Burlington Indus., Inc. v. Ellerth and Faragher v. City of Boca Raton*, 36 HOUS. L. REV. 1315, 1344-46, 1349 (1999).

<sup>162</sup> Bacon, *supra* note 59, at 221.

A. *Proposal for the Recognition of the Privilege*

Having established that the current situation—infrequent and uncertain recognition of the self-critical analysis privilege in the employment context—is based on erroneous assumptions and creates a situation that is not conducive to fostering diversity and positive workplace relations, an alternative proposal must be offered. Some commentators have suggested a legislative or administrative solution, in which the self-critical analysis privilege might be codified by statute or amendment to the Federal Rules of Evidence.<sup>163</sup> However, the fact that the evolution of privileges in federal jurisprudence has primarily been a matter of common law, coupled with the cumbersome nature of the legislative and rule-making processes, suggests that this may not be the most timely or effective solution. Additionally, despite the latitude provided by the Federal Rules of Evidence, courts are generally reluctant to recognize new privileges<sup>164</sup> or to expand the bounds of existing ones, due in large part to the presumption that litigants should have access to “every man’s evidence.”<sup>165</sup>

Of course, ideally the Supreme Court would issue a new decision—one that explicitly revisits and clarifies the applicability of the self-critical analysis privilege in the employment context in light of the changing nature of employment law and the Court’s more recent decisions emphasizing the importance of preventative measures. However, given that there are presently no cases addressing this issue pending before the Court, this resolution seems neither imminent nor likely.

Fortunately, courts do not need further legislative or Supreme Court guidance in order to properly address this issue. Rather, they simply need to revisit the Supreme Court jurisprudence that has evolved subsequent to the *University of Pennsylvania* case, primarily *Faragher*, *Ellerth*, and *Kolstad*.<sup>166</sup> These cases make clear that prevention of employment discrimination is a primary objective of Title VII, and companies need to be incentivized and rewarded for taking proactive steps such as self-examination of policies, procedures,

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<sup>163</sup> Leonard, *supra* note 113, at 122-23.

<sup>164</sup> See, e.g., *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990).

<sup>165</sup> WIGMORE, *supra* note 48, at 70.

<sup>166</sup> *Kolstad v. Am. Dental Ass’n*, 527 U.S. 526 (1999); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

demographics, workplace culture, and other diversity and equality issues.

Having established that the Supreme Court jurisprudence not only provides a basis, but indeed a mandate, for recognition of the self-critical analysis privilege with respect to employment documents such as diversity studies, the question becomes: What should that privilege look like?

First, it is clear that the narrow confines of the *Webb* analysis should be discarded. Specifically, the limitation that only documents produced as a result of mandatory government reporting should be protected by the privilege is outmoded and without merit. The instruction, established by the more recent Supreme Court cases, that companies engage in proactive behavior to identify and remedy discrimination, requires that they engage in self-examination well beyond the reporting requirements that some companies as federal contractors are required to undertake. Indeed, voluntary self-analysis is at the very heart of the kind of preventive compliance to ensure a discrimination-free workplace that both Title VII and the Supreme Court cases interpreting the statute intended. Thus, voluntary self-examination should be given the same protection as mandatory reports.

Similarly, the distinction created in *Webb*—whereby documents or portions of documents containing subjective analysis should be protected while the objective portions of such documents must be produced—should be abolished. Companies should not be required to disclose objective portions of self-critical studies where the studies involved a determination as to which data should be included and how it should be tabulated—decisions that are in themselves subjective self-critical analysis and an integral part of the self-examination process.

Stripped of the confines and artificial strictures of the *Webb* analysis, the question remains: How then should the applicability of self-critical analysis in employment cases be determined? The courts need to return to the Wigmore analysis, which lies at the heart of any assessment of privilege. Under this conceptualization, a court would first consider as a threshold matter: (1) the nature of the confidential relationship; (2) the value society places on the relationship; and (3) the expectation of privacy that was contemplated in

making the communication in question.<sup>167</sup> In many, but not all, cases, these three factors will weigh in favor of protecting self-examination undertaken by companies with respect to diversity in the workplace. In cases where one or more of these initial criteria are not met, the court should not protect the documents as privileged.

In cases where these preliminary criteria are met, the court should focus its analysis on the fourth prong—the relative harm-versus-benefit of disclosure. This balancing test will allow the court to take into account nuanced considerations, such as the nature of the plaintiff's claims relative to the types of documents sought, and make a determination of how the purpose of the law can best be served.

The proposed privilege is not without its limitations and must contain several important parameters. First, where the conduct of the diversity committee and its reports are actually at issue in the case (for example, where the plaintiff alleges that the company's diversity activities are in themselves discriminatory) the privilege would not apply.

Additionally, where the defendant company puts its diversity initiatives at issue in the case, submitting, for example, a diversity study as evidence that it has not engaged in discriminatory practices, the privilege would be waived. As one court noted in holding that such documents were not protected,

The court need not reach the privilege questions . . . the defendant has disseminated the affirmative action plan itself in response to public pressure regarding minority hiring. . . . In such circumstances, it must be concluded that defendant has waived any privilege to withhold information the business has already publicly disclosed voluntarily in the exercise of sound business judgment about how to diffuse protest aimed at the company.<sup>168</sup>

### B. *Addressing the Critics*

Clearly, the proposal that the self-critical analysis privilege applies in the employment context is not without its detractors. Armed with decades of jurisprudence, critics contend that the privilege should not be recognized because: (1) other privileges or doctrines are sufficient to protect the documents,<sup>169</sup> (2) recognition of the privilege would deny

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<sup>167</sup> WIGMORE, *supra* note 48, at 527.

<sup>168</sup> *Jamison v. Storer Broad. Co.*, 511 F. Supp. 1286, 1297 (E.D. Mich. 1981).

<sup>169</sup> *See Vandegrift, supra* note 52, at 191.

litigants information needed to pursue claims and hamper government enforcement efforts;<sup>170</sup> and (3) that the privilege would not go far enough to justify its creation. However, an examination of existing privilege law quickly demonstrates that it is insufficient to protect employment documents such as the diversity studies contemplated herein. Moreover, the well-tailored privilege set forth in the proposal, when carefully applied, would not preclude plaintiffs or government agencies from obtaining the documents they need.

### 1. Other Privileges Are Insufficient to Protect Diversity Documents

Critics attempt to deny the validity of the self-critical analysis privilege in the employment context by claiming that it is not needed because other privileges and doctrines, such as attorney-client privilege, attorney work product, and the subsequent repairs doctrine, can cover any documents that should rightfully be protected. An examination of those mechanisms makes clear that they are insufficient to fulfill this purpose.

For example, one suggested alternative to self-critical analysis privilege is that the attorney-client privilege, which protects communications between counsel and the party he or she represents, can protect employment documents in lieu of the self-critical analysis privilege.<sup>171</sup> However, this privilege falls far short of protecting documents such as diversity studies.<sup>172</sup> As an initial matter, the attorney-client privilege only applies where a client is seeking legal advice from counsel, but diversity analyses are often conducted by nonlegal personnel such as human resources or employee relations personnel.<sup>173</sup> Moreover, diversity studies do not solely or even primarily consist of the kind of legal advice that would be protected by attorney-client privilege, but cover a wide range of business topics including organizational dynamics and social and cultural issues.

Additionally, with respect to the attorney-client privilege in the corporate context, there is a question of who is the client. Generally the protection of the privilege only extends to

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<sup>170</sup> Stephen C. Simpson, *The Self-Critical Analysis Privilege in Employment Law*, 21 J. CORP. L. 577, 589, 591 (1996).

<sup>171</sup> See Leonard, *supra* note 113, at 121; Vandegrift, *supra* note 52, at 191.

<sup>172</sup> Vandegrift, *supra* note 52, at 191.

<sup>173</sup> Leonard, *supra* note 113, at 121.

corporate officers and supervisory personnel.<sup>174</sup> Thus, communications by many of the participants in diversity studies, including the rank and file employees, would not be protected.<sup>175</sup>

For similar reasons, the attorney work product doctrine, which protects documents containing the opinions, mental processes, and opinions of counsel, would not suffice to protect diversity documents.<sup>176</sup> In addition to sharing the problem with attorney-client privilege that many diversity studies are not prepared by counsel, the attorney work product doctrine protects only documents prepared in anticipation of litigation—the majority of diversity studies are undertaken proactively rather than in anticipation of litigation and therefore would fall outside the privilege's protections.<sup>177</sup>

Some commentators have suggested that self-examination documents such as diversity studies might, in the alternative, find protection under Federal Rule of Evidence 407, more commonly known as the subsequent remedial measures doctrine.<sup>178</sup> As codified in Federal Rule of Evidence 407, the doctrine provides:

When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.<sup>179</sup>

Thus, under Rule 407, remedial measures undertaken subsequent to an incident are not admissible for purposes of proving liability. This rule, however, will generally be insufficient to protect self-examination documents such as diversity studies. First, because it is not a privilege, but rather a rule regarding admissibility of evidence, the diversity documents will likely still be discoverable by adverse parties in litigation, even if deemed inadmissible at trial.<sup>180</sup> The present chilling effects of discovery would therefore persist unabated.

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<sup>174</sup> See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

<sup>175</sup> See *id.*

<sup>176</sup> Leonard, *supra* note 113, at 122.

<sup>177</sup> *Id.*

<sup>178</sup> FED. R. EVID. 407.

<sup>179</sup> *Id.* The Rule further notes that it “does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.” *Id.*

<sup>180</sup> Vandegrift, *supra* note 52, at 190.

Further, the rule only protects studies or measures that are taken subsequent to an injury or claim, not those that are taken beforehand, as is the case with most diversity studies sought in litigation.<sup>181</sup>

Notwithstanding the fact that Rule 407 is in itself insufficient to protect documents of the scope and nature of diversity studies, its rationale is helpful in understanding why such documents should be protected under the analogous self-critical analysis privilege: “Rule 407 is designed to protect the important policy of encouraging defendants to repair and improve their products and premises without the fear that such actions will be used later against them in a lawsuit.”<sup>182</sup> The rationale that protects documents related to measures taken after injury surely must apply with equal, if not greater, force to preventive measures designed to avoid harm in the first place, particularly in light of the Supreme Court’s emphasis on such proactive steps.

## 2. The Privilege Will Not Hamper Private Claims or Government Enforcement

Perhaps most fundamentally, opponents express concern that application of the self-critical analysis privilege to employment documents such as diversity studies will preclude plaintiffs from obtaining the information they need to seek redress of their claims.<sup>183</sup> This is an argument that could be made with respect to the self-critical analysis privilege in other areas of the law, or for that matter, with respect to any privilege at all. Taken to its utmost extreme, an argument such as this, which places overwhelming and undue emphasis on a litigant’s need for access to documents, would destroy the privileged relationships fundamental to our society by undermining well-established privileges such as the attorney-client privilege and eliminating the societal benefit that flows from the candor in such privileged relationships.<sup>184</sup>

Dealt with in the limited context of employment discrimination, however, this argument still does not undermine

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<sup>181</sup> *Id.* at 189-90.

<sup>182</sup> *Werner v. Upjohn Co.*, 628 F.2d 848, 855 (4th Cir. 1980).

<sup>183</sup> Robert J. Bush, *Stimulating Corporate Self-Regulation—The Corporate Self-Evaluative Privilege: Paradigmatic Preferentialism or Pragmatic Panacea*, 87 NW. U. L. REV. 597, 634 (1993); Simpson, *supra* note 170, at 595; see also Flanagan, *supra* note 124, at 559.

<sup>184</sup> See Alexander, *supra* note 42, at 243.

recognition of the privilege. First, it is clear that the purpose and intent of Title VII, as articulated in the more recent Supreme Court cases, emphasize that preventive measures are to be valued, encouraged, and placed on at least equal—if not greater—footing with the need for an individual to redress his or her claims.<sup>185</sup> If the critics' argument is allowed to win the day, then the claims of individuals (the merits of which have not yet been assessed) would prevent institutional discourse and reform, to the detriment of the employees at large.

Moreover, the proposed framework for the application of the self-critical analysis privilege to employment documents contemplates and addresses concerns about individual employees' need for information to pursue their claims. The privilege is qualified subject to the balancing analysis set forth by Wigmore, which considers, on a case-by-case basis, the plaintiff's need to have access to such information. Indeed, the balancing inquiry favors the rights of plaintiffs as it requires the harm of disclosure to outweigh the benefits before the privilege will apply, and places the burden on defendant companies to show why documents should be protected. Additionally, while plaintiffs may not have access to the self-critical documents in cases where the privilege is properly applied and the balance tips in favor of non-disclosure, they are not precluded from obtaining any of the underlying data through well-crafted discovery requests.<sup>186</sup> They also continue to have access through discovery to the myriad other information, including documents regarding their own employment, and, to the extent relevant, documents regarding comparable employees and the company at-large.

Nor, as critics contend, will recognition of the self-critical analysis privilege hamper government agencies in their enforcement roles.<sup>187</sup> A carefully tailored application of the balancing test would still permit government agencies to obtain the mandatory reports and other documents to which they are entitled as a matter of law where appropriate, perhaps pursuant to a protective order to prevent further disclosure.<sup>188</sup> As with private plaintiffs, the Wigmore balancing test would also permit disclosure of self-examination documents to

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<sup>185</sup> *Faragher v. City of Boca Raton*, 524 U.S. 775, 805-06 (1998).

<sup>186</sup> *Bacon*, *supra* note 59, at 231.

<sup>187</sup> *Id.* at 230-31.

<sup>188</sup> *Id.* at 232-33.

governmental agencies where the company could not show that the harm of disclosure would outweigh the benefit.

Finally, as at least one commentator has noted, there are benefits to government enforcement entitles from effective self-analysis:

Potential advantages include helping businesses cut through often complex regulations by affording them a detailed breakdown of their operations (which also allows them to detect operational problems before they become more severe), and reducing the billions of dollars a year spent on governmental attempts to regulate industry.<sup>189</sup>

Another observed that the privilege “should be expanded because it generates positive net social utility by facilitating corporate self-regulatory conduct at minimal social cost.”<sup>190</sup>

### 3. Other Criticisms

The proposal for a test that balances the benefits and harms of disclosure is also subject to criticism from those who do not feel it goes far enough. For example, some commentators have suggested that a balancing test does not provide enough certainty for companies and will not alleviate the chilling effects, instead proposing a blanket protection for internal corporate studies.<sup>191</sup> Others have suggested, in a similar vein, that these studies be protected by a self-critical analysis privilege that is coextensive with the deliberative privilege enjoyed by governmental agencies with respect to their investigations.<sup>192</sup>

These proposals, while conceived from the same impetus as the framework suggested herein—the desire to encourage socially beneficial self-examination by corporate actors—are simply not feasible. First, the notion of a blanket privilege for internal corporate studies fails to take into account the nature of a qualified privilege, which will be considered subject to the relative interests of the parties in a particular case and in light of the circumstances and policies implicated. Moreover, in the employment context, where the contemplation of privilege must take into account the competing objectives of Title VII of encouraging measures that prevent discrimination and allowing those who believe they have suffered discrimination

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<sup>189</sup> *Id.*

<sup>190</sup> Bush, *supra* note 183, at 636-37.

<sup>191</sup> See Pollard, *supra* note 18, at 1000-02.

<sup>192</sup> Kellog, *supra* note 43, at 278-79.

redress of their claims, a blanket protection would not give sufficient consideration to the latter of these aims.

Similarly, the notion that self-critical analysis should enjoy blanket protection tantamount to the governmental deliberative privilege goes too far. The role of the government in an investigation on behalf of a third party differs greatly, in terms of objectives and self-interest, from that of a defendant corporation in litigation, and the extent to which the two privileges respectively protect documents needs to reflect that important difference.

Finally, some critics may argue that the implementation of the Wigmore criteria, which requires a case-by-case balancing of factors, will in fact result in more uncertainty than the bright-line approach adopted by courts that have embraced the *Webb* criteria. As an initial matter, it is clear that by eschewing the flawed distinctions inherent in the *Webb* criteria (that is, protecting mandatory studies but not voluntary ones and protecting subjective portions of reports but not “objective” data), companies can voluntarily undertake comprehensive diversity initiatives with greater certainty that their self-analysis will be entitled to at least a qualified protection by the privilege. More fundamentally, by applying the Wigmore criteria with a mindful eye toward the Supreme Court’s guidance in *Faragher*, *Ellerth* and *Kolstad* that preventative measures are to be given primacy over litigious ones as a means of furthering diversity and equal employment and eliminating discrimination, courts will undoubtedly conclude, absent a showing of an unusual and compelling need by a plaintiff, that the self-critical analysis privilege should apply to the majority of diversity initiatives. This conclusion will result in greater protection and certainty.

The proposed balancing analysis is a strong middle ground. It allows corporations to engage, with reasonable certainty, in self-examination such as diversity studies with the expectation that they will generally not be discoverable, while still providing a plaintiff with the ability to obtain information if he or she can show a direct need for it based on the claims and circumstances of the case.

## CONCLUSION

There is undisputed benefit in diversity initiatives and discussions undertaken by employers. However, such steps cannot be freely taken while the threat of disclosure in

litigation looms. The most effective way to encourage such measures is to provide self-examination documents and information with a qualified self-critical analysis privilege. While courts have been reluctant to recognize the privilege, this situation may be remedied by revisiting the more recent Supreme Court jurisprudence. Careful examination of the cases reveals that the courts' emphasis is misplaced and should focus on the changing nature of employment law and the primacy of preventative measures, as embodied in the trilogy of *Faragher*, *Ellerth*, and *Kolstad*. Armed with these decisions, courts can recognize and apply a carefully tailored privilege that balances the harms of disclosure against the benefits, thereby protecting the right of plaintiffs to pursue their claims, but also allowing rigorous candid self-analysis and dialogue to the benefit of the larger workforce.

The Beer Summit exemplified the benefits of open communication in the resolution of diversity-related conflicts and the ways in which such open discourse can be used to improve diversity and relationships going forward. However, unlike the events in Cambridge that culminated in the Beer Summit, most conflicts do not enjoy the benefit of presidential mediation to facilitate resolution. Absent such divine intervention, a qualified self-critical analysis privilege for employment documents, such as the one proposed herein, would serve as an effective means of encouraging companies to review their actions, foster dialogue, and take proactive steps toward improving diversity.