Consensual Amorous Relationships Between Faculty And Students: The Constitutional Right to Privacy

Elisabeth A. Keller
Professor, Boston College Law School

Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy*

Elisabeth A. Keller**

Introduction

Surveys of college students in the United States revealed that a significant number of students thought they had been victims of some form of sexual harassment. Thirty percent of the female seniors at the University of California at Berkeley reported harassment by at least one male instructor.[1] A survey of graduate and undergraduate female students at Iowa State University found that 43.2 percent of the students thought they received undue attention from a professor; 17.4 percent experienced verbal sexual advances; 6.4 percent experienced physical advances of fondling, kissing, pinching, or hugging; and 2.1 percent were subject to sexual bribery that included promises of rewards for compliance.[2] The results of a survey reported in the *Journal of College and Student Personnel* showed that seventy-five percent of students believed that most female students would be reluctant to report a professor's sexually-harassing conduct. None of those surveyed who considered themselves harassed reported such harassment to a university official.[3] Thus, a lack of sexual harassment reports does not necessarily indicate absence of such a problem.

Growing awareness of the magnitude, dimensions, and effects of sexual harassment at educational institutions and the potential for institutional liability have prompted educators to adopt policies to avert such problems. Many private and public colleges and universities include these policies in their faculty and student handbooks. The

---

* An abstract of this article, which won the NACUA National Legal Writing Competition, was printed in The NACUA Publication Series, Sexual Harassment on Campus: A Legal Compendium (1988).

** B.A., Brandeis University, 1981; J.D. Candidate, Ohio State University, College of Law, 1988; M.A. Candidate, College of Education, Ohio State University, 1988.

[1] Smith, *Must Higher Education Be a Hands-On Experience? Sexual Harassment by Professors*, 28 Educ. L. Rep. 693, 696 (1986) (referring to Middleton, *Sexual Harassment by Professors: An Increasingly Visible Problem*, Chron. of Higher Educ., Sept. 15, 1980, at 1, 4).

[2] Adams, Kotke & Padgitt, *Sexual Harassment of University Students*, 24 J.C. Student Personnel 484, 488 (1983).

[3] *Id.*

policies typically prohibit sexual harassment of employees and students and alert the university community to the serious effects of sexual harassment and the potential for student exploitation. Many institutions have used a definition of sexual harassment in academe similar to that of the National Advisory Council of Women's Educational Programs: "Academic sexual harassment is the use of authority to emphasize sexuality or sexual identity of a student in a manner which prevents or impairs that student's enjoyment of educational benefits, climates, and opportunities."[4]

Some universities have gone beyond establishing regulations directed at the widely litigated problems of sexual harassment and have promulgated policies addressing the problematic issues surrounding consensual amorous relationships between faculty and students. For example, the University of Iowa adopted a policy stating: "No faculty member shall have an amorous relationship (consensual or otherwise) with a student who is enrolled in a course being taught by the faculty member or whose academic work (including work as a teaching assistant) is being supervised by the faculty member."[5] The policy further declares that "[a]morous relationships between faculty members and students occurring outside the instructional context may lead to difficulties," but are not prohibited so long as the faculty member avoids participation in decisions that could penalize or reward the student.[6] The University of Minnesota does not forbid consensual relationships between faculty and students, but its policy statement on sexual harassment clearly states that such relationships are considered "very unwise."[7]

The Faculty Senate of the University of California defeated a proposed amendment to the Faculty Code of Conduct which declared it unethical for professors to engage in amorous relationships with students.[8] A similar proposal was rejected by the faculty of the University of Texas at Arlington.[9] Some faculty members at both universities considered the issue "none of the university's business."[10] A University of California professor suggested that restrictions on amorous relationships between faculty and students may violate civil rights.[11] Such a comment highlights the potential conflict between concerns for preventing victimization of students through sexual harassment and concerns for the individual's right to enter intimate relationships.

---

[4] Somers, *Sexual Harassment in Academe: Legal Issues and Definitions*, 38 J. SOCIAL ISSUES 22, 24 (1982).

[5] University of Iowa, Policy on Sexual Harassment and Consensual Relationships, Division 2, § 7 (1986) (Consensual Relationships in the Instructional Context).

[6] *Id.* at § 8.

[7] University of Minnesota, Policies and Procedures on Sexual Harassment, Policy Statement on Sexual Harassment (1984) (approved by University Senate, May 17, 1984).

[8] Chron. of Higher Educ., Sept. 3, 1986, at 44.

[9] McMillen, *Many Colleges Taking a New Look at Policies on Sexual Harassment*, Chron. of Higher Educ., Dec. 17, 1986, at 1, 16.

[10] *Id.* at 16.

[11] Chron. of Higher Educ., *supra* note 8, at 44.

This article contends that the constitutional right to privacy applies to consensual amorous relationships between faculty and students in public colleges and universities. Accordingly, such institutions must recognize this right when regulating faculty-student amorous relationships. The analysis begins with a review of recent law regarding sexual harassment, followed by an examination of possible responses of private and public institutions to these developments. Finally, court decisions challenging institutional actions regarding consensual amorous relationships are analyzed in light of the constitutional guarantees of privacy and proper limits of institutional policies.

I. Sexual Harassment Under Title VII and Title IX

Institutions which have included statements regarding amorous relationships in their sexual harassment policies acknowledge the difficulty of drawing a line between sexual harassment and intimate consensual relationships. Therefore, consenting relationships and sexual harassment cannot be dealt with as entirely distinct concerns. The legal developments surrounding Title VII of the Civil Rights Act of 1964[12] and Title IX of the Educational Amendments of 1972[13] set the stage for the formulation of university policies regarding sexual harassment and amorous relationships between faculty and students.

Congress enacted Title VII to prevent sexual discrimination in the employer-employee relationship and Title IX to prevent sexual discrimination in the educational environment. Under both acts sexual harassment has been considered tantamount to sexual discrimination.[14] Due to the broader application of Title VII, a greater number of actions in this area have been filed under Title VII than under Title IX.[15] Consequently, the law under Title VII has developed more rapidly and more fully. In considering charges of harassment under Title IX, the courts have turned to case law under Title VII for assistance.[16]

A. *Title VII*

The Equal Employment Opportunity Commission (EEOC) guidelines, enacted pursuant to Title VII, define sexual harassment as:

---

[12] 42 U.S.C. §§ 2000e - 2000e-17 (1982).

[13] 20 U.S.C. § 1681 (1982). See *infra* note 32 and accompanying text.

[14] *See, e.g.*, Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[15] Employers with more than 15 employees are subject to Title VII provisions. 42 U.S.C. § 2000e(b) (1982).

[16] *See, e.g.*, "Though the sexual harassment doctrine has generally developed in the context of Title VII, [the Equal Employment Opportunity Commission's] guidelines seem equally applicable to Title IX." Moire v. Temple Univ. School of Medicine, 613 F. Supp. 1360, 1366-67, n.2 (E.D. Pa. 1985), *aff'd without opinion*, 800 F.2d 1136 (3d Cir. 1986) (referring to the 1980 Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11 (1984)); *see also* Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980) (citing Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977)).

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[17]

The courts have adopted the EEOC definition and have classified sexual harassment under Title VII into two categories: (1) "quid pro quo" situations, in which a supervisor conditions tangible employment benefits on the granting of sexual favors or in which a supervisor makes threats of retaliation for non-compliance;[18] and (2) "hostile environment" situations, in which harassment takes the form of suggestive language and/or intimidating conduct that creates an offensive atmosphere in the work setting which unreasonably interferes with the work performance of the employee.[19] In both categories of sexual harassment, the harassing behavior must be inflicted by persons in positions of authority against persons in subordinate roles over whom the former can exert authority. In hostile environment cases under Title VII, courts require evidence of repeated questionable conduct in the workplace. This standard operates to discourage blatant or persistent sexual misconduct but not to deter normal friendship and communication between co-workers. Thus, to establish a hostile environment claim under Title VII, the harassment must be so severe and persistent as to affect seriously the employee's psychological well-being.[20]

The only sexual harassment case to come before the United States Supreme Court was *Meritor Savings Bank, FSB v. Vinson*.[21] A former employee of Meritor Savings brought an action under Title VII against the bank and the bank's supervisor, claiming that during her employment she was subjected to repeated demands from her supervisor for sexual relations, to which she unwillingly acquiesced. The district court found no tangible economic injury to the employee and refused to recognize the existence of a valid claim of sexual harassment in violation of Title VII, despite the presence of a "hostile environment."[22] The Supreme Court reversed, holding that hostile environment claims are actionable under Title VII, even in the absence of alleged economic

---

[17] 29 C.F.R. § 1604.11 (1984).

[18] *See, e.g.*, Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977).

[19] *See, e.g.*, Hensen v. City of Dundee, 682 F.2d 897 (11th Cir. 1982); Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981).

[20] *Hensen*, 682 F.2d at 904.

[21] 477 U.S. 57, 106 S. Ct. 2399 (1986).

[22] 23 Fair Emp. Prac. Cas. (BNA) 37 (D. D.C. 1980).

harm, such as demotion, loss of wages or loss of employment.[23]

Courts have not uniformly applied the standards for employer liability in sexual harassment cases under Title VII. Moreover, the Court, in *Meritor*, did not provide definitive standards for employer liability. Prior to *Meritor*, some courts applied a two-tiered standard of liability for employers. Those courts held the employer strictly liable for the conduct of supervisors in instances of quid pro quo harassment. In claims of hostile environment harassment, however, courts held liable only that employer who had knowledge of the supervisor's conduct.[24]

The Eleventh Circuit justified a different standard of liability in *Hensen v. City of Dundee*.[25] The court reasoned that in order to cause quid pro quo harassment, a supervisor must use the authority in which the employer has "clothed" the supervisor. The power given to the supervisor by the employer to hire, fire, and promote allows the supervisor to condition continued employment and advancement on submission to sexual demands.[26] Without this express use of the authority, vested by the employer, no quid pro quo sexual harassment exists. A co-worker lacking such authority to retaliate could not effect this type of harassment.[27] Therefore, authority given to the supervisor by the employer justified the strict liability standard.

On the other hand, the capacity to create a hostile environment in the workplace "is not necessarily enhanced or diminished by any degree of authority which the employer confers upon th[e] individual. . . ."[28] and, therefore, strict liability should not apply. Rather, the ability to create a hostile environment is a function of the proximity of the harasser to the harassed. This is outside the actual or apparent authority of the harasser. Employers, however, are required to maintain a safe work environment, which would include an environment free of sexual harassment. Thus, it may be argued that employers should be held to the strict liability standard. Other courts[29] have imposed strict liability on employers for both types of harassment for another reason. Since employers are held strictly liable for ethnic and religious harassment under Title VII, some judges and commentators believe that the same standard of strict liability should apply to all forms of sexual harassment.[30]

---

[23] 477 U.S. at 67-68, 106 S. Ct. at 2406 (affirming the circuit court's ruling on hostile environment claims under Title VII).

[24] *See, e.g.*, Katz v. Dole, 709 F.2d 251 (4th Cir. 1983); *Hensen*, 682 F.2d 897 (11th Cir. 1982); *Bundy*, 641 F.2d 934 (D.C. Cir. 1981). *See* Note, *Employment Discrimination—Defining an Employer's Liability Under Title VII for On-the-Job Sexual Harassment: Adoption of a Bifurcated Standard*, 62 N.C.L. REV. 795 (1984).

[25] 682 F.2d 897 (11th Cir. 1982).

[26] *Id.* at 910 (citing Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979)).

[27] Note, *supra* note 24, at 808.

[28] *Hensen*, 682 F.2d at 910. *But see Meritor*, 477 U.S. at 74-78, 106 S. Ct. at 2409-10 (Marshall, J., concurring).

[29] *See, e.g.*, Miller v. Bank of Am., 600 F.2d 211 (9th Cir. 1979).

[30] Note, *supra* note 24, at 801.

In *Meritor*, although presenting no definitive standard of employer liability, the Court does offer some guidance. The Court rejected the imposition of strict liability in all cases, but suggested that an employer's lack of notice of hostile environment harassment would not necessarily insulate the employer from liability.[31] Thus, a vague liability standard under Title VII emerged which took a middle ground, adopting neither the two-tiered approach nor the automatic liability standard.

B. *Title IX*

A student who is not an employee of the university and is sexually harassed by a faculty member has no recourse under Title VII, which applies only to employer-employee relations. For relief, the student must proceed under Title IX. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance."[32] Title IX further requires universities and other federally funded educational institutions to establish adequate grievance procedures for alleged violations.[33] Universities must guarantee prompt investigation of complaints and proper remedial measures. Failure to adopt and publish such procedures may result in the loss of federal funds and invite civil liability.[34]

Alexander v. Yale University[35] was the first case to recognize that sexual harassment violates Title IX and that students have the right to sue directly in federal court. Five former Yale University students sued the University for violating Title IX through failure to consider seriously and to investigate adequately complaints of sexual harassment brought

---

[31] *Meritor*, 477 U.S. at 72, 106 S. Ct. at 2408.

[32] 20 U.S.C. § 1681 (1982).

[33] 34 C.F.R. § 106.8 (1987).

[34] The matter of federal funding may also limit the protection of students under Title IX. Grove City College v. Bell, 465 U.S. 555, 104 S. Ct. 1211 (1980), established that only the programs, within an educational institution, that receive federal funds are subject to Title IX. Thus, the fact that a particular program receives federal funds does not trigger institution-wide Title IX coverage. A student claimant must demonstrate that a nexus exists between the sexual harassment and the federally-assisted programs or activity within the institution. *Id.* at 573, 104 S. Ct. at 1221. The Civil Rights Restoration Act, Pub. L. No. 100-259 (1988), overrules *Grove City* by reinterpreting "program or activity" under Title IX. For purposes of the Educational Admendments of 1972, "program or activity" means "all of the operations of a college, university, or other post-secondary institution, or a public system of higher education." *See also* Alexander v. Yale Univ., 631 F.2d 178, 181 n.1 (2d Cir. 1980). But other grounds and avenues of recourse may be available to students, such as claims under applicable state constitutional provisions, torts of intentional infliction of emotional harm, or breach of contract. Therefore, universities should take note of the Court's view in *Meritor* that the mere existence of grievance procedures and a policy against sexual harassment will not insulate the employer from liability. *Meritor*, 477 U.S. at 71-73, 106 S. Ct. at 2408-09.

[35] 631 F.2d 178 (2d Cir. 1980).

by female students. The University's inaction, it was claimed, in effect condoned the sexual harassment.[36] The court found that only one of the claims of sexual harassment fell within Title IX protection:[37] the quid pro quo claim of a female student who received a poor grade because she rejected the sexual demands made by a course instructor. The court considered the hostile environment claims of other students insufficient to warrant judicial action.[38]

In *Brown v. California State Personnel Board*,[39] a California court found that a single sexual invitation to a student unaccompanied by a threat of retaliation or promise of gain, did not constitute sexual harassment.[40] The court commented that in the absence of a rule against faculty student dating, one such incident did not constitute sexual harassment and, therefore, was not sufficient grounds for dismissal of the faculty member.[41] Although *Brown* involved an appeal in an action for wrongful dismissal, not Title IX, it suggests that in order to make a case of hostile environment harassment in the education context, a pattern of abusive behavior must be demonstrated, similar to the pattern under Title VII.

Both types of sexual harassment in the workplace may provide reasonable analogies for the academic setting, where faculty members are vested with institutional authority over students. For example, a professor offering a student a good grade or a good recommendation in exchange for sexual favors would commit quid pro quo sexual harassment.[42] Hostile environment harassment would seldom involve a single incident. It would rather be characterized by repeated exposure to offensive conduct and language and/or sanction-free sexual advances.

The direction of Title IX litigation and university policies will likely be influenced by *Meritor*.[43] The relevance of *Meritor* to the liability of educational institutions in sexual harassment claims by students, however, remains unclear. It has been suggested that a university "must always be held liable for the sexually harassing behavior of its faculty in either quid pro quo or hostile environment cases because Title IX imposes upon the institution the nondelegable duty of nondiscrimination."[44] In view of the great power differential between faculty and students, and the relative autonomy of faculty as compared with supervisors in the usual employment context, a strict liability standard

---

[36] *Id.* at 181.

[37] *Id.* at 185.

[38] *Id.* at 184-85.

[39] 213 Cal. Rptr. 53, 166 Cal. App. 3d 1151 (1985).

[40] *Id.* at 61, 166 Cal. App. 3d at 1163.

[41] *Id.*

[42] *Alexander*, 631 F.2d at 184-85.

[43] McMillen, *supra* note 9, at 1, 16.

[44] Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525, 567 (1987).

may ensure greater university efforts to comply with Title IX's mandate.[45]

Perhaps the most significant aspect of *Meritor* to the issue of consensual amorous relationships was the Court's determination that an employee's voluntary participation in sexual intercourse with a supervisor provides no defense to the employer.[46] The inquiry more importantly focuses on whether the sexual advances by a person in authority are unwelcome rather than on whether the participation in sexual conduct was voluntary. The Court recognized the dilemma of the employee who fears that lack of compliance with a supervisor's sexual demands may result in lack of advancement, demotion or loss of job.

Courts may view the asymmetry of power between faculty and students as analogous to the power differential existing between a supervisor and an employee. Students are keenly aware of their vulnerability to the broad discretionary power of faculty.[47] Regardless of faculty intention, potential coercion can influence students to consent to sexual involvement with faculty. Students may consent to unwanted sexual liaisons because of uncertainty regarding the academic consequences of noncompliance. Therefore, what may appear to be an adult, consensual, private relationship may be the product of implicit or explicit duress and thus may constitute the basis for individual or institutional liability.[48] Additionally, truly consensual relationships may change and lead to rancor, disappointment and retaliatory claims of sexual harassment.

Concern for protecting students and faculty and avoiding potential liability may encourage colleges and universities to consider a total ban on all amorous relationships between faculty and students. Such a ban, however, raises other legal issues unrelated to those concerning sexual harassment, and may, depending upon the public or private identity of the institution, raise constitutional issues as well.

II. Consensual Relationships

A. *Private and Public Institutions*

Actions by private colleges and universities to prohibit consensual intimate relationships between faculty and students would be treated similarly to private company rules prohibiting such relationships between managerial and non-managerial personnel. Court challenges to such rules have been unsuccessful, even though employees dismissed

---

[45] *Id.* at 569.

[46] 477 U.S. at 68, 106 S. Ct. at 2406 (1986).

[47] Tuana, *Sexual Harassment in Academe: Issues of Power and Coercion*, 33 College Teaching 58 (1985).

[48] Wyatt, *Avoiding Sexual Abuse Claims After* Meritor, Nat'l L.J., Oct. 7, 1986, at 19, col. 1.

for violation of so-called "non-fraternization" rules have usually alleged wrongful discharge and tortious invasion of privacy.[49] For example, in *Rogers v. IBM*, the plaintiff was discharged after fourteen years of service for engaging in a relationship with a subordinate employee that "exceeded reasonable business associations."[50] The court reasoned that the dismissal was appropriate because an employer may be legitimately concerned with the appearance of favoritism, possible claims of sexual harassment, and employee dissension resulting from amorous relationships between management and nonmanagement employees.[51] Similarly, another court, to support the contention that employers have a legitimate interest in enforcing "no-dating" policies, cited a federal regulation that states: "[A]n employer should take all steps necessary to prevent sexual harassment from occurring."[52]

While employer-employee relationships in private institutions are governed by contract principles and state constitutional provisions, generally such institutions are not subject to the federal constitutional provisions, which require state action. However, public institutions with policies banning amorous relationships must consider the principles which protect an individual's constitutional rights, since a public institution's enforcement of administrative policies constitutes state action.

B. *Freedom of Association*

The constitutional guarantees of freedom of association would appear to apply to policies which improperly prohibit consensual amorous relationships between faculty and students in public institutions. The Eleventh Circuit Court of Appeals in *Wilson v. Taylor* concluded that "dating is a type of association which must be protected by the first amendment's freedom of association."[53] In *Wilson*, a police officer employed by the City of Winter Park, Florida, was dismissed for dating the daughter of a convicted felon, a reputed key figure in organized crime in Florida.[54] Relying on earlier first amendment cases that recognized that freedom of association may apply to relationships which promote social and personal ties, rather than just those that advance political and religious beliefs,[55] the court held that the right of a public employee to date falls under the protection of the first amendment.

---

[49] *See, e.g.*, Rogers v. International Business Machines Corp., 500 F. Supp. 867 (W.D. Pa. 1980); Crosier v. United Parcel Service, Inc., 150 Cal. App. 3d 1132, 198 Cal. Rptr. 361 (1983); Ward v. Frito-Lay, Inc., 95 Wis. 2d 372, 290 N.W.2d 536 (1980).

[50] 500 F. Supp. at 868.

[51] *Crosier*, 150 Cal. App. 3d at 1140, 198 Cal. Rptr. at 366.

[52] *Id.* at 1140 n.10, 198 Cal. Rptr. at 366 n.10 (1983) (quoting from 29 C.F.R. § 1604.11(f) (1987)).

[53] 733 F.2d 1539, 1544 (11th Cir. 1984).

[54] *Id.* at 1540.

[55] *Id.* at 1543.

Thus, the court held that the police officer was fired for "a reason infringing upon his constitutionally-protected freedom of association."[56]

Although the constitutional rights at issue in consensual amorous relationships may be thought to be first amendment rights of association, they are more properly considered as protected under the penumbral right to privacy. One month after the *Wilson* decision, the United States Supreme Court, in *Roberts v. United States Jaycees*,[57] for the first time outlined the existence of two distinct associational freedoms under the United States Constitution: (1) expressive association and (2) intimate association. In *Roberts*, the United States Jaycees challenged a Minnesota law[58] which prohibited charitable organizations from denying membership on the basis of gender. The Court held the state did not abridge either the Jaycees' male members' freedom of intimate association or their freedom of expressive association. The freedom of expressive association, according to the Court, guarantees the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."[59] Intimate association, an intrinsic element of personal liberty,[60] is not grounded solely in the first amendment but is secured generally by the Bill of Rights and the fourteenth amendment. Referring to a line of decisions which speak to the constitutional right to privacy, the Court explained that "choices to enter into and maintain certain intimate relationships must be secured against undue intrusion by the State."[61]

Roberts thus makes clear that the analysis of the right to engage in intimate consensual relationships free from governmental interference does not properly focus on the first amendment freedom of association. Rather, universities contemplating restrictions on the personal associations of faculty and students must consider the constitutional right to privacy. Accordingly, while the Eleventh Circuit's reliance on the first amendment in *Wilson* may have been inappropriate, the "right to date" recognized in *Wilson* should still be entitled to constitutional protection under the fundamental right to privacy.

C. *Right to Privacy*

While the right to privacy is not explicitly mentioned in the Constitution, numerous Supreme Court decisions rest on this principle and explore its scope. One of the earliest statements of the fundamental right to privacy appears in the dissenting opinion of Justice Brandeis

---

[56] *Id.* at 1544.
[57] 468 U.S. 609, 104 S. Ct. 3244 (1984).
[58] MINN. STAT. § 363.03, subd. 3 (1982).
[59] 468 U.S. at 618, 104 S. Ct. at 3249.
[60] *Id.*
[61] *Id.* at 617-18, 104 S. Ct. at 3249.

in *Olmstead v. United States*.[62] In *Olmstead*, the Court considered the government's gathering of criminal evidence through unauthorized wiretapping. The majority found that no violation of the defendant's fourth or fifth amendment rights resulted from this conduct. Brandeis' dissent stated that "[t]he makers of our Constitution . . . conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."[63] This dissent was later relied upon to overrule the case.[64]

Two cases, *Meyer v. Nebraska*[65] and *Pierce v. The Society of Sisters*,[66] contemporaries of *Olmstead*, support the idea that the right to personal privacy inheres in the concept of liberty protected by the fourteenth amendment. In *Meyer*, the Court invalidated a statute making it illegal to teach a foreign language to any child who had not completed the eighth grade. In *Pierce*, the Court struck down an Oregon law requiring children to attend public school. While neither case specifically found a constitutional right to privacy, the recognition of a liberty interest in family-related matters, such as child-rearing and education, became the foundation for the more modern recognition of a constitutional right to privacy.

Not until 1965, in *Griswold v. Connecticut*,[67] was the privacy concept identified as an independent constitutional right. In *Griswold*, the Court declared unconstitutional a Connecticut statute forbidding the use of contraceptives by married persons. Justice Douglas, writing the majority opinion, considered the constitutional right to privacy to have roots in the penumbras of the first, third, fourth, fifth, and ninth amendments.[68] Other Justices believed that the right to privacy emanated from the ninth amendment or the concept of personal liberty in the fourteenth amendment.[69] Although the specific textual source of the constitutional right to privacy may still be debated, a line of Supreme Court decisions, beginning with *Griswold*, clearly established an independent constitutional right to privacy, the scope of which is still being explored and defined. In *Griswold*, Justice Douglas asserted that marriage is a relationship that lies within the zone of privacy created by the emanations of several fundamental constitutional guarantees. He wrote:

> We deal with a right of privacy older than the Bill of Rights—older than our political parties, older than our school system.

---

[62] 277 U.S. 438, 48 S. Ct. 564 (1928) (*overruled*, 389 U.S. 347, 88 S. Ct. 507 (1967)).

[63] *Id.* at 478, 48 S. Ct. at 572.

[64] Katz v. United States, 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967).

[65] 262 U.S. 390, 43 S. Ct. 625 (1923).

[66] 268 U.S. 510, 45 S. Ct. 571 (1925).

[67] 381 U.S. 479, 85 S. Ct. 1678 (1965).

[68] *Id.* at 484, 85 S. Ct. at 1681.

[69] *Id.* at 487, 85 S. Ct. at 1683 (Goldberg, J., concurring) (ninth amendment); *see also* Roe v. Wade, 410 U.S. 113, 153, 93 S. Ct. 705, 727 (1973), *reh'g denied*, 410 U.S. 959, 93 S. Ct. 1409 (1973) (fourteenth amendment).

> Marriage is coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.[70]

Two years later, in *Loving v. Virginia*,[71] which involved an equal protection challenge to a Virginia statute prohibiting interracial marriages, the Supreme Court strongly reiterated that a constitutional protection surrounds marriage. "The freedom to marry has long been recognized as one of the vital personal rights essential to orderly pursuit of happiness by free men."[72] Seven years after *Griswold*, in *Eisenstadt v. Baird*,[73] the Court extended the zone of privacy beyond marital relations. The Court invalidated a statute which made it illegal to distribute contraceptives to unmarried persons. "If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[74]

Given the emphasis placed by the Court on the interrelationship among the right to privacy, marriage and child-bearing, the formation of consensual intimate relationships, viewed as natural precursors to the more formal bond of marriage, should similarly be protected by the right to privacy. Otherwise, one might argue, the specific rights of privacy previously announced by the Court are hollow.

It has been suggested that the right to privacy may be the "least stable terrain of modern constitutional doctrine."[75] There is little doubt, however, that Americans believe that their civil rights include the right to engage in highly personal relationships free from governmental intrusion.[76] In our daily lives, "the values of intimate association loom larger than the value of freedom of expression or political association."[77] Many faculty have immediately deemed university policies prohibiting faculty-student dating, violative of their civil rights, thus reflecting the "natural law" quality of the right to privacy.

The Court has recently hesitated to expand the substantive reach of the right to privacy. This may be attributed in part to an effort to avoid the appearance of reviving the judicial activism associated with the 1930s and, thus, appearing to make law without express constitutional

---

[70] *Griswold*, 381 U.S. at 486, 85 S. Ct. at 1682.
[71] 388 U.S. 1, 87 S. Ct. 1817 (1966).
[72] *Id.* at 12, 87 S. Ct. at 1824.
[73] 405 U.S. 438, 92 S. Ct. 1029 (1972).
[74] *Id.* at 453, 92 S. Ct. at 1038 (emphasis in original).
[75] Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 625 (1980).
[76] *Id.*
[77] *Id.* at 655.

authority.[78] This concern is reflected in *Bowers v. Hardwick*,[79] a 1986 Supreme Court opinion addressing a challenge to Georgia's criminal sodomy statute which gave the Court another opportunity to define the scope of the right to privacy. Justice White, writing for the majority, commented that "the Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution."[80] While deciding that the Constitution confers no right upon homosexuals to engage in sodomy, the Court did reaffirm the privacy rights previously recognized by it, rights that touch upon traditional family matters. Restrictions on dating, unlike the prohibition of sodomy, would arguably render meaningless the Court's reaffirmation of privacy rights relating to family matters. *Bowers* seems limited to the power of the State to proscribe specific sexual acts; it did not recognize state power to intrude upon the rights of adults to establish consensual relationships.

The analysis of the Court in *Roberts v. United States Jaycees* is instructive in examining the right to privacy and consensual dating policies. In distinguishing the freedom of intimate association from that of expressive association, the Court characterized the personal affiliations that come under the shelter of the constitutionally protected freedom of intimate association and the right to privacy. These relationships are "distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship."[81]

The Court noted the spectrum of human relationships, from the smallest and most selective and seclusive, at one end of the spectrum, to large business enterprises, at the other.[82] The location of a specific relationship on this spectrum determines the limits of State authority to interfere with such associations.[83] Intimate consensual relationships may well be considered relationships that require a high degree of selectivity, smallness, and seclusiveness. Under the analysis in *Roberts*, therefore, an amorous relationship formed by two adults would lie at the end of the spectrum affording the greatest claim to constitutional protection from incursions by the State.

The right of privacy, however, is not absolute. As with any constitutionally guaranteed individual right, a compelling state interest permits certain infringements of that right.[84] Laws which limit the

---

[78] *Id.* at 664.

[79] 106 S. Ct. 2841 (1986), *reh'g denied*, 107 S. Ct. 29 (1986).

[80] *Id.* at 2846.

[81] 468 U.S. at 620, 104 S. Ct. at 3250.

[82] *Id.*, 104 S. Ct. at 3250-51.

[83] *Id.*, 104 S. Ct. at 3251.

[84] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155, 93 S. Ct. 705, 728 (1973); Eisenstadt v.

fundamental freedoms of an individual must serve a compelling state interest and also must be narrowly drawn to serve only that interest.[85] The context of an educational institution may reveal such a compelling interest. Case law, however, has not been very helpful in this regard since courts have not properly addressed these issues or have avoided them by focusing on the particular facts or egregious behaviors before them.

III. Consensual Amorous Relationships Between Teachers and Their Students—Case Law

In a New York case, *Goldin v. Board of Education*,[86] a high school guidance counselor claimed that school officials violated his constitutional right to privacy by sanctioning him for his sexual relationship with a former student.[87] The teacher was suspended without pay, pending a hearing, when school officials discovered that he had spent the night at the home of a former student while her parents were away. The student was over eighteen years of age and had graduated two months prior to the incident.[88] The court upheld the suspension but expressed no opinion regarding the ultimate outcome of the hearing.[89] The majority opinion stressed that the hearing should focus on "whether the plaintiff used his position as a teacher to establish that relationship and whether that relationship has adversely affected the plaintiff's fitness as a teacher within the community . . . ."[90] The teacher's recent professional supervision of the student made his conduct "susceptible to the presumption that the intimate relationship did not develop overnight."[91] A teacher's guarantee of privacy may yield to the valid

---

Baird, 405 U.S. 438, 92 S. Ct. 1029 (1972); Griswold v. Connecticut, 381 U.S. 479, 485, 85 S. Ct. 1678, 1682 (1965).

[85] For example, in *Roe v. Wade* the constitutionality of a state criminal abortion statute was challenged. The Supreme Court, in striking down this statute, decided that the statute violated the implicitly guaranteed constitutional right to privacy. The Court determined that the fundamental right to privacy is broad enough to encompass the right of a woman to decide whether to terminate a pregnancy. 410 U.S. 113, 153, 93 S. Ct. 705, 727 (1973). This right, however, is not unqualified. The Court acknowledges that some state regulations in the areas protected by the right to privacy are appropriate. *Id.* at 153-54, 93 S. Ct. at 727. In its efforts to define the area of appropriate governmental regulation, the Court took into account the stage of the pregnancy at which the abortion is performed. The mother's right to privacy is paramount in the first trimester. After the first trimester, the state's interest in protecting the health of the pregnant woman and protecting the potentiality of human life becomes more compelling as the woman approaches term. *Id.* at 163, 93 S. Ct. at 731. The Texas anti-abortion statute challenged in *Roe v. Wade* was found to sweep too broadly because it did not delineate the boundaries of permissible state regulation.

[86] 45 A.D.2d 870, 357 N.Y.S.2d 867 (1974).

[87] *Id.*, 357 N.Y.S.2d at 869.

[88] *Id.*

[89] *Id.* at 873, 357 N.Y.S.2d at 873.

[90] *Id.* at 872, 357 N.Y.S.2d at 872.

[91] *Id.* at 871, 357 N.Y.S.2d at 870.

government purpose of inquiring into "the character and integrity of its teachers in the educational process . . . ."[92]

The dissenting judge reasserted that this incident involved voluntary intimate conduct at a private residence between a teacher and an adult former student. Absent proof that the teacher used his position of authority over the student to establish a "meretricious relationship," the plaintiff is entitled to protection from inquiry under the principle enunciated in *Griswold*.[93] The dissent also noted that "it is apparent that proof of such prior relationship is not available to the board or it most certainly would have been the subject of another and separate charge."[94]

Both the majority and the dissent would confine the proper scope of inquiry at the suspension hearing to the teacher's activities while the student was still under his educational guidance. Thus, the scope of appropriate state interference with a protected right was limited to the academic setting. The court recognized a legitimate school board concern that intimate relationships between teachers and students may undermine confidence in the integrity of the teachers and the school. To justify the inquiry into a seemingly consensual relationship between two adults outside the school, however, the majority indulged the inference that the relationship may have been initiated earlier as a teacher-student romance. Without this presumption, the board of education's actions may have violated the teacher's right to privacy.

Few would deny that in a high school, as opposed to a post-secondary institution, factors such as age and maturity of the students make a broader scope of inquiry permissible. The place of the high school in the community also requires greater awareness of and sensitivity to local public opinion. The board of education's interest in maintaining an atmosphere that preserves the integrity of the educational process overrides the right of the teacher to be let alone.[95] The parameters of permissible infringement on the constitutional right to privacy thus depend on the setting. In a secondary school setting, broad proscriptions regarding amorous relationships between faculty and students may be both wise and constitutionally permissible. However, in post-secondary public institutions such proscriptions may be subject to a different constitutional test.

Cases involving consensual sexual relationships between faculty and students in institutions of higher education may also involve allegations of sexual harassment or other such egregious behavior on the part of faculty compelling schools to take action. Because court decisions often focus on such behavior, it is difficult to discern the limits of permissible infringement on the rights of faculty and students to private relation-

---

[92] *Id.* at 873, 357 N.Y.S.2d at 872 (concurring opinion).

[93] *Id.*, 357 N.Y.S.2d at 873 (dissenting opinion).

[94] *Id.*

[95] *Id.* at 873, 357 N.Y.S.2d at 872 (concurring opinion).

ships. For example, *Board of Trustees v. Stubblefield*[96] concerned patently outrageous behavior on the part of a junior college professor. The professor offered to drive a student home after an evening class. The professor subsequently parked the car on a public street and engaged in sexual relations with the student.[97] When the local sheriff approached the car, the professor shouted expletives and sped away, knocking down but not seriously injuring the sheriff. The student had to force the professor to bring the vehicle to a stop.[98] A California court upheld the school's decision to dismiss the professor on the basis of the professor's unacceptable behavior with the sheriff and the notoriety surrounding the incident that likely would impair the professor's ability to carry out his academic role.[99] Additionally, the court felt that this apparently consensual sexual relationship threatened "[t]he integrity of the educational system under which teachers wield considerable power in the grading of students and the granting or withholding of certificates and diplomas . . . ."[100] While the court articulated the state's legitimate concerns regarding amorous involvement of faculty and students generally, this was not its focus; the court was clearly more concerned with the professor's bizarre behavior.

In *Korf v. Ball State University*,[101] current and former students accused an associate professor of making unwelcomed homosexual advances and offering good grades for sexual favors. Professor Korf denied the allegations but admitted having sex with one of the students. Korf characterized his relationship with the student as consensual.[102] He claimed that the University, in dismissing him, violated his constitutional rights to substantive and procedural due process, equal protection, free speech, freedom of association, and privacy. In addition, Korf made state claims for breach of contract and infliction of emotional distress.

A hearing committee at the University found evidence supporting the charge that Korf was guilty of unethical conduct because he "used his position and influence as a teacher to exploit students for his private advantage."[103] The testimony and affidavits of the students alleged quid pro quo harassment. The court acknowledged the possibility that one of the relationships was consensual, finding no proof to the contrary.[104]

On appeal, the Seventh Circuit, dismissed all the professor's claims despite the fact that Ball State University had no specific policy regarding intimate relations between faculty and students. The University

---

[96] 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971).
[97] *Id.* at 823, 94 Cal. Rptr. at 320.
[98] *Id.*
[99] *Id.* at 826, 94 Cal. Rptr. at 322.
[100] *Id.* at 827, 94 Cal. Rptr. at 323.
[101] 726 F.2d 1222 (7th Cir. 1984).
[102] *Id.* at 1224.
[103] *Id.*
[104] *Id.* at 1227.

relied on a statement of the American Association of University Professors (AAUP), which it had adopted and printed in the Faculty Handbook: "(1) The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge recognizes the special responsibilities placed upon him . . . ; (2) He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor . . . ."[105] The court held that such relationships breached the professor's ethical obligations under the AAUP guidelines.[106]

In *Korf*, like in *Stubblefield*, the determination that the professor breached his ethical obligations was not necessary to support the court's decision. The testimony of seven other students clearly indicated Professor Korf's sexual harassment and exploitive conduct. This case too, then, does not adequately define the extent of constitutional protection in consensual relationships between faculty and students in institutions of higher education.[107]

In 1984, the Fifth Circuit Court of Appeals heard a case involving a consensual adult sexual relationship with no allegations of harassment or outrageous public misconduct, unlike the circumstances in *Goldin*, *Stubblefield*, and *Korf*. In *Naragon v. Wharton*,[108] the plaintiff, Naragon, a music instructor at Louisiana State University, had a lesbian relationship with a freshman student over eighteen years of age.[109] The instructor was not in a position to evaluate, recommend, or otherwise affect the academic progress of the student. The student was not enrolled in any of the instructor's classes and was unlikely to be in these classes in the course of her studies.[110] While the student never lodged a complaint against the instructor, the student's parents expressed their concern to university officials. Upon University investigation, the instructor maintained that her relationship with the student was a private matter and therefore none of the University's business.[111] The University

---

[105] *Id.*

[106] *Id.*

[107] Korf also claimed that it was the homosexual nature of the relationship that led to his dismissal, in violation of his right to equal protection of the laws. However, the record failed to provide any suggestion that "the university would hesitate to discourage a professor who acted in a manner similar to Dr. Korf but directed his or her advances towards students of the opposite sex rather than the same sex." *Id.* at 1229. The court rejected Korf's equal protection claim as having no legal or factual basis. However, the court left unanswered the question of whether homosexuals would indeed have a valid equal protection claim.

[108] 737 F.2d 1403 (5th Cir. 1984).

[109] The student and the instructor were friendly before the student's 18th birthday. However, there was no sexual involvement between them until the student was 18. 572 F. Supp. 1117, 1119 (M.D. La. 1983), *aff'd*, 737 F.2d 1403 (5th Cir. 1984). Sexual relations with a minor may give rise to claims of statutory rape, which is not a problem in this case.

[110] Naragon v. Wharton, 572 F. Supp. 1117, 1119 (M.D. La. 1983).

[111] *Id.*

took no immediate action and at the end of the term a faculty committee recommended continuation of the instructor's teaching assignment.[112] However, the University administrators ultimately responsible for appointments decided, in the "best interests of the university," to relieve the instructor of teaching assignments and reassign her to research activities.[113] Although the University had no written policy prohibiting amorous relationships between faculty and students, the administrators relied on general standards of professional conduct and ethics, considering avoidance of such relationships an obvious standard of the academic profession.[114] The instructor's appointment ended at the close of the term and, therefore, the University had no legal obligation to renew her employment.

Naragon sought an injunction to compel the University to restore her teaching duties. Naragon alleged violation of a variety of constitutional rights, including the right to association under the first amendment and the right to equal protection under the fourteenth amendment. The plaintiff alleged that she was treated differently from heterosexuals in the same situation. The trial court tied Naragon's constitutional claims to the issue of whether the University based its decision on Naragon's sexual preference. The trial court and the court of appeals found no evidence that the reassignment was motivated by considerations of sexual preference.[115] Therefore, the court of appeals did not resolve whether the "Equal Protection Clause of the fourteenth amendment prohibits or circumscribes discrimination based upon an individual's sexual preference."[116]

While the court never explicitly addressed the instructor's constitutional right to privacy, much of the court's analysis of the University's actions spoke implicitly to this issue. The court examined the interests of the University which might override the instructor's right to engage in intimate relationships free from interference. The University asserted that it based its decision to reassign Naragon on the belief that intimate relationships between teachers and students are unprofessional and likely to be detrimental to the students and to the University. The court stated that the University was legitimately concerned:

> that a romantic relationship between a teacher and student may give the impression of an abuse of authority; it may appear to create a conflict of interest even if in fact no such conflict directly results; it tends to create in the mind of other students a perception of unfairness; it tends to and most probably does affect other students' opinions of the teacher . . . .[117]

---

[112] *Id.* at 1120.
[113] *Id.*
[114] 737 F.2d at 1403.
[115] 572 F. Supp. at 1124; 737 F.2d at 1406.
[116] 737 F.2d at 1408 (Goldberg, J., dissenting).
[117] 572 F. Supp. at 1121.

The inherent asymmetry in faculty-student power is manifest primarily in the instructional context, which includes course work, advisorships, student evaluation, recommendations, and similar processes. When amorous involvement and academic responsibilities intersect, a student's meaningful consent to an intimate relationship is suspect. The voluntary nature of the association cannot be assured. Even when the faculty member intends no coercion, these concerns are still valid. However, when a faculty member does not academically supervise a student, these concerns cannot be entirely substantiated.

In *Naragon*, the University's concern over the appearance of abuse of authority and potential harm to the University's mission caused by faculty-student amorous relationships would be compelling only in the instructional context, where the risk of harm is greatest. However, Naragon's relationship with the student occurred outside the instructional context and, therefore, the potentially coercive factors arguably did not taint the relationship.

Serious inconsistencies emerge in *Naragon* if one accepts the University's contention that all amorous relationships between faculty and students are unethical.[118] The University's Dean acknowledged that no action was taken and no sanctions imposed against a well-known heterosexual, teacher-student relationship.[119] The University justified its inaction, noting that the student had been previously married, that her parents knew of the relationship, and that the school received no complaints. In *Naragon*, only the parents of the adult student lodged complaints.

Arguably, the University interfered improperly in a private relationship in *Naragon*, without sufficient compelling interest. The court's determination that no constitutional violation occurred may have turned on the fact that the University action imposed minimal deprivation. The University gave Naragon an equivalent position in research, rather than teaching, with no economic loss or significant damage to her career. The University's action, however, foreclosed Naragon's opportunity to teach, solely because of a consensual adult relationship, in violation of Naragon's right to privacy.

IV. Defining the Limits of the Prohibition on Intimate Associations

Upon examination of the Supreme Court decisions which define the constitutional right to privacy, the foregoing consensual relationship cases pose privacy questions not adequately addressed by the courts that decided them. In *Roberts v. United States Jaycees*,[120] the Court described the characteristics of intimate association, i.e., smallness, selectivity, and seclusiveness, which confer the right to privacy. This

---

[118] 737 F.2d at 1406.

[119] *Id.*

[120] 468 U.S. 609, 104 S. Ct. 3244 (1984).

right places constraints upon the power of the state to interfere in such intimate associations. Once a right to privacy is established as protecting consensual amorous relationships between faculty and students, public universities, as state actors, may only intrude upon these relationships to serve compelling interests.

In the landmark abortion case, *Roe v. Wade*,[121] the Court deemed it appropriate for states to interfere with the mother's right to abortion for only a limited time during the pregnancy. The Court utilized a time line to delineate the boundary of permissible state regulation in areas otherwise protected by the mother's right to privacy. The timeline in *Roe v. Wade* illustrates when it is appropriate for the state to regulate areas protected by the right to privacy.[122] This approach could be adapted to establish the permissible limits of university authority to regulate intimate consensual relationships between faculty and students. In the university setting, however, a situational paradigm would be more appropriate than a temporal one.

The overall university setting should be viewed as a large circle encompassing all its activities and interrelationships. Within the larger circle, a smaller circle sets off the activities and interrelationships that fall within the "instructional" context that could appropriately be regulated. Intimate associations between faculty and students arising within the "zone of instruction" carry the presumption of coercion and render the consensual nature of the relationships suspect. Here the university has a compelling interest in preserving academic integrity and safeguarding students from duress and exploitation. Within the instructional context, students fearing adverse consequences from non-compliance may feel compelled to enter or to continue undesired intimate relationships with faculty members, even when such duress is not intended by the faculty member. Other students may also assume that such relationships result in unfair academic advantage. Since such perceptions damage the academic climate and the exact nature of such relationships is difficult to determine, the university may legitimately proscribe all such associations.

Outside the instructional context, the presumption that an intimate faculty-student relationship results from coercion cannot be justified.

---

[121] 410 U.S. 113, 93 S. Ct. 705 (1973).

[122] The Supreme Court in *Roe v. Wade* delineated the boundaries of permissible state interference in another circumstance involving the right to privacy, namely, a pregnant woman's right to elect an abortion. The Court placed the interest of the individual versus the compelling interests of the state on a timeline. In the first trimester of pregnancy, the right of the individual to chose to terminate the pregnancy is paramount, as there is little or no risk to the mother and the fetus is not viable. In the second trimester, the important and legitimate state interest in protecting the health of the woman may abridge the individual right of the mother. Thus, the state is permitted to regulate abortion to the extent that it will protect and preserve maternal health. In the last trimester of pregnancy, the interest of the state in protecting fetal life, after viability, permits the state to go as far as to proscribe abortion. 410 U.S. at 160-62, 93 S. Ct. at 181-82.

Since the faculty member does not academically supervise the student, the university has no reason to question the consensual nature of the association. The faculty person cannot use the threat of reprisal or the promise of reward to manipulate the student. Also little reason would exist for others to suspect academic favoritism. Consequently, proscribing such relationships would serve no compelling interest.

A bright-line test can thus be formulated for public universities, defining the area of permissible state intrusion into constitutionally protected private relationships: the university may proscribe the formation of intimate faculty-student relationships within the instructional context, namely, when the faculty member academically supervises the student. Intimate consensual relationships falling outside the instructional context are constitutionally protected from university interference.

Under this bright-line test, the University in *Naragon*, apparently impermissibly infringed upon the instructor's constitutional right to privacy. The relationship between the instructor and the student arose outside the instructional context, there were no allegations of harassment or exploitation, and it was highly unlikely that the instructor would ever academically supervise the student. Consequently, the University had no authority to intervene.

The bright-line test suggests the constitutional minimum which public institutions should incorporate into a policy. However, universities may need to address other concerns before adopting a policy on amorous relationships. Frances Hoffman, writing in the *Harvard Educational Review*, discussed some of the implications of such policies.[123] Hoffman believes that amorous relationships between faculty and students are generally inappropriate and risky. She labels all such relationships inappropriate when there is an abuse of power.[124] However, Hoffman suggests that policies should not "reinforce status hierarchies and ignore or deny the right of individuals to establish relationships when, with whom, and where they choose."[125] The paternalistic attitude of policies on amorous relationships runs counter to higher education's abandonment of the in loco parentis role.[126] Female students have a strong interest in protecting their right to forge alliances with faculty, in order to generate the personal ties of trust and friendship crucial for personal and political strength within an organization and beyond. "It is not in women's interest to concede to institutions the right to delimit the formation of personal ties among community members."[127]

The entire definition of amorous relationships is fraught with ambiguity, which may result in a further chilling effect on mentorship and

---

[123] Hoffman, *Sexual Harassment in Academia: Feminist Theory and Institutional Practice*, 50 HARV. EDUC. REV. 105 (1986).

[124] *Id.*

[125] *Id.*

[126] *Id.* at 112.

[127] *Id.* at 115.

the social interactions that are part of a nurturing academic environment. Therefore, policymakers should carefully delineate the realm of unacceptable behavior, which is a difficult task. Consequently, some institutions may choose to have no explicit policy and others may prefer to articulate a very general statement with no mention of sanctions.

Conclusion

The freedom to decline or resist intimate association is inextricably bound up with the freedom to form intimate association. Upholding both these freedoms in the university setting generates inherent conflict. Clearly, "coerced intimate association is the most repugnant of all forms of compulsory association."[128] However, the right to form adult consensual intimate relationships is a fundamental personal freedom. A strong and effective university policy against sexual harassment, together with the recognition of the right to privacy of faculty and students, will, within the parameters of constitutional guarantees, serve both the interests of the university and those of the individual.

---

[128] Karst, *supra* note 75, at 638.