The Importance of the Secret Ballot in Law Faculty Personnel Decisions: Promoting Candor and Collegiality in the Academy

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"Article 21 of the Universal Declaration [of Human Rights] provides for 'periodic and genuine elections...by universal and equal suffrage and...by secret vote' as the only process by which democracy can be attained." 

Preface

This article began as an exercise in self-education. At a recent faculty meeting, my colleagues were preparing to vote on a slate of candidates. Because discussion had become heated, a tenured faculty member moved for a secret ballot on the appointments committee's recommendation. The main argument in favor of the secret ballot was that, for the protection of untenured professors (who have equal votes with tenured professors on questions of hiring new faculty), neither their senior colleagues nor the Dean should be permitted to know how they voted. The ensuing discussion on whether to hold a secret ballot was no less heated than the original discussion on the committee's recommendation. The secret ballot motion was never put to a vote, and an open vote on the recommended slate followed.

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I am grateful to Anuja Athani, Adrienne Belyea, Sima Bhakta, Lauren Bianchini, Molly Bruder, Melissa Duvall, Doug Fischer, Jessica Gold, Eugene Ho, Lonnie Klein, Kate Rakoczy, Melissa Troiano, and Alisa Tschorke for their excellent research and editorial assistance; to Adrienne Belyea for her outstanding assistance sending the questionnaires and collecting and distilling the results; and to my colleague Jonathan Baker for reading and commenting on an earlier draft. I am also beholden to the many law school deans, associate deans, professors, and others who responded to my questionnaires and telephone inquiries. This article would have been impossible to write without their participation and cooperation.

For a more extended analysis of the issues raised in this article, see the unabridged version, with tabular appendices and more extensive quotations from law faculty and administrators, available at <http://papers.ssm.com/sol3/papers.cfm?abstract_id=909253>.

I left the meeting thinking something had gone awry and decided to do some research on the importance and prevalence of secret ballots in law school faculty personnel decision-making. In an original smaller sample of the D.C.-area law schools, I found a lack of uniformity in procedures. I then contacted administrators and professors at all 168 Association of American Law Schools ("AALS") member law schools and twenty-two of the twenty-three AALS non-member fee-paying law schools, e-mailing a brief questionnaire asking about each law school's voting practices on faculty personnel matters. A majority of the recipients responded. The responses showed many variations in voting policies and practices. After reviewing the responses, I requested permission from all respondents whom I was interested in quoting and found many variations even in responses to my request for permission to quote. Deans and faculty fell into four groups regarding that request: (1) permission granted, with attribution to both the respondent and the law school; (2) permission granted, with anonymity for the respondent, but not for the law school; (3) permission granted, with anonymity for both the individual and the school; and (4) permission denied. This last category struck me as a bit odd—not because some respondents did not want me to quote their personal opinions, which is perfectly understandable, but because some of them did not want to be quoted even regarding the (I thought) straight-forward question of whether their schools used secret or open ballots. And then there was the irresistible irony: some respondents who advocated open ballots—primarily to hold individuals answerable for their positions—declined to allow the use of their names in this article.

To obtain more specific information, I sent a second questionnaire to deans and faculty asking—in the categories of hiring, retention, promotion, tenure, and dean selection—whether the school used secret ballots; whether the ballots were completely secret, or instead whether faculty members had to sign the ballot or provide reasons; and whether use of the secret ballot was automatic or had to be requested. I also asked whether the school used secret ballots for any other purposes. After several requests with follow-up e-mails, I received

2. The one non-member school that I did not contact was The Judge Advocate General's School of the U.S. Army, as the school "conducts [only] a graduate legal education program." See <http://www.globalsecurity.org/military/agency/army/tjagsa.htm> (last visited Aug. 29, 2007).

I asked the following questions: (1) Does your school ever use a secret ballot in making faculty hiring, retention, promotion, and/or tenure decisions?; (2) If so, does a faculty member have to request a secret ballot, or is it automatic?; (3) Do you use secret ballots for any other matters?; (4) If so, does a faculty member have to request a secret ballot, or is it automatic?; (5) Does your school have a written policy regarding open vs. secret ballots? (If so, may I review a copy of the policy statement or the provision of the law school or university manual?); (6) If your school allows a secret ballot for faculty personnel (or other) decisions, would you say that this process has been more productive or more counter-productive? Why? Would you please share any anecdotes to illustrate your conclusion?; and (7) If your school does not allow a secret ballot for faculty personnel (or other) decisions, would you say that this process has been more productive or more counter-productive? Why? Would you please share any anecdotes to illustrate your conclusion?
replies from 165 (of 168) AALS member schools and 20 (of 22) non-member schools—for a 97 percent response rate.³

What began as a one-month exercise turned out to be a year-long project. Undoubtedly, this article will not be the final word on the use of secret ballots for law school faculty personnel decisions. Perhaps other researchers will gather more detailed information. And perhaps they will parse that information differently and find and emphasize other nuances. The results of this project, however, answered my initial query about the prevalence of secret ballots. Perhaps equally important, the e-mail exchanges and conversations I had with faculty and administrators reveal a subtext that involves, among other things, the need for candor, collegiality, openness, fairness, and sensitivity, on the one hand, as well as concerns about politics, frustration, anger, trust, power, dominance, and control, on the other.

Introduction

One of the most important ingredients in a democracy is the secret ballot. A true democracy emphasizes the will of the people, and secret voting ensures this. The U.S. government guarantees "[e]very American...the right to a secret ballot so that no one—not husband or wife, not parents, not employer—knows how a voter votes."⁴ This secrecy enables citizens to express their private opinions freely, without infliction of even the subtlest influence, and without fearing reprisal from those who vote or think differently.⁵

Many universities also follow this democratic tradition. University faculty members have a professional responsibility to evaluate their peers and

³. The tabulations are presented infra at notes 94-97 and accompanying text; the narrative responses from law school faculty and administrators are interspersed throughout the article. The only schools that did not respond to my questionnaires are AALS members University of Detroit Mercy School of Law, University of Puerto Rico School of Law, and St. Thomas University School of Law, and non-AALS members North Carolina Central University School of Law and Pontifical Catholic University of Puerto Rico School of Law.


⁵. The official secret ballot system, also known as the Australian ballot, was an election process developed in Australia during the 1850s to end the bribery and chaos that surrounded the country’s elections. See Lionel E. Fredman, The Australian Ballot: The Story of an American Reform 4 (East Lansing, Mich., 1968). Corruption, intimidation, and bribery plagued nineteenth-century America’s open voting system as well. In 1888, advocates of the Australian ballot persuaded Massachusetts to implement the first secret ballot system in the United States. During the next half-century, all of the states adopted the secret ballot, culminating in 1950 when South Carolina became the final state to approve that form of voting. See Jack Hitt, Real Campaign-Finance Reform, N.Y. Times Magazine, July 25, 1999, at 36; Richard M. Valelly, The Changing Shape of the American Electorate: Suffrage Laws and Turnout, in American Presidential Campaigns and Elections 9, 14 (William G. Shade and Ballard C. Campbell eds., Armonk, N.Y., 2003).
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participate in academic governance. Many schools recognize the importance of truthfulness and conscientiousness in evaluations made in hiring and similar decisions and generally use secret ballots for these critical faculty personnel determinations. The academic community, represented by well-respected organizations such as the American Association of University Professors ("AAUP"), the American Council on Education ("ACE"), and the National Commission on Higher Education Issues, recommends this level of confidentiality to encourage candor and to facilitate selection of the most qualified candidates.

While some critics argue that the secret ballot impedes faculty self-governance by not holding professors accountable for their votes, law schools can implement mechanisms, when necessary, to discourage professors from voting with improper motives. Further, law schools should use a strict or modified secret ballot system for faculty hiring, retention, promotion, and tenure decisions because the secret ballot best ensures that professors cast votes on academic grounds, and not out of fear of reprisal from the administration or their colleagues. A confidential vote also facilitates a greater exchange of ideas among the faculty by breaking down political factions and decreasing disharmony—two essential goals at many law schools. Indeed, most U.S. law schools use secret ballots for most of their faculty personnel decisions.

Academic Freedom: Shielding Professors from Unfair Influence

Courts and commentators have recognized the importance of shielding citizens' thoughts and expressions from government intrusion not only in the political arena, but also in the academic realm, because universities play a unique and critical role in society by advancing ideas, providing expert advice to civic leaders, and guiding new generations. To allow the academy


7. See Michael L. Seigel, On Collegiality, 54 J. Legal Educ. 406, 416 (2004); E-mail from Dennis Arrow, Professor of Law, Oklahoma City University School of Law, to Adrienne Belyea, Washington College of Law (Oct. 13, 2005, 09:01:18 EST) (on file with author) ("To most of us, I believe, [the unvarying rule mandating the secret ballot for personnel decisions is] congruent with the 'secret ballot' premises of the American electoral system, and in my own judgment (and, I believe, that of most of my colleagues), the rule has been productive (even where I and/or any of my colleagues have personally disagreed with the result."). See also Association of American Law Schools, Report of the AALS Special Committee on Tenure and the Tenuring Process, 42 J. Legal Educ. 477, 499 (1992) (recognizing that many law schools use secret ballots to "encourage honest votes and [to] help eliminate 'back scratching' and fear").


9. See Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (referring to universities as the
to perform these responsibilities well, the Supreme Court has recognized that, like our nation's electorate, professors need constitutional protection from government influence as they embark on these vital duties. Thus, the Supreme Court has held that the First and Fourteenth Amendments provide both universities and individual professors the right to express ideas freely without government intrusion or distrust. Justice Frankfurter articulated the concept of constitutional academic freedom as allowing all universities to decide "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study." 

**Benefits of the Secret Ballot System in Faculty Personnel Decisions**

Determining who may teach is arguably the most important issue protected by academic freedom and the most critical matter on which university faculty members vote. After all, the quality of a university depends in large part on the quality of its faculty. Professors drive the flow of ideas both in the classroom and in society. Further, tenure is an enormous contractual obligation for a university. It results in a substantial commitment of university resources to a professor, often for thirty or more years. It is therefore critical for a university to ensure, to the greatest extent possible, that it hires and tenures only the most qualified, effective, and productive individuals. 


10. See Keyishian, 385 U.S. at 603 (stating that the First Amendment protects academic institutions from laws that inhibit the flow of ideas or that seek to broadly regulate academic institutions).


12. Sweezy, 354 U.S. at 263 (Frankfurter, J., concurring) (quoting The Open Universities in South Africa 10-12).

13. See Association of American Law Schools, supra note 7, at 477. Dean Warner Lawson of Howard University School of Law stated, "I have been at Howard for 31 years and I have always believed that the vote to hire new faculty is the most important decision the faculty makes." E-mail from Warner Lawson, Associate Dean for Academic Affairs, Howard University School of Law, to author (Dec. 7, 2005, 18:31:46 EST) (on file with author). The importance of personnel matters in academic governance is illustrated by the practices at some schools to use open voting for all other issues except hiring, promotion, or tenure decisions.

14. Some law schools realize the consequences and commitment that granting tenure carries and possibly take it more seriously by requiring a secret ballot for tenure and promotion, but not for initial hiring decisions. See, e.g., E-mail from John Strait Applegate, Executive Associate Dean for Academic Affairs, Indiana University School of Law-Bloomington, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 08:28:16 EST) (on file with author) ("[W]e use a secret ballot, but only for tenure decisions or hiring with tenure.").
Faculty members are heavily involved in deciding who may teach. Frequently, the dean appoints or the faculty elects committees or subcommittees to recommend new appointments and to review and make recommendations on retention, promotion, and tenure. The rest of the faculty (or only tenured faculty, for the promotion and tenure decisions) votes on the committee recommendations. The future of a school depends on the committees' best collective judgment and the remaining faculty members' honest assessments of the candidates. A confidential review process and a secret ballot system best promote this honesty by encouraging "candid, searching, and rigorous evaluations." A secret ballot also alleviates the conflict and disharmony that often exist among faculty members or between faculty and the administration. E-mails too numerous to cite confirm that many members of law school faculties agree.

The Secret Ballot Encourages Faculty Candor and Eliminates the Chilling Effect

A secret ballot voting system for personnel decisions dispels the chilling effect that open voting systems have on faculty candor. An open voting system often induces faculty members to refrain from voting. It also has the capacity to chill faculty from giving "honest, candid criticism of another in public because of the fear that in some way their comments will be misunderstood and misused by others in their community and because of the fear that in some undefined way there is the potential for some kind of reprisal against them." As a result, personnel decisions made in an open voting system often fail to reflect the faculty's best collective judgment.

Faculty members have many reasons to refrain from voting or to vote contrary to their honestly held beliefs in an open voting system. Open voting may dissuade professors who want to remain in the good graces of the dean from participating in the faculty selection or peer review process for fear that their opinions, no matter how legitimate, may be in opposition to the administration's views and therefore might lead to reprisals against them. The university setting mirrors a political democracy: while

16. Gray, Confidentiality of Faculty Peer Review, supra note 8, at 28.
17. See Seigel, On Collegiality, supra note 7, at 416 (maintaining that many tenured professors on law school faculties view their dean as their equal, and therefore conflict occurs when they want to vote contrary to the dean's opinion).
18. See John D. Copeland and John W. Murry, Jr., Getting Tossed From the Ivory Tower: The Legal Implications of Evaluating Faculty Performance, 61 Mo. L. Rev. 233, 312 (1996).
19. Gray, Confidentially of Faculty Peer Review, supra note 8, at 29; see Saul Levmore, The Anonymity Tool, 144 U. Pa. L. Rev. 2191, 2222-23 (1996) (supporting the idea that open voting may be appropriate in social settings but not necessarily in a more formal environment such as a faculty meeting).
20. See, e.g., James H. Brooks, Confidentiality of Tenure Review and Discovery of Peer Review
the dean may be *primus inter pares*, faculty members accentuate the *pares* and view themselves as equals to the dean and faculty administrators. Open voting undermines this equality by unduly empowering administrators. Since the dean controls the salary, committee assignments, and budgetary allotments for all faculty members—as well as course assignments and class schedules—many tenured faculty members may hesitate to disclose a vote that is contrary to the dean’s position. This result is irreconcilable with the essence of academic freedom and undermines the purpose of tenure, which is to protect faculty members from retaliation by the administration for espousing unpopular ideas.

The pressure to vote in accordance with the beliefs of the dean or senior faculty members to avoid reprisal is even more pervasive among untenured faculty. Because untenured faculty members serve in a probationary status, usually at the discretion of the tenured faculty, they are “necessarily beholden” to them for continued appointment. Untenured faculty members thus feel greater trepidation than their tenured colleagues in expressing their opinions. Although society expects professors to be “deeply engaged with colleagues and administrators on a myriad of controversial educational issues,” untenured faculty members may face devastating repercussions if they oppose their senior colleagues under an open voting system. At worst, tenure may be denied to a faculty member who voted against others on a faculty personnel (or other) matter. At one undergraduate institution, for example, an untenured history professor refused to vote in accordance with the views of his department chair, instead taking the politically unpopular position that the seat should go to the most qualified candidate, regardless of gender. As a result, the university later denied the professor tenure. Rather than risk such a fate, many untenured faculty members typically vote according to how those in power vote, instead

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23. See Benjamin Ernst, David A. Hollinger, and Jonathan Knight, Professors of Practice, 91 Academe 60 (2005) (presenting the official report of the American Association of University Professors’ Committee on Academic Freedom and Tenure).


25. See id. at 424-25.
of following their own consciences. Or worse, they may not vote at all. For an extreme example, the faculty at Michigan State University College of Law recently voted no confidence in their dean. “Nontenured faculty members were not asked to vote; the dean’s opponents said it could be too risky for their careers.”

Many professors also refrain from voting in opposition to the views of other professors or the dean for fear that their colleagues or students may misunderstand their votes. Students at one university sought to become members of the university’s decision-making body. When they proposed this idea at a student-faculty assembly, the majority of faculty—in an open ballot conducted in front of the students—voted for preliminary approval of the proposal. Two weeks later, however, when the faculty voted on the issue formally by secret ballot, they rejected the idea. The reasons for this discrepancy exemplify the way in which the open system chills honest voting. The presence of the students influenced the faculty because they felt pressure to accommodate the students’ desires. This example illustrates that many faculty members fear becoming unpopular if they vote contrary to the views of those around them. Clearly, a majority of the faculty did not agree with the students’ proposal, but because they did not want to upset the students, the majority either raised their hands or refrained from voting altogether. This situation is analogous to what happens when a school employs an open voting system for personnel decisions. If a professor hears the dean or a senior colleague, whom he or she does not want to alienate, espouse a particular stance on an


27. See, e.g., E-mail from Eric Andersen, Associate Dean for Academic Affairs, University of Iowa College of Law, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 11:59:54 EST) (on file with author) (“[Secret ballot voting for appointments matters and other issues when requested by a member of the faculty] is generally regarded as a positive rule, allowing faculty members to vote their consciences without fear of giving offense or injuring relationships.”); E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 16:31:47 EST) (on file with author) (relating that some faculty may think that “knowledge of who voted against a candidate who ultimately joins the faculty may at some point leak out and affect the relationship of those two colleagues”); E-mail from law school official who requested anonymity, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 20:26:43 EST) (on file with author) (“[The secret ballot allows faculty to vote in accordance with true feelings without pressure that their vote will disappoint colleagues, candidates, etc.”).
issue, that professor may put his or her beliefs aside and vote along with that person or abstain from voting. If the vote is secret, however, faculty are free to vote without fear of alienation or vindictiveness.

The "show of hands syndrome," in which faculty who are indecisive on an issue tend to vote with the majority, is another disadvantage of the open voting system.99 Associate Dean Shirley Mays of Capital University Law School has witnessed this phenomenon: "[P]eople seem to be more willing to vote 'no' on a secret ballot than with a show of hands."30 As the example in the previous paragraph demonstrates, when the faculty actually voted on the student-generated proposal by secret ballot, the fence-sitters chose to vote a different way. The open voting system thus produced an outcome that was not indicative of each faculty member's true beliefs regarding the best interests of the institution.

The experience at one law school illustrates all of these drawbacks of the open ballot. Dickinson School of Law, prior to and for a while after its 2000 merger with Pennsylvania State University ("PSU" or "Penn State"), had a tradition of using secret ballots on faculty personnel matters.9 With the arrival of a new Dean in 2002, the situation changed. One faculty member wrote that the Dean, to his credit, "is leading an aggressive charge to hire 'impact' laterals and to embrace the PSU research model...."32 Another faculty member wrote, "[h]e has been pushing for aggressive recruitment of laterals—which is great."33 But this move for aggressive change did not come without controversy. It came "at a time when we have some significant curricular gaps and when tensions between and among faculty and [the] Dean are high."34 In addition, "some of the recruits, as wonderful as they are, have been his former colleagues from his previous institution—and in some instances, recruits have been good friends of the dean." As a result of these and other disagreements, "during the second season of voting [after his arrival, the dean] began advocating against secrecy in balloting."35 Another faculty member wrote, "[t]he Dean has been very vocal

99. See Blackburn and Lindquist, Faculty Behavior, supra note 28, at 410.
30. E-mail from Shirley Mays, Associate Dean of Academic Affairs, Capital University Law School, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 10:01:57 EST) (on file with author).
31. I contacted Penn State-Dickinson professor Francis J. Mootz III in his then-capacity as Associate Dean. Dean Mootz described the Penn State system as contentious and in flux and suggested that he did not wish to be quoted as providing the "official" description of his school's practices because there might be competing views. Subsequently I followed up with inquiries to individual professors and decided that it made sense to report all Penn State-Dickinson responses anonymously, although not all professors insisted on it.
32. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Oct. 27, 2005, 16:32:33 EST) (on file with author).
33. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Dec. 2, 2005, 10:48:48 EST) (on file with author).
34. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Oct. 27, 2005, 16:32:33 EST) (on file with author).
35. E-mail from law professor who requested anonymity, Penn State University, Dickinson
about moving to a completely non-secret ballot approach. Indeed, as another faculty member wrote, "we had been told repeatedly by the Dean that we are the single unit at PSU that has the horrible practice of voting on hiring, promotion, and tenure by secret ballot." A faculty member summarized the situation as follows:

The two rationales offered for maintaining the Dickinson Law School (pre-2000 merger) tradition of secret ballots...were to avoid having untenured or even tenured faculty members believe that there could be repercussions based on their voting, and to avoid having news of a negative vote ever leak out to one's future colleague and make the relationship difficult. The rationale offered by the Dean for public voting is to prevent illegitimate bases for decision-making, including potentially discriminatory voting.

The faculty complied with the Dean's request and ended the tradition of secret balloting. This decision did not sit well with some faculty members. One consequence was that "[s]ome people either abstained [from voting on hiring matters] or declined to attend hiring meetings because of reluctance to vote openly." "[M]any of the faculty belie[ved] that voting for the Dean's agenda (including hiring decisions) [was] the way to avoid trouble for oneself."

Reconsidering its decision, in the 2004-05 academic year the faculty reversed itself again. One faculty member wrote, "I see good reasons for anonymity..."
in voting—and dangerous reasons. The last two years have for the first time made me desire anonymous voting because I personally feel the pressure, even though I'm not easily intimidated." But the faculty did not move back to strict secret balloting, for the Dean stated that "he [would] ignore anonymous negative notes in his calculation, citing the need to protect diversity among faculty ranks, etc." Instead, the faculty adopted a compromise—a secret ballot that is "not anonymous in the full sense, but also without having to reveal one's vote to the Dean or colleagues." Under this modified secret ballot approach,

[0]ur current practice is for each voter to sign the written ballots, and the written ballots are to be kept secure by the Office of Human Resources.... The dean has agreed to respect this decision. The ballots are read and counted by the chair of the faculty, who is a member of the faculty elected by the faculty. Sometimes the secretary or another individual has helped, with no objection from the faculty.

Some at Penn State who shared information and comments with me referred to their situation as "atypical," "somewhat unique," and "a bit in transition," as the school has gone through a merger, is expanding its faculty, and during the past four years has been debating its location and institutional affiliation. For whatever reasons, however, the school is in flux, at best, or in conflict, at worst, on secret ballot voting. Even the faculty who urged caution on extrapolating too broadly from the Penn State example saw the common denominator clearly. One wrote: "[I realize that] tensions between administration and faculty probably are always a potential factor for any educational employer deciding who[m] to hire and promote." And another wrote: "By

41. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Dec. 2, 2005, 11:45:27 EST) (on file with author).
42. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Oct. 27, 2005, 16:32:33 EST) (on file with author).
43. Id.
44. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Dec. 4, 2005, 14:47:57 EST) (on file with author). "I think our written, signed ballot approach is our current compromise that would permit a candidate who feels unfairly treated the option of discovery in litigation—but at the same time permits some insulation for voters against a perception that we have a very strong dean who leans on people to get his way." Id.
45. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Oct. 28, 2005, 11:05:49 EST) (on file with author).
46. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Dec. 4, 2005, 14:47:57 EST) (on file with author) (due to "relatively recent joinder with Penn State, very recent battles over location, etc.").
47. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Dec. 4, 2005, 20:35:42 EST) (on file with author).
48. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Dec. 4, 2005, 14:47:57 EST) (on file with author).
saying that our situation is atypical I meant that the issues go well beyond the specific hiring decision. But...I realize that this is the typical situation to the extent that what is at issue is power.”

Secret Ballot Critiques and Responses

Opponents of the secret ballot system argue that the potential for discriminatory voting outweighs the chilling effect that the open voting system engenders. Critics postulate that secret voting prevents accountability by permitting faculty members to conceal votes that may be influenced by negative or inappropriate purposes. Knowing that a secret ballot system protects confidentiality, biased faculty members may abuse the system, since they do not have to disclose their real reasons for voting a certain way. In particular, critics and the courts are concerned with faculty voting that is a result of biases involving race, color, gender, sexual orientation, religion, national origin, or age. Consider In re Dinnan, a case involving denial of promotion to the rank of associate professor and termination of employment at the University of Georgia. The court compelled a member of the Education Promotion Review Committee to disclose his vote, writing that an open voting system would deter only those individuals who are acting pursuant to bad motives and those who are weak-willed.

Even the strong-willed, however, can face adverse consequences if their votes run contrary to the positions of those in power. Consequently, the most “courageous” faculty members may simply decline to vote altogether or may refrain from attending faculty meetings—neither of which is desirable. Although critics claim that the potential for improper motives and cowardly voting are problems unique to secret voting systems, they fail to acknowledge that, even with an open voting system, faculty members could

49. E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to author (Oct. 28, 2005, 11:05:49 EST) (on file with author). In fairness to the Dean of Pennsylvania State University, Dickinson School of Law, as well as to the integrity of this article (and therefore to me), the reader should be aware that several times I invited him to comment on matters pertaining to the use of secret versus open ballots at his school. I never received a reply.

50. See, e.g., Don Mark North, University of Pennsylvania v. EEOC: The Denial of an Academic Freedom Privilege, 18 Pepp. L. Rev. 213, 218 (1990); E-mail from John Strait Applegate, Executive Associate Dean for Academic Affairs, Indiana University School of Law-Bloomington, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 08:28:16 EST) (on file with author) (“The danger of secret ballots is that they permit voters not to express their true reasons openly, which enables (a) ambushing a candidate, or (b) voting against him/her for personal rather than professional reasons, or (c) both.”); E-mail from Paul Kurtz, Associate Dean for Academic Affairs, University of Georgia School of Law, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 11:13:46 EST) (on file with author) (“There have been times when the secret ballot nature of our voting system has served as a shield for the exercise of unreasoned and unexpressed judgments against...various candidates.”).

51. 661 F.2d 426 (5th Cir. 1981).

52. Id. at 432 (dismissing the necessity of a secret ballot system, for only the cowardly lack the "courage to stand up and publicly account for [their] decision[s]"). Here, too, e-mails to me agreed with this position.
cloak their improper motives (e.g., discrimination, political correctness) behind pretextual reasons for voting against—or for—a particular candidate.

In addition, more recent judicial decisions have alleviated the fear that the use of secret ballots facilitates discriminatory motives in faculty hiring and tenure decisions. In *University of Pennsylvania v. EEOC*, the U.S. Supreme Court formally discarded the idea of a judicially sanctioned academic freedom privilege in employment discrimination cases and ordered the automatic disclosure of votes.\(^5\)

While the Court did not dispute that confidentiality plays an integral role in properly functioning peer review processes, it ruled that, if a party suspects discriminatory motives, the faculty must disclose their votes during discovery. "[I]f there is a 'smoking gun' to be found that demonstrates discrimination in tenure decisions, it is likely to be tucked away in peer review files."\(^54\)

This decision acts not only as a tool for plaintiffs in discrimination suits, but also as a deterrent for potentially dishonest and biased voters. It is unlikely that faculty members, no matter how biased or malicious, would risk having their disingenuous or discriminatory votes disclosed—to the faculty, the administration, and the public—via the judicial process. Secrecy is quickly stripped away in litigation, thereby ensuring accountability for any non-academic bases for decisions. While it is easy to offer a pretextual reason for a decision, the litigation process works to pierce the pretext. Thus, the secret ballot is not a carte blanche for those who act with inappropriate purposes.

Moreover, the employment-bias objection may well be a red herring. The sexism, racism, or other discriminatory bias exhibited in faculty voting is typically not of a crude variety. Rather, it reflects a more subtle reading of résumés, publications, and promotion/tenure files through clouded lenses. Open or closed voting usually will not matter much, because the voting faculty member sees the world in a particular way and (contrary to the perceptions of his or her colleagues) is not just skulking in the shadows waiting to cast a bigoted or mean-spirited vote. The key is to have robust debate on the facts to clear these clouded judgments, to the extent possible, but this does not necessitate open voting.

Even though the evidence may show that the secret ballot does not enable discriminatory voting, some schools have implemented modified secret ballot systems. For hiring decisions, for example, several law schools require signed secret ballots, which faculty members may view upon request.\(^55\) At least one school requires that a faculty member make this request to the entire faculty. Since most faculty members refrain from asking to see the votes for fear that


\(^54\) Id. at 193.

\(^55\) See E-mail from law school official who requested anonymity, to Adrienne Belyea, Washington College of Law (Sept. 15, 2005, 19:33:10 EST) (on file with author) ("For hiring, we sign written ballots so someone who wants to know how particular members of the faculty voted has to ask to see the ballots. This shaming mechanism usually works to keep the ballot secret, but on occasion, a faculty member has asked to see the signed ballots.").
their peers will look negatively on them, this system compels only those faculty members who truly believe that discriminatory voting has occurred to request to view the individual ballots. Under this system, however, faculty members still fear retribution from the dean, who could presumably view the votes without a request, thus rendering the "shaming mechanism" void. There is a variant of this system at the University of Kansas School of Law, whose hiring policy requires written comments to the dean. "[I]n effect, it's secret from the rest of the faculty but not from the dean." Other schools, including the University of Oregon School of Law, also require a signed secret ballot. Votes are disclosed only if a legal proceeding arises. The ballots are not accessible to faculty members who wish merely to view them.

At Pennsylvania State University, Dickinson School of Law, the ballots for promotion and tenure are secret and unsigned, but (unlike the voting procedure for faculty hiring) any member who votes against a candidate must include the rationale in the dossier. As long as a neutral party keeps the votes confidential from faculty members and the dean, these methods remedy critics' fears that secret ballots mask discriminatory motives, while still preserving the benefits of the secret ballot. These systems respect confidentiality and provide adequate discovery in employment discrimination litigation, should the occasion arise.

Yet another method to avoid the risk of discriminatory votes, used by Valparaiso University School of Law, is to alter the format of the ballot while still maintaining strict confidentiality. Instead of a simple yes/no vote, "the ballot forces evaluation on the three criteria of teaching, scholarship and service and disallows a [yes] vote unless there is a positive vote in each category." This approach ensures anonymity, counters the temptation of improper motives, and, ideally, leads to the appointment or retention of the most qualified candidates.

A different variation of an absolute secret ballot requires voters to identify their rank (assistant, associate, or full professor) and tenure status (tenured

56. E-mail from Edwin W. Hecker, Associate Dean for Academic Affairs, University of Kansas School of Law, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 16:32:01 EST) (on file with author).

57. See E-mail from Margaret Paris, Associate Dean for Academic Affairs, University of Oregon School of Law, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 16:23:09 EST) (on file with author) ("Ballots are secret but signed and forwarded to the university provost.").

58. See E-mail from law professor who requested anonymity, Penn State University, Dickinson School of Law, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 16:31:47 EST) (on file with author) ("This can be done by passing the information on to the Chair of the Committee, rather than in the meeting itself.").

59. E-mail from Bruce Berner, Associate Dean for Academics, Valparaiso University School of Law, to Adrienne Belyea, Washington College of Law (Oct. 11, 2005, 11:19:19 EST) (on file with author) ("The tenure and promotion document requires a secret ballot and even specifies its format.").
or untenured). However, this approach, used at the University of Wyoming College of Law, is inadequate to achieve true, open, and effective voting on faculty personnel decisions, as these categories can often destroy confidentiality, especially at small schools.  

UCLA School of Law employs yet another variation, allowing its faculty the option to waive its secret ballot requirement on an annual basis. Even if the faculty waives the secret ballot in its yearly vote, however, "a secret ballot shall be taken on a specific vote at the request of one or more voting members." This option benefits a university that has had a long history of open voting but is considering a transition to a secret ballot system, or for a school still apprehensive about potential improper motives. This system gives the faculty an opportunity to see the benefits of a confidential vote without feeling tied down for the long term.  

Notwithstanding these mechanisms to eliminate potential abuses while preserving the advantages of a secret ballot system, some critics contend that secret ballots hinder communication among faculty members because they do not have an opportunity to discuss openly their opinions on hiring, retaining, promoting, or tenuring candidates. An open voting system, however, can have similar effects. Faculty members appointed to peer review committees, for example, often compromise their beliefs out of fear that their opinions will create confrontational situations among the faculty or that their colleagues will retaliate against them if their opinions do not coincide. Consequently, peer reviews can lead to promotion or tenure where faculty members wish to vote against a candidate but refrain from doing so when others vote affirmatively. Thus, ironically, an open voting system may actually decrease the value of the communication. If an open ballot leads to "groupthink"—i.e., uncritical acceptance of or conformity to prevailing points of view—there will also be less deliberation. Everyone will be looking to the signal from the "powers that be" concerning how to act. If the secret ballot does not promote greater conversation (and, as described above, I think it does), then at a minimum  

60. See E-mail from Dee Pridgen, Associate Dean, University of Wyoming College of Law, to Adrienne Belyea, Washington College of Law (Sept. 20, 2005, 16:20:13 EST) (on file with author) ("We have a really small faculty so these designations can identify some persons.").  
61. See E-mail from Ann Carlson, Academic Associate Dean, University of California at Los Angeles School of Law, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 11:28 EST) (on file with author).  
62. See id. (quoting Law School Bylaws).  
63. See E-mail from M. Thomas Arnold, Associate Dean for Academic Affairs, University of Tulsa College of Law, to Adrienne Belyea, Washington College of Law (Sept. 23, 2005, 15:29 EST) (on file with author) ("If a person is going to vote for or against someone based on something, it should be something in the record and something the faculty has had an opportunity to incorporate into their deliberations.").  
64. See Brooks, Confidentiality of Tenure Review, supra note 20, at 734.  
65. Id.
there would be an opportunity for each individual to vote on the merits after the groupthink discussion has concluded.

A secret ballot need not hinder communication when schools still hold open discussions before the matter goes to a secret vote. Faculty members with conflicting views have the opportunity (but are not required) to voice their opinions, exchange ideas, and lobby other faculty to adopt their viewpoints. The controlling difference is that, with a secret ballot, each individual can cast his or her ballot after considering the discussion, yet remain free from the influence of colleagues or administrators who choose to voice their opinions openly.66

The Secret Ballot Decreases Disharmony Among the Faculty

The secret ballot is important because it may help alleviate disharmony among the faculty.67 This goal is significant because academic excellence relies on collegial relationships and the free exchange of ideas among faculty members. Faculty who fear reprisal or who generally do not associate with one another are unlikely to provide feedback on their colleagues’ projects, to discuss teaching methodologies, or to observe each other’s classes. Indeed, they might not talk to each other at all.

Under the secret ballot system, faculty members can fulfill their professional duty and vote honestly on what they believe is in the school’s best interest without creating confrontational situations.68 Further, by not knowing how others vote, a professor cannot get upset with other faculty members if they vote in a way that he or she deems inappropriate. It is less likely, therefore, that a faculty member would refuse to work with other faculty members, decline to participate on a particular committee, or cast a future vote that is motivated only by spite simply because faculty members do not share the same beliefs about law, legal education, or even life in general. In essence, over time the

66. See E-mail from Phillip McIntosh, Associate Dean for Academic Affairs, Mississippi College School of Law, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 15:17:51 EST) (on file with author) (“The secret ballot is [p]roductive and essentially noncontroversial. We fully discuss the candidate prior to voting. Faculty members prefer secret ballot so as to avoid any undue pressure.”).

67. See E-mail from Kathleen Boozang, Associate Dean, Seton Hall University School of Law, to Adrienne Belyea, Washington College of Law (Oct. 13, 2005, 17:29:09 EST) (on file with author) (“[The secret ballot]...eliminates actual knowledge about who voted how, unless people speak before the vote, and diminishes hard feelings and gossip.”); E-mail from Edwin W. Hecker, Associate Dean for Academic Affairs, University of Kansas School of Law, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 16:32:01 EST) (on file with author) (“[E]ach person is free to vote his/her conscience without fear of gossip getting back to the candidate.”); E-mail from Barbara Kritchevsky, Associate Dean, The University of Memphis-Cecil C. Humphreys School of Law, to Adrienne Belyea, Washington College of Law (Oct. 10, 2005, 12:17:52 EST) (on file with author) (“[T]he secret ballot is] helpful—people are freer to vote their minds without worrying about what will get back to the person involved.”).

secret ballot system may actually lessen factionalization, not increase it. This system, then, is the best means to preserve the collegial relationships upon which, in part, an academic institution thrives. As Associate Dean Carol Goforth of the University of Arkansas School of Law-Fayetteville reported, the secret ballot avoids fear that negative votes will be reported back to the candidate, and might poison or harm future relationships. Certainly some negative comments made in the course of discussions have been reported back to candidates, who then must deal with hurt feelings and resentment. And certainly, critical observations in some of our meetings have sometimes strained some relations on the faculty. But not to any great extent, and I think that the faculty credits part of that with our respect for the secret ballot process.

The open voting system, on the other hand, threatens to create and perpetuate disharmony among the faculty. When making personnel decisions, professors aim to provide truthful assessments of a candidate’s potential or actual scholarly achievement and teaching effectiveness. Inevitably faculty members will hold opposing views. Forcing professors to reveal their votes and thus disclose how they view candidates’ qualifications may strain indispensable collegial relationships. Faculty members who have been granted tenure may hold grudges against those who voted against them. As a result, compulsory

69. See E-mail from M. Thomas Arnold, Associate Dean for Academic Affairs, University of Tulsa College of Law, to Adrienne Belyea, Washington College of Law (Sept. 23, 2005, 15:25:29 EST) (on file with author) (“The...secret ballot...probably minimizes hard feelings after votes on very controversial cases.”); E-mail from Lawrence Cunningham, Associate Dean for Academic Affairs, Boston College Law School, to Adrienne Belyea, Washington College of Law (Oct. 9, 2005, 21:15:42 EST) (on file with author) (“[The secret ballot] helps collegiality.”).

70. See E-mail from W. Clark Williams, Associate Dean for Academic Affairs, University of Richmond School of Law, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 15:38:56 EST) (on file with author) (“[The secret ballot] enhances the collegial working relationship among faculty, particularly as to one who may be hired/promoted/tenured with a less than unanimous vote, and with whom ongoing positive relations are, of course, important.”).

71. E-mail from Carol Goforth, Associate Dean, University of Arkansas School of Law-Fayetteville, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 12:16:53 EST) (on file with author).


73. See id. For example, Associate Dean Michael Ariens of St. Mary’s University School of Law finds the secret ballot to be productive in faculty hiring decisions because such decisions are fraught with interpersonal conflicts. Our tenured faculty took a secret vote on whether to tenure the wife of a tenured colleague. A secret ballot made the consequences of voting one’s conscience less severe than an open ballot, for despite the outrage of some faculty members who were friends of the applicant, they could not directly accuse anyone of voting negatively in her case.
open voting on controversial matters often pits faculty members against each other and creates factions among them. When factions exist and tempers flare, professors may simply refuse to work with one another or may even seek retribution for casting an unpopular vote. And once factions develop, open voting only exacerbates the disharmony and alienation among the factions that it helped create. While a professor may often agree with, and thus vote with, the rest of his or her faction, that is certainly not always the case. And when the professor's assessment is not in accordance with the rest of his or her faction, under the open voting system the professor may nevertheless feel compelled to vote with that group. To avoid this compulsion and the subsequent disharmony among and even within faculty groups, schools should implement the secret ballot or its functional equivalent, thus allowing faculty members an unfettered vote and more productive and amiable relationships thereafter.

Law Schools' Use of Secret Ballots

A Range of Views

Following the recommendations of the academic community and well-respected academic associations, such as the AAUP, most law schools in the United States recognize the benefits of a secret ballot and implement the system in making faculty personnel decisions, either as a matter of custom or under explicit policy. For example, the Rules and Procedures for the Faculty Appointments Process for the College of William & Mary, Marshall-Wythe School of Law state: "Decisions on appointment matters will be made by Faculty.... The Faculty will vote by secret ballot on an appointment." Similarly, the UCLA Senate Bylaw for voting rights pertaining to personnel decisions provides: "The vote on all personnel matters shall be by secret ballot. Procedures should be designed so that only the voter shall know how he or she voted." Catholic
University’s Columbus School of Law is also strongly committed to the secret ballot tradition for faculty personnel decisions; indeed, then-Dean William Fox emphasized that he “would not want this to change—ever!!”71

Other law schools employ the secret ballot system only when a faculty member requests it. The University of Maryland School of Law, for example, generally votes through open ballot procedures, but the university’s long-standing practice permits any faculty member to request a vote by secret ballot on any issue.79 As a matter of collegiality, Maryland grants the faculty member’s request without any procedural obstacles or separate votes on whether there should be a secret ballot vote on the issue.80 Taking this approach further, some schools that officially have the same written policy as Maryland have evolved in practice—and sometimes in writing, amending the previous policy—to an automatic secret ballot system for personnel decisions, because requests for a secret ballot vote have been so common.81 Consider the maturation of secret ballot voting at the University of the Pacific, McGeorge School of Law. The Faculty Bylaws had provided (and still provide) that, on matters of retention, promotion, and tenure, secret ballots are automatic, but on matters of hiring, as well as on any other question, “[v]oting shall be conducted by secret ballot if requested by any voting member and approved by the presiding officer or by one-third of the voting members present at the meeting.”82 McGeorge faculty members reported that—because secret ballots were typically requested on committee recommendations for new hires, and because “in recent memory we have always used secret ballots for hiring decisions”83—the faculty came to

78. E-mail from William Fox, Dean, Catholic University of America, Columbus School of Law, to Eileen M. Flanagan, Assistant to the Dean, forwarded to Sima P. Bhakta, Washington College of Law (Apr. 6, 2005, 14:25:46 EST) (on file with author).

79. E-mail from Richard Boldt, Associate Dean for Research and Faculty Development, University of Maryland School of Law, to Sima P. Bhakta, Washington College of Law (Apr. 6, 2005, 12:09:40 EST) (on file with author).

80. E-mail from Richard Boldt, Associate Dean for Research and Faculty Development, University of Maryland School of Law, to Sima P. Bhakta, Washington College of Law (May 9, 2005, 10:39:02 EST) (on file with author).

81. See, e.g., e-mail from William Mock, Associate Dean for Academic Affairs, The John Marshall Law School, to Adrienne Belyea, Washington College of Law (Sept. 16, 2005, 14:45:59 EST) (on file with author) (“Technically, it has to be requested, but it has been requested in every vote in memory. In recent years, the Chair of the Selections and Appointments Committee [has] typically save[d] someone the trouble of making the motion by making the motion him/herself sua sponte.”).

82. Faculty Bylaws on Employment, Promotion, and Tenure, University of the Pacific, McGeorge School of Law (on file with author).

83. E-mail from law professor who requested anonymity, University of the Pacific, McGeorge School of Law, to author (Dec. 13, 2005, 11:37:15 EST) (on file with author).
view secret ballots on faculty personnel matters as "routine." Recognizing this evolution, the faculty amended the Bylaws to provide for automatic secret ballots on motions to recommend offers of employment, as well as on motions to prioritize appointments candidates.

Other schools, including the University of Pittsburgh School of Law, recognize that even requesting a secret ballot can raise suspicions among colleagues and the administration, making this practice vulnerable to the dangers of the open ballot discussed previously. Although the University of Pittsburgh has an automatic secret ballot for personnel decisions, Associate Dean Darryll Jones discussed a recently implemented method to protect confidentiality and ensure thoughtful, productive decisions on all other issues.

[About two years ago, we] adopted a policy whereby any faculty member may request a secret vote on any matter before the faculty. The faculty member...sends such a request to the Chairperson of the Faculty Steering Committee...in confidence and the Chairperson must grant the request without divulging the name of the requestor. The faculty member need not divulge his or her identity to the Chairperson.

Others raised this point as well. A faculty member at another law school wrote:

[W]e recently had an issue on the agenda for our faculty meeting (where secret ballots are at the option of a faculty member) that was somewhat charged. Several non-tenured members of the faculty asked some of us who are tenured to request a secret ballot. This raises two points: (i) [t]hey perceived the secret ballot as a positive and a way to allow them freedom in voting, and (2) [t]hey preferred to not be the ones to ask for the secret ballot, which perhaps is a flaw in our system if one is disadvantaged by asking for it.

Some schools—including the University of California at Davis School of Law and the University of Iowa College of Law—use a double-blind system for the submission of secret ballots. Iowa also has a non-academic administrator transcribe the ballots, to avoid recognition of handwriting.

84. E-mail from Gerald Caplan, Professor of Law, University of the Pacific, McGeorge School of Law, to author (Dec. 8, 2005, 19:43:11 EST) (on file with author).
85. Faculty Bylaws on Employment, Promotion, and Tenure, University of the Pacific, McGeorge School of Law, §§ II.B.2.d, II.B.3.b (on file with author).
86. E-mail from Darryll Jones, Associate Dean of Academic Affairs, University of Pittsburgh School of Law, to Adrienne Belyea, Washington College of Law (Oct. 11, 2005, 16:00:09 EST) (on file with author). Dean Jones further discussed how the policy was first implemented out of concern for untenured faculty members; however, a number of secret ballots have been requested and there is no way to determine whether those requests have come from tenured or untenured faculty. Id.
87. E-mail from law professor who requested anonymity, to author (Dec. 8, 2005, 20:05:21 EST) (on file with author).
88. E-mail from Eric G. Andersen, Associate Dean, University of Iowa College of Law, to author (Mar. 23, 2006, 17:32:42 EST).
For the same reason, the University of Akron tries to have ballots with the names listed on them to be checked or circled.89

Another method employed by at least one law school—the University of Michigan Law School—is the “secret straw vote.” Under this system, the eligible faculty vote by secret ballot, the dean announces the results of that secret vote, discussions continue, and the final governing vote is taken in the open.90

Finally, whether based on policy, tradition, or varying governance structure, some law schools continue to use an open voting system for all faculty decisions. Indeed, on a motion for a secret ballot at a recent faculty meeting on hiring, one law school dean is reported to have said, “A secret ballot is anti-democratic!”91

Law schools employing an open ballot system should, at the very least, permit faculty members to make a secret ballot request and, better yet, a confidential one. Schools that do not have provisions detailing how voting should take place might adopt a policy following Robert's Rules of Order, according to which a faculty member has the right to assert that the vote take place by secret ballot.92 Under Robert's Rules, when a faculty member makes such a request, the faculty would vote—preferably by secret ballot—to determine if the vote on the issue at hand should be decided by secret ballot.93 A more efficient and less complicated policy is to adopt the practice whereby the faculty complies with the request without a separate vote, to maintain respect among faculty members. In either case, the importance of maintaining good relations and honest votes among colleagues necessitates either following a strict secret ballot policy or a viable modification thereof (such as a signed ballot that is not revealed unless there is a lawsuit or investigation) for all faculty personnel decisions, or consistently granting faculty members' confidential secret ballot requests on any issue.

Quantitative Results and Discussion

Of the 97 percent of U.S. law schools that responded to my survey, 88 percent use secret ballots for one or more categories of personnel decisions (163/185).94

89. E-mail from William S. Jordan III, Professor of Law, University of Akron, to author (Mar. 6, 2006, 14:23:17 EST).
90. E-mail from Evan Caminker, Dean, University of Michigan Law School, to author (Mar. 23, 2006, 19:43:43 EST).
91. Why did you look down here? You don’t really expect me to disclose the name of the professor or the law school, do you? E-mail from law professor who requested anonymity, to author (Sept. 16, 2005, 10:18:25 EST) (on file with author).
93. See id. at 274, 398.
94. All percentages in this section are based on the number of schools responding in the particular category, as not all schools responded in all categories. For a tabular summary, as well as a school-by-school listing, see the unabridged version of this paper, available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=909253> (last visited Sept. 4, 2007).
For faculty personnel decisions alone (hiring, retention, promotion, or tenure), 83 percent of law schools use a secret ballot (153/185). Only 7 percent of U.S. law schools use a secret ballot for dean selection only and not for any other decision regarding faculty personnel (10/145).

Separated into the various decisions on faculty personnel, the following results emerge: For faculty hiring decisions, 76 percent of law schools use secret ballots (141/185). Of those law schools, 99 percent use completely secret ballots (139/141). Secret ballots must be signed at 4 percent of law schools (5/141). Only 1 percent of law schools require reasons along with the submission of secret ballots (2/141). Secret ballots for hiring decisions are automatic at 94 percent of law schools that use secret ballots in this category (132/141).95

For faculty retention decisions, 67 percent of law schools use secret ballots (105/157). Of those law schools, 98 percent use completely secret ballots (103/105). Secret ballots must be signed at 5 percent of law schools (5/105). Five percent of law schools require reasons along with the submission of secret ballots (5/105). Secret ballots for faculty retention decisions are automatic at 93 percent of law schools that use secret ballots in this category (98/105).

For faculty promotion decisions, 70 percent of law schools use secret ballots (124/176). Of those law schools, 95 percent use completely secret ballots (120/124). Secret ballots must be signed at 5 percent of law schools (8/124). Five percent of law schools require reasons along with the submission of secret ballots (6/124). Secret ballots for faculty promotion decisions are automatic at 92 percent of law schools that use secret ballots in this category (114/124).

For faculty tenure decisions, 74 percent of law schools use secret ballots (132/178). Of those law schools, 95 percent use completely secret ballots (126/132). Secret ballots must be signed at 7 percent of law schools (9/132). Five percent of law schools require reasons along with the submission of secret ballots (7/132). Secret ballots for faculty tenure decisions are automatic at 92 percent of law schools that use secret ballots in this category (122/132).

For dean-selection decisions, 83 percent of law schools use secret ballots (118/142). Of those law schools, 95 percent use completely secret ballots (112/118). Secret ballots must be signed at 3 percent of law schools (3/118). Three percent of law schools require reasons along with the submission of secret ballots (3/118). Secret ballots for faculty dean-selection decisions are automatic at 85 percent of law schools that use secret ballots in this category (100/118).

Finally, 87 percent of law schools (82/94) use secret ballots on other—i.e., non-faculty-personnel—matters.97

95. At first glance, the figures in this sentence may appear to be at odds with those in the previous sentence. However, a school that requires that secret ballots be signed may still have a system that is completely secret if a double-blind procedure is used.

96. That is, there is no necessity for a voting member to make a motion for or otherwise request a secret ballot.

97. These decisions include, for example: election to particular committees, such as a faculty executive committee (Illinois) or a dean’s advisory committee (Nevada-Las Vegas); student
More generally, many respondents added that their schools also use secret ballots for sensitive or controversial decisions, as well as whenever a voting member of the faculty requests a secret ballot. As a matter of courtesy to the requesting faculty member, faculty at some schools will accede to that request without requiring a motion or a vote (e.g., Arkansas, Colorado, Denver, Louisville, Loyola New Orleans, and Texas Tech).

### Numerical Summary

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The Importance of the Secret Ballot

Some of these results are striking. Significantly, most law schools in the United States use secret ballots for decisions involving faculty personnel and dean selection. The most common pattern in every category—hiring, retention, promotion, tenure, and dean selection—is that law faculties automatically use a completely secret ballot that is unsigned and that does not require a statement of reasons.

Other results may require some explanation or further investigation. For example, respondents at some law schools wrote that they did not understand my question, “Does your faculty use secret ballots for faculty retention decisions?,” or that it was not applicable at their schools. The reason is that, after an initial hire, faculty at some schools do not vote for reappointment (e.g., annually or biennially) other than when the candidate comes up for promotion or tenure. Thus, the number of schools that indicated use of secret ballots for retention (105) was significantly lower than the number that indicated use of secret ballots for hiring (4), promotion (124), or tenure (132). Nevertheless, the percentage of schools that use secret ballots for retention (67 percent) is not significantly different from the percentage that use secret ballots in the other categories (76 percent for hiring, 70 percent for promotion, and 74 percent for tenure).

More law schools use secret ballots for dean selection (83 percent) than for any other category of faculty personnel decisions. Yet, while the percentage is still high, use of secret ballots for dean selection is automatic less often (85 percent) than it is in all other categories (94 percent for hiring, 93 percent for retention, 92 percent for promotion, and 92 percent for tenure). I suspect that the reasons are at least threefold. First, although a strong argument can be made for secret ballots in either situation, law schools are much more likely to use secret ballots automatically when the dean search involves at least one internal candidate than when all of the candidates are external. Second, law school dean search committees are typically appointed and largely controlled by university officials. The committees' procedures are determined by the university administration and not by the law school faculty. Third, dean searches occur with much less frequency than the other faculty personnel decisions discussed in this article. From one dean search to another, procedures at a school can vary greatly.

There are some variables that I did not consider when I drafted and distributed my questionnaires. One of these is university governance structures. While voting practices at most law schools are within the discretion of the law school faculty, at many schools university-wide procedures govern. At some schools at which the law faculty uses secret ballots for hiring, for example, they do not vote at all on promotion and tenure; that determination is made by a university committee.98

Nor did I consider the relationship between the use of secret ballots and whether a law school was public or private. It may be, for example, that—in

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98. Similarly, at some law schools faculty play only a limited role in dean selection.
states that have open-meetings laws—faculty at public universities are not permitted by law to vote by secret ballot.

In addition, I did not initially consider the relationship between a law school's position in the *U.S. News & World Report* annual rankings and its use of secret ballots. When I tabulated the final responses, however, I was struck by the following discrepancy: nine of the top eleven law schools in the United States generally do not use secret ballots. Yet the vast majority of law schools in the country—including six out of the next ten schools—generally do use secret ballots. Others may wish to speculate about the reasons for this apparent anomaly.

Although the use of secret ballots for faculty hiring is similar at AALS member (76 percent) and non-member (75 percent) schools, at non-member schools the use of secret ballots is far less frequent in the other categories: retention—69 percent member schools, 50 percent non-member schools; promotion—73 percent member schools, 50 percent non-member schools; tenure—77 percent member schools, 55 percent non-member schools; and dean selection—85 percent member schools, 71 percent non-member schools. The explanation likely has to do in large part with a school's age. Many non-member law schools are relatively new and, therefore, have not gone through the necessary maturation process for enough retentions, promotions, tenures, and dean selections to have established fixed procedures.

I would be remiss if I did not point out the following limitation of this study: Many faculty—and even some members of the administration—expressed some uncertainty about their own school's precise rules and practices. Thus, administrators and faculty at some schools may not agree with the descriptions of the secret ballot procedures (or lack thereof) that one or more of their colleagues provided to me. Indeed, some faculty members had longer institutional memories than others (or than their deans). Others disagreed on nuances of their school's practices. When I encountered inconsistent or conflicting responses, I contacted the respondents for clarification. Moreover, if I received only one response from a school (typically from the dean or an associate dean), I did


100. These schools are: Yale, Stanford, Columbia, Chicago, Pennsylvania, UC-Berkeley, Michigan, Duke, and Virginia. (Columbia and Pennsylvania do use secret ballots for dean selection. Duke does not use secret ballots for hiring, retention, or dean selection, but does use secret ballots for promotion and tenure.) The two schools that generally do use secret ballots are Harvard and NYU.

101. These schools are: Cornell, Georgetown, UCLA, USC, Vanderbilt, and Washington University. The four schools that generally do not use secret ballots are: Northwestern, Texas, Minnesota, and Boston University. (Minnesota does not use secret ballots for hiring or retention, but does use secret ballots for promotion, tenure, and dean selection.) For the prior year's rankings, see America's Best Graduate Schools 2007, U.S. News & World Report, Apr. 10, 2006, at 44. Eight of the top ten schools did not use secret ballots; seven of the next eleven did.
not write to others at the school for confirmation.109 It may be that, had I done so, I would have seen more deviations. Finally, of course, just because I received two (or more) consistent responses from a school does not necessarily mean that other colleagues at the same school would have agreed.

Notwithstanding the foregoing explanations, anomalies, speculations, and limitations—some or all of which others may wish to pursue—the point remains that most law schools in the United States use secret ballots for most faculty personnel decisions.

Conclusion

Law school faculty personnel decisions—i.e., those pertaining to hiring, retention, promotion, and tenure—can be exceedingly sensitive and are among the most important questions that come before the faculty. I argue that all law schools should use a secret ballot voting system for these decisions to ensure candid and voluntary assessments at every level of the faculty evaluation process. A substantial majority—88 percent—of law schools in the United States already use secret ballots for one or more categories of faculty personnel decisions or dean selection. But many law schools do not, and those that do so for only some purposes might consider going further.

In a perfect world, of course, we would not need secret ballots at all. Faculty members would trust each other, faculty and administrators would not search for others’ ulterior motives where none exist, discussion and debate would be courteous and honest, and voting would be fair and unbiased. But we do not typically operate in such a world. Moreover, in the world in which we do operate, critics may well be correct that, with secret ballots, someone may vote “no” for inappropriate reasons (e.g., bias, discrimination). It is essential to recognize, however, that, with open ballots, someone may also vote “yes” for inappropriate reasons (e.g., political correctness, sycophancy, fear of reprisals). Votes can be disguised in either type of system.

It is also important to acknowledge that different law schools have different personalities, different cultures, and different climates of trust and respect. Not only do schools vary in these ways, but these factors also vary within schools over time—particularly, although not exclusively, when there is a change of administration. So the foremost criterion that faculty members should constantly address is this: which system of voting at this school at this time will lead to votes that best reflect this faculty’s good faith collective judgment on the merits? At schools that cannot have a sincere and civil discussion about whether to use a secret ballot, whether generally or on a specific question, secret ballots should clearly be used.

102. Also, not all respondents answered all questions. In many cases, I followed up with a request for additional information. Many, but not all, respondents complied.
With secret ballots—or, at the very least, with an open and honest debate about whether to conduct secret balloting—may come not only candor, but also greater harmony and collegiality.\footnote{103}

\footnote{103. If the secret ballot is desirable for faculty personnel decisions, it could also be a beneficial procedure for other faculty decisions—some of which can be at least as divisive. While some responses to my questionnaires addressed this matter, see \textit{supra} note 97 and accompanying text, and many of the arguments discussed herein would be equally applicable, that issue is beyond the direct scope of this article.}