

**THE LEGAL PARAMETERS OF CONSENT IN CASES
OF ALLEGED SEXUAL BATTERY OR
"ACQUAINTANCE ASSAULT"
AND THE ANALYTICALLY RELATED ISSUE OF
INSTITUTIONAL POLICIES ON CONSENSUAL
SEXUAL RELATIONSHIPS**

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16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE
Clearwater Beach, Florida
February 12-14, 1995

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**Part I:
"Consent" and Its Meaning in Sexual Assault Cases**

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- I. **A Brief Discourse on the Classical Doctrine of Consent as a Defense to Intentionally Tortious Conduct: What Consent, Is, Why it Is Important in Tort Law, and What Factual and Other Issues it Raises.**
- A. ***Consent, Defined.***
- (1) The most widely honored definition is only seven words long. Consent is defined in Section 892 of the RESTATEMENT (2D) OF TORTS as "willingness in fact for conduct to occur." Even the normally effusive comments accompanying Restatement definitions are barely more illuminating in this instance: "Consent means that the person concerned is in fact willing for the conduct of another to occur." *Id.*, comment *a.*
- More prosaically, X consents to Y's conduct if X understands what Y intends to do, foresees the effect of Y's conduct, and is willing to accept the consequences of Y's conduct without holding Y responsible for those consequences.
- (2) How does an actor express consent? Consent can be manifested *directly*, through the actor's words or actions, or it can be inferred *indirectly* from the circumstances. The former is known as "consent in fact"; the latter is known as "apparent consent."
- An example of consent in fact: A builds a swimming pool behind his house, and grandly declares to his next-door-neighbor, B, that he is glad to have everybody in the neighborhood make use of the pool. C, another neighbor,

enters the pool and makes herself at home. A brings an action against C for trespass. On the basis of A's statement to B, it may be found that he has *consented in fact* to C's entry (even though C may never have heard the statement uttered!), and C, accordingly, is not liable for trespass. See RESTATEMENT (2D), TORTS § 892, comment *b*, illustration 1.

- A famous example of apparent consent is found in *O'Brien v. Cunard Steam-Ship Co.*, 28 N.E. 266 (Mass. 1891). Boston quarantine laws required immigrants to present a smallpox vaccination certificate before disembarking after a trans-Atlantic crossing -- a fact apparently not explained to the plaintiff, a female steerage passenger. For the convenience of its passengers, the Cunard Line supplied a doctor who vaccinated immigrants lacking the tell-tale pock-mark on their upper arms -- the mark indicating they had already been vaccinated. As the ship approached harbor, approximately 200 female passengers formed a line in front of the doctor, the plaintiff among them. When it was her turn, the doctor said she required vaccination because her arm was unmarked. She responded that she had already been vaccinated, the lack of a mark notwithstanding. When the doctor said she could not receive a certificate without being vaccinated again, "she held up her arm," said nothing, took the certificate when it was proffered, handed it to the immigration authority, and left the ship. Later, she sued for assault, alleging that she had never explicitly consented to the vaccination. The court held in the shipping company's favor on the theory that the company reasonably assumed from the circumstances that the plaintiff did not object to being vaccinated: "[All the women in line] indicated by their conduct that they desired to avail themselves of the provisions made for their benefit. There was nothing in the conduct of the plaintiff to indicate to the surgeon that she did not wish to obtain a card which would save her from detention at quarantine, and to be vaccinated, if necessary, for that purpose."
- (3) A recurring problem in the law of torts is whether apparent consent can be inferred from what the RESTATEMENT calls "the customs of the community." The homely example given in the RESTATEMENT: "[I]f it is the custom in wooded or rural areas to permit the public to go hunting on private land or to fish in private lakes or streams, anyone who goes hunting or fishing may reasonably assume, in the absence of

a posted notice or other manifestation to the contrary, that there is the customary consent to ... entry upon private land to hunt or fish." *Id.*, comment *d.*

A more topical example is provided in *Hackbart v. Cincinnati Bengals, Inc.*, 601 F. 2d 516 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979). Dale Hackbart, a defensive back for the Denver Broncos, was seriously injured when Bengals running back Charles "Booby" Clark, living up to his nickname, intentionally "struck a blow with his right forearm to the back of the kneeling plaintiff's head" after the whistle had blown. The Bengals were penalized for a flagrant rules violation, and Clark admitted at trial that the blow was intentional. His imaginative defense was that the "general customs" of professional football countenanced the intentional maiming of opponents, both within and without the rules. The court, however, would have none of it, and allowed Hackbart to proceed to trial on his intentional tort claim.

(By contrast to hunting and football, the dating scene involves social interactions where the "customs" not only are more difficult to establish empirically, but may be changing with sufficient rapidity to confuse participants or create different expectations in the minds of participants from differing backgrounds or social strata. See D.N. Husak & G.C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW AND PHILOSOPHY 95 (1992), in which the authors undertake a fascinating examination of the social conventions -- the "customs of the community," to borrow the RESTATEMENT's phrase -- by which unattached men and women endeavor to send one another verbal and non-verbal "cues" about their sexual intentions.)

B. *The Legal Significance of Consent.*

- (1) *Consent is an absolute defense against liability for intentionally tortious conduct.* FROM RESTATEMENT (2D), TORTS § 892A, "Effect of consent": "One who *effectively consents* to conduct of another intended to invade his interests cannot recover in an action of tort for the conduct or harm resulting from it." [Emphasis added.]
- (2) As the phrase in italics indicates, consent must be "effective" to be legally meaningful. If X holds a gun to Y's head and whispers, "Now it's okay if I have sex with you, isn't it?", and Y answers in a stammering voice, "Okay, okay, whatever you say," X has obtained Y's consent, but that consent is scarcely effective. Returning again to

Section 892A of the RESTATEMENT, consent is legally effective only if it satisfies the following criteria:

- Consent must be given by a person who possesses the *legal capacity* to consent. For a heart-wrenching example of the way in which the capacity to consent can become a contested issue of fact, see *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 225 Cal. Rptr. 297 (1986).
- It must be clear that the particular conduct was intended by the consentor to come within the scope of the consent. (Examples of this principle inevitably -- and to modern sensibilities rather comically -- involve dueling. X challenges Y to a duel. Y accepts the challenge, and appears on the appointed day with his sword in a scabbard by his side. X takes a pistol from beneath his coat and shoots Y. Y can maintain an action for grievous bodily injury against X. Even though Y consented to a duel and assumed the risk of injury entailed by his willingness to duel, his consent extended only to sword blows, not gunfire.)
- Consent cannot be obtained through fraud, duress, or coercion. (The "duress" exception is why the person with the gun to her head three paragraphs above has not given her assailant effective consent to engage in sexual relations with her.) See RESTATEMENT (2D), TORTS § 892B. A notorious example of consent vitiated by fraud is *Micari v. Mann*, 126 Misc. 2d 422, 481 N.Y.S. 2d 967 (1984), in which the teacher of an acting class persuaded impressionable female students to remove their clothing and have sexual relations with him under the guise that it would improve their emotive power as actresses. To the defense of consent, the court responded in no uncertain terms that any consent that the defendant may have obtained was nullified by the misrepresentations used to obtain it.

II. Consent Principles Applied in Sexual Assault Cases

- A. The starting point: Most date-rape cases on college and university campuses share these confounding characteristics:
- There are no witnesses. It is difficult to corroborate either party's account of what happened.

- The stories of the alleged perpetrator and the alleged victim are irreconcilable. The starkest factual dispute involves differing accounts of whether the victim consented to have sex with the perpetrator.
- The judgment (hence credibility) of each party is impaired by alcohol or some other substance.
- Both parties are young and sexually inexperienced (relatively speaking), increasing the likelihood of miscommunication.
- Nobody can quite agree whether campus disciplinary proceedings should be likened to civil tort actions or criminal rape prosecutions. Persons accused of sexual assault (and their lawyers) want the process analogized to a criminal prosecution so they can take advantage of the more protective "beyond a reasonable doubt" standard of proof. Much confusion ensues concerning the procedural rights of the accused.

B. *"Affirmative nonconsent" as an element in the prima facie case of rape.* In every state except one,¹ the prosecution in a rape case bears the affirmative burden of proving that the victim did not consent to have sex with the perpetrator. "The law thus creates what is in effect a legal presumption of female consent to sexual activity." L. Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1110 (1993) (emphasis added). The author of this extraordinary law review article continues:

Standing alone, such a presumption is inoffensive; it can be viewed as merely effectuating the constitutional guarantee of a presumption of innocence and reflecting the fact that the majority of sexual interaction is consensual. It is the combination of this presumption with judicial interpretation of the nonconsent element that is problematic. Judges have historically held that the burden of proving nonconsent is not satisfied by a showing of a *lack of affirmative consent*; instead, *affirmative nonconsent* must be proven. [*Id.* at 1110; emphasis in the original.]

Compare the stringent "affirmative nonconsent" standard that obtains in *criminal* rape cases to the much more plaintiff-protective standard employed in a traditional *civil* tort case under RESTATEMENT principles. In a tort action,

¹ The exception is Washington State. See *State v. Camara*, 781 P. 2d 483 (Wash. 1989).

consent is an affirmative defense that must be pleaded and proved by the defendant; there is a presumption of *nonconsent* unless and until the defendant satisfies the burden of persuasion on that point. In the criminal context, the presumption works in the defendant's favor; the law presumes that the complaining witness in a rape case *did* consent, and places the onus on the prosecutor to prove the *absence* of consent. What makes rape prosecutions unique is that the prosecutor can overcome the presumption of consent *only by showing that the victim affirmatively communicated the fact of nonconsent to her assailant*. "To establish 'without consent,' [the prosecution must prove *actual refusal*; mere absence of consent or silence will usually be insufficient for conviction." D. Berliner, *Rethinking the Reasonable Belief Defense to Rape*, 100 YALE L. J. 2687, 2689 (1991) (emphasis added).

- C. ***Disproving "affirmative nonconsent" by adducing evidence of "apparent consent."*** If the prosecutor's burden is to prove that the victim affirmatively communicated that she did not consent to have sex, then the door is opened for the perpetrator to exploit any ambiguity in what the victim said or did in an effort to bolster his consent defense -- and that is why rape trials focus so incessantly (and in the minds of many, so offensively) on the conduct of the victim. To resort to the language of the RESTATEMENT (see page 1 of this outline), even if the perpetrator is unable to show that the victim "consented in fact," he still can choose from an array of tactics by which to suggest that he had the victim's "apparent consent":

[B]ehaviors and qualities ... may be used as a proxy for consent [These] include promiscuity, flirting, good looks or bad looks, and race. ... 'A woman who sends out signals, such as drinking, dancing, or hitchhiking, is assumed to have invited the rape. A victim's "provocative clothing" or "sexually promiscuous" behavior are also signals of "implied" consent,' as is sexual activity short of intercourse. Jurors may infer consent from a victim's failure to fight her attacker or her failure to report the assault to the police promptly. ... [W]omen who use oral contraceptives and women with live-in boyfriends are less likely to be believed when they claim they did not consent....

Read Her Lips, supra, 141 U. PA. L. REV. at 1124-25, quoting C. Tchen, Comment, *Rape Reform and a Statutory Consent Defense*, 74 J. CRIM. L. & CRIMINOLOGY 1518, 1524 (1983).

- C. ***The "Verbal Consent" Standard.*** Although it inspired ridicule when it became the subject of media attention a few years ago, Antioch College's "explicit verbal consent" dating policy is a comprehensible extension of

consent theory in tort law. The Antioch policy conditions each escalation of intimacy -- from holding hands to kissing to touching other body parts to disrobing, and onward -- on each parties' explicit consent to movement to the next stage. In RESTATEMENT terms, such policies reject reliance on "apparent consent" and require the alleged perpetrator to demonstrate "consent in fact" -- explicit, unambiguous consent in fact -- whenever the consent defense is relied upon.

Lani Anne Remick, author of *Read Her Lips, supra*, suggests that a standard based on explicit verbal consent -- what she refers to as the "bright line standard" -- offers several advantages:

- *Clarity.* Both genders benefit when the rules of the road are clear, easy to understand, and easy to apply. To the extent that current law leaves both genders uneasy because of the possibility that subtle signals will be misinterpreted or misunderstood, the bright-line standard removes any possibility of ambiguity and leaves each participant with the peace of mind that comes from understanding the rules.
- *Equity.* "[The explicit verbal consent standard] is based upon a vision of equality in sexual interactions. In this respect, it differs from current law, which merely reflects our sexually coercive society and its resulting inequality and miscommunication between men and women in the sexual arena." 141 U. PA. L. REV. at 1144.
- *"Intimacy".* Ms. Remick offers one additional argument for explicit verbal consent:

One possible objection to the idea of a mandatory verbal inquiry is that it threatens to destroy the intimacy of sexual relations -- that seeking and acquiring verbal consent would "ruin the moment." This objection assumes a sort of "silent is sexy" view of intimate physical relations Despite what television, films, magazines, and novels suggest, however, "meaningful silence" is unlikely to lead to sexual pleasure for either party, especially where the silence has different meanings for each (as is frequently the case). In reality, informed, consensual, pleasurable sexual encounters are the result of communication, not silence. [*Id.* at 1148.]

The same point was made by a student rape prevention counselor at the University of California Berkeley: "Of course, you'd sound ridiculous stopping in the middle of everything to inquire, 'Do you, Catherine Q.

Robinson, agree on this second day of March to have sex with me, Philip Q. Weston?' But when things get hot, you could breathlessly whisper, 'Want to, or wanna just make out?' This won't interrupt the romantic flow." Quoted in *More on Sexual Assault Policies*, SYNFAW WEEKLY REPORT, March 29, 1993, at 70.

III. Consent Principles in Practice: A Real-Life Case Study

(Note: The case described below is real. All quotations in the indented paragraphs below are from publicly available pleadings and motion papers filed during the judicial phase of the case. Out of respect for the parties' privacy, I refer to them only as "Male" and "Female" in the account that appears in this outline.)

A. *The Factual Allegations*

Male and Female were both seniors at a large eastern university and were both 21 years old. The events that gave rise to Male's action against the university for a temporary restraining order occurred during the last week of their senior year in May, 1994, after final examinations and before Commencement -- a period known as "Senior Week" marked by social events and relatively steady party-going.

Male met Female when both were freshmen. They were friends during their undergraduate years, but did not have their first date until shortly before Senior Week. They attended a formal dance on campus, then went to several post-dance parties in the off-campus apartments of various friends.

At an end-of-evening party [at approximately 3:00 in the morning], Female confided in a friend about a moral dilemma: she had earlier promised her boyfriend that she would not "hook up" (a term connoting sexual conduct), with Male that evening. But now, she admitted to her girlfriend, she was "in a hooking-up kind of mood."

At 3:30 a.m., with their last party breaking up, Male and Female headed back to campus. At Male's invitation, Female accompanied him to his apartment. Both students had been drinking heavily, although each denied that either one was inebriated.

At this point, recollections diverge. Male's version:

After briefly listening to the stereo and posing for a picture, Male and Female began kissing passionately. Male asked Female

whether she wanted to go to his bedroom. She said yes. They continued kissing and embracing there. As they both became more excited, Male asked Female for permission to unzip her evening dress, which she was wearing without a bra. She agreed. Male unzipped the dress, and Female removed it voluntarily. Male suggested that they climb the ladder to his upper bunk bed. Again, Female agreed.

At some point, Female assisted Male in removing her panties by lifting her hips off the bed. She then helped Male remove his boxer shorts. ... Male moved on top of Female. She willingly spread her legs to accommodate him.

After a few minutes, Male asked Female whether it was okay for him to proceed further. *Female did not say no. Her only answer was that she was "not sure we know each other well enough." The two discussed the matter briefly, with Male interpreting Female's comment as reflecting concern about his sexual history. He offered to wear a condom. Female responded that she did not want him to get up. She held him tight, and resumed kissing him passionately. ...*

Female's version:

We were just chatting and we started kissing a little bit. Then we went into his bedroom and it was dark. We were just kissing there. Then he unzipped my dress and I know that was dumb but I allowed him to do it. My dress was off. I do not remember how his clothes came off but I did not take them off. I guess he did. At that point I was getting a little tired and I thought that I could just lay in his bed and go to sleep and he would too. So then I got into his bed and he got in. ...

I wanted to fall asleep but I also wanted to kiss him. Then after that, eventually he got on top of me. ... We were holding each other and we were kind of moving like we were having sex but we were not.

At that point, he said that he had condoms and he pointed over to his desk or something. I said that I am not going to have sex with you and we do not know each other well enough. ... He said that sure he knew me and that he had known me for four years. He persisted in saying that we knew each other well enough to have sex. I explained to him that I had never had sex before and I was not going to have it on a whim with him. He kept saying that he had a condom over there

and I kept telling him that he did not need them because I was not going to have sex with him.

There is no dispute that the two then had sexual relations. Male contended that it was with Female's active assistance. Female contended that she tried to push him off but felt constrained by her fear of falling out of the top bunk. Eventually, Male ejaculated and the two fell asleep. When they awoke at 9:00 the next morning, Female borrowed a pair of Male's shorts and a T-shirt, stating that she did not want to return home in her evening dress, and left his apartment.

B. *Administrative and Judicial Proceedings*

The Initial Administrative Determination. Twice over the next three days, Female visited Male at his apartment, each time expressing agitation about the possibility that she may have become pregnant. A week before graduation, Female went to the Office of Student Conduct and lodged sexual assault charges against Male. In accordance with the university's Code of Conduct, the Director of the Office of Student Conduct organized an expedited investigation, during which Male and Female -- each accompanied by lawyers and family members -- were separately interviewed. On May 23, the Director issued a written finding that Male had committed sexual assault:

An objective person in your situation [the Director wrote to Male] would have been confused by the incongruence between the words which Female spoke and the messages her body was sending. Given that state of confusion, it was incumbent upon you to stop and talk about what Female actually wanted. Knowing of her hesitation, *the burden was on you to get an explicit yes.* You failed to do so and therefore engaged in intentional, nonconsensual sexually explicit touching. ...

[Y]ou were persistent and overly aggressive in your attempts to verbally convince Female to have sex with you. You made assumptions about what she wanted based on what you viewed as "shows of affection" on her part. I find that you misread these cues and engaged in sexual behavior to which Female had not given an explicit "yes".

Male was barred from participating in graduation ceremonies or receiving his diploma until August of 1994 -- a sanction that he believed threatened his matriculation to medical school in the fall.

The Court Challenge. Male immediately filed an action for a temporary restraining order against the university. Male argued, in essence, that the university had violated its contractual obligations to him by depriving him of procedural rights guaranteed under the Code of Conduct. By memorandum opinion entered June 1, 1994 (but communicated orally to the parties two days before graduation), a United States District Court Judge denied Male's application for injunctive relief, based in part on the university's representation that Male had not exhausted his internal administrative remedies by appealing from the Director's determination to a specially constituted, three-member "Appeals Board."

Subsequent Administrative Review. Male immediately lodged an administrative appeal. On the evening before graduation day, the Appeals Board reversed the Director's decision, rescinded the sanctions she had imposed on Male, and cleared the way for Male's participation in Commencement exercises the next day. Observing that the Director "committed a procedural error by applying the incorrect standard for determining 'consent'," the Appeals Board ruled that the Director held Male to too high a standard by insisting that he obtain "express verbal consent" *à la* the Antioch policy -- a standard the Appeals Board could not discern in the definition of "sexual assault" contained in the Code of Conduct.²

C. *Some Concluding Thoughts and Observations about this Case*

Consider again the critical language in italics near the middle of page 9 of this outline, which describes Male's perception of what happened:

After a few minutes, Male asked Female whether it was okay for him to proceed further. *Female did not say no. Her only answer was that she was "not sure we know each other well enough." The two discussed the matter briefly, with Male interpreting Female's comment as reflecting concern about his sexual history. He offered to wear a condom. Female responded that she did not want him to get up. She held him tight, and resumed kissing him passionately. ...*

² "Sexual assault" was defined in the university's Code of Conduct as "[a]ny intentional and nonconsensual, sexually explicit touching, or attempt or threat of such touching, by a student that results in or could result in physical or emotional injury to any person."

The Director drew two mutually reinforcing conclusions from this language. First, the signal Female sent by hesitating when Male asked for permission to proceed was confusing. Not surprisingly, given the passion of the moment, the signal may have meant one thing to the sender and something different to the recipient. Under those circumstances, the Director reasoned, Male should have had the presence of mind to resolve the ambiguity *against* proceeding any further. "Knowing of her hesitation," wrote the Director, "the burden was on you to get an explicit yes. You failed to do so and therefore engaged in ... nonconsensual" sexual assault.

Second, the Director characterized Male's conduct *after* Female hesitated as "persistent" and "overly aggressive." Once Female said no (or suggested no by refusing to give an explicit yes), efforts by Male to change her mind were *themselves* indications of criminal or tortious intent.

The Director's approach has the virtue of clarity. The rule is straightforward: Unless she says "yes" unambiguously and without hesitation, don't go on. Here, according to Male's version of events, Male did in fact *ask* for permission to proceed -- which is not typically the case. But, as is so often true in human interaction, Female (according to Male) gave an answer that was not quite yes and not quite no. It was an answer that Male interpreted as an unambiguous and unhesitating yes; and it was an answer that was *glossed* in Male's mind by absolutely unambiguous conduct by Female -- holding him tight, assisting him in removing her panties, spreading her legs. Is there, in fact, any such thing as a "bright line" when the principals are young, inexperienced, possibly inebriated, and in the throes of passion?

On the other hand, allowing Male to rely on "apparent consent" opens the Pandora's Box illustrated so well by the facts in this case. One of the facts to which the parties stipulated was that Female was wearing an evening gown with no bra underneath. Is that a colorless statement of fact reflecting only the truism that certain strapless evening gowns require no bra? Or is it redolent with lascivious undercurrents? Does the finder of fact -- no matter how well-intentioned -- yield to the ingrained impulse to wonder whether Female was dressing provocatively precisely to convey willingness to engage in whatever conduct Male may have had in mind?

Once a factfinder admits to the possibility of allowing Male to establish consent indirectly, then the inevitable result is a record like the one in this case, replete with references to drinking, boyfriends, sexual history, clothing, sexual comments to girlfriends, and second-by-second analyses of lurid details. Whose interests, ultimately, are served by fixating on those details?

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Part II:

Consensual Faculty-Student Romantic Relationships -- Policy and Legal Considerations

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- I. Regulating Faculty-Student Romantic Relationships -- Some Threshold Questions**
- A. Is an explicit consensual relationship policy, particularly one that takes the form of a written code, necessary? What price does the institution pay for implementing such a policy? What legal liability, if any, does it assume?
 - B. May a faculty member be disciplined in the absence of such a policy --
 - for "unwelcome" sexual overtures, contact?
 - for a "consensual" sexual relationship with a student?
 - for persisting in an affair after it goes awry?
 - for showing favoritism toward a paramour in grading, academic evaluation?
 - C. What issues and interests come into play? What other institutional policies are germane?
 - sexual harassment policy?
 - professional ethics standards?
 - actual or appearance of conflict of interest?
 - constitutional privacy or association rights?
 - due process procedures available?

* With sincere thanks to James J. Mingle, General Counsel of the University of Virginia, who authored a longer outline on this topic for the NACUA/NASPA Conference in October, 1993, from which this outline has been excerpted and updated.

- D. What disciplinary sanction is appropriate for a faculty member found to have violated a policy prohibiting consensual romantic relationships?
- reprimand, counseling?
 - suspension?
 - dismissal?

II. Noteworthy Court Cases

Ruh v. Samerjan, 816 F. Supp. 1326 (E.D. Wis. 1993):

A female university student brought a civil rights action against a University of Wisconsin-Milwaukee professor and officials, claiming that she had had an intimate relationship with a professor who, when their relationship soured, subsequently failed to attend appointments, gave her lower grades, and demeaned her. The court dismissed all of the student's claims, stating that her allegations against the professor were insufficient to state a claim for sexual harassment or discrimination based on gender. The court also held that the plaintiff's allegations regarding officials' mishandling of her harassment claim failed to state a sex discrimination claim.

Bougher v. University of Pittsburgh, 713 F. Supp 139 (W.D. Pa. 1989):

The plaintiff complained that her relationship with a professor, although at all times consensual, was "unwelcome" and "violative" in retrospect. 713 F. Supp. at 144. She sought to hold the university responsible for the professor's intrusions on her life after the relationship ended. The court granted the university's motion for summary judgment, holding that the plaintiff's allegations did not state a sexual harassment claim under Title IX. A student, held the court, has no due process right to be free from a professor's unwanted sexual advances or to require a university to develop procedures for restraining a professor from associating with a student.

Wilson v. Taylor, 733 F.2d 1539, 1544 (11th Cir. 1984):

"[D]ating [by a public-sector employee] is a type of association which must be protected by the first amendment's freedom of association."

Roberts v. United States Jaycees, 468 U.S. 609 (1984):

"[C]hoices to enter into and maintain certain intimate associations must be secured against undue intrusion by the State."

Goldin v. Board of Education, 357 N.Y.S.2d 867, 872 (1974):

A high school guidance counselor's sexual relationship with a student may be legitimate grounds for discharge if evidence shows that he "used his position as a teacher to establish that relationship and . . . [the intimate] relationship has adversely affected the plaintiff's fitness as a teacher within the community . . ."

Board of Trustees v. Stubblefield, 16 Cal. App. 3d 820, 94 Cal. Rptr. 318 (1971):

A junior college professor's behavior in cursing and knocking down a sheriff, who encountered him and a student both partially undressed in a parked car, was a sufficient basis for discharge. The school legitimately concluded that the professor's conduct, notwithstanding the apparent consensual sexual relationship, impaired his ability to perform his academic responsibilities.

Korf v. Ball State University, 726 F.2d 1222, 1224 (7th Cir. 1984):

A professor, besides having a consensual homosexual relationship with one student, allegedly extracted *quid pro quo* favors from a number of other unconsenting students. The court rejected the professor's claims that his constitutional privacy and association rights were violated when the institution fired him, and concluded that his dismissal was justified because he "used his position and influence as a teacher to exploit students for his private advantage" in violation of AAUP ethical standards.

Naragon v. Wharton, 737 F.2d 1403 (5th Cir. 1984):

A university instructor was sanctioned (*not* fired -- see below) for engaging in a consensual homosexual relationship with a freshman student over the age of eighteen. Although the student was not enrolled in any of the instructor's classes and the university had no written policy prohibiting amorous relationships between faculty and students, the court nevertheless upheld the university's action against the instructor (reassignment to research duties and subsequent non-renewal of her contract) because of "the impression of an abuse of authority" and the appearance of "a conflict of interest."

Wexley v. Michigan State University, 821 F. Supp. 479 (W.D. Mich. 1993):

Court rejected tenured faculty member's constitutional challenge of his suspension for making "repeated, unwelcome, intimidating sexual advances" to a student. While acknowledging there was no quid pro quo element to professor's actions, the court declared that "a professor-student relationship [is] inherently unequal" and concluded that the professor violated University's policy prohibiting use of professional authority to exploit students.

III. Crafting a Suitable Code: Features and Factors to Consider

A. *What policy justification should the institution rely on?* Universities that have endeavored to regulate in this area have usually predicated their policies on one (sometimes both) of two justifications.

- "Consent is suspect" -- The relationship is not truly "consensual" because of the inherent power differential between the parties. *See, e.g., P. DeChiara, The Need for Universities to Have Rules on Consensual Relationships Between Faculty Members and Students*, 21 COLUM. J. LAW & SOCIAL PROBS. 137, 141-42 (1988) [cited below as "*DeChiara*"]:

In deciding whether to enter a sexual relationship with a teacher, a student may take into account the teacher's power. When the teacher is in a position to grade or otherwise evaluate the student, the student may see the teacher's power as a direct threat, and that threat may strongly influence her decision about whether to enter the relationship. ... Thus, the first problem with consensual faculty-student relationships is that in many cases the student may have been unintentionally coerced into the relationship. [Footnote deleted.]

- "Conflict of interest" -- In furtherance of the faculty member's obligation to refrain from conduct that could be characterized as a conflict of interest, he should refrain from compromising himself or his students by engaging in a romantic relationship, even by consent. *See, e.g., the College of William and Mary's Policy and Procedures Affecting Consensual Amorous Relationships* (adopted by the Board of Visitors June 28, 1991):

The appearance of a compromising conflict of interest, or of coercion, favoritism, or bias in educational or academic

evaluation is prejudicial to the interests of the College of William and Mary, its members, and the public interest which it serves. Amorous relations between faculty members and students with whom they also have an academic evaluative role create such an appearance, even where the relationship is genuinely consensual.

- B. ***Where should the policy be codified?*** Should it be a freestanding policy, or should it be incorporated into a preexisting policy such as the sexual harassment code, the conflict-of-interest code, or the policy on ethics?
- C. ***Should the policy proscribe or merely admonish?*** The AAUP's recommended policy is precatory (although that recommended policy, which dates back to 1984, is currently undergoing review): "Faculty members and staff *are cautioned* against entering romantic or sexual relationships with their students" *Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, reprinted in AAUP POLICY DOCUMENTS AND REPORTS ("Redbook") 114 n. 3 (1990) (emphasis added). Some universities, by contrast, flatly prohibits certain forms of consensual romantic relationships. The University of Iowa's policy, described at *DeChiara* 146, is one example.
- D. ***How broad should the scope of the policy be?*** Should it regulate all permutations of faculty-student sexual relationships, or just those between students and faculty members in a direct "position of authority"? Should it apply to faculty and students only, or to other relationships – for example, between supervisors and subordinates, graduate teaching assistants and undergraduates, coaches and athletes?
- E. ***How should inherently vague terms be defined?*** "Romantic" relationships? "Amorous" overtures? "Position of authority"?
- F. ***What sanctions are appropriate?*** Should sanctions be explicitly enumerated or obliquely stated?
- G. ***By whom and how should the policy be enforced?*** This has proven to be a contentious issue on many campuses because of widespread cynicism about the enforceability of any policy in this area. Should enforcement be entrusted to department heads and deans? Or does it make more sense to vest enforcement authority in an office that is experienced in investigating and adjudicating volatile claims of this kind, *e.g.* the Affirmative Action office?

IV. The University of Virginia Experience

A. *The Faculty Committee's original proposal* (November, 1992):

1. A teaching assistant or grader shall not make romantic and sexual overtures to, or engage in sexual relations with, any student currently in his or her class.
2. A faculty member may not make romantic or sexual overtures to, or engage in sexual relations with, any undergraduate student.
3. A faculty member may not make romantic or sexual overtures to, or engage in sexual relations with, any graduate/professional student in the same department who has not completed all of his or her course work or any graduate/professional student currently enrolled in a course offered by the faculty member, or any graduate/professional student currently working for or being supervised by the faculty member.
4. A faculty member who allocates funds or other benefits among student applicants, may not make romantic or sexual overtures to, or engage in sexual relations with, any student who is receiving, or is in a position to receive, those benefits.

B. *The Policy Statement ultimately adopted* (August, 1993):

As a matter of sound judgment and professional ethics (see *section on professional ethics*, pages _____), faculty members have a responsibility to avoid any apparent or actual conflict between their professional responsibilities and personal interests in terms of their dealings or relationships with students. It is the responsibility of faculty members to avoid being placed in a position of authority -- by virtue of their specific teaching, research, or administrative assignments -- over their spouses or other immediate family members who are students at the University. It is also the responsibility of faculty members to avoid sexual relationships with or making sexual overtures to students over whom they are in a position of authority by virtue of their specific teaching, research, or administrative assignments.¹ These professional constraints derive from AAUP ethical standards and the University's policy prohibiting conflict

¹ In this context, the term "faculty members" broadly includes all full-time and part-time University personnel who hold positions on the academic and general faculty, as well as all graduate teaching assistants, graders, and coaches.

of interests, in order to ensure that the evaluation of students is conducted fairly and without any perception of favoritism or bias. Perhaps less obvious, but equally compelling, is the interest in avoiding potential harm to students as well as the liability that could occur, for example, if facts regarding a sexual relationship or sexual overture are demonstrated that support a legal claim of sexual harassment by either party (see *policy on sexual harassment*, pages ___)

.....

Failure to abide by the conflict of interest principles described above can have serious consequences. Violations of the employment-based restrictions contained in the State Conflict of Interests Act may lead to civil -- and if willful, criminal -- penalties, as well as termination from state employment. Breaches of professional ethics standards, *e.g.*, an abuse of the faculty member's authority over students, may also prompt disciplinary action. Moreover, serious misconduct associated with sexual harassment raises the risk, under federal law and state policy, of personal responsibility in terms of both litigation defense and liability exposure.

C. *Comments "pro" and "con" during the policy debate:*

- *Faculty proponents:* faculty-student romantic and sexual relationships are inherently non-consensual . . . pose potential sexual harassment problems . . . conflict with AAUP ethical standards.
- *Faculty opponents:* policy illegitimately intrudes on privacy rights of faculty and students . . . improperly equates consensual relationships with sexual harassment . . . impossible to enforce.
- *Student Council President:* "Most students want some form of policy [covering] classroom [situations]. But they want autonomy as adults and the ability to date whomever they want outside of the classroom."
- *ACLU viewpoint:* "The ACLU believes that any outright ban on adult consensual relationships tramples on individual rights . . . The Constitution protects privacy and associational rights that allow consenting adults to explore and create their own relationships. We therefore recommend against adoption of either of the proposed policies or any other policy written for the same purpose."
- *AAUP position:* "We recommend a policy stance of admonishment and caution with regard to the potential for a conflict of interest, couched in a language and tone suitable to a community of adults, . . . The conflicting interests, between a desire to avoid exploitation of students

and the desire to enhance an atmosphere of friendship and sensitivity to the rights of privacy, suggest the need to address this issue in a nonprescriptive manner [T]he AAUP's concern in the areas of both sexual harassment and consensual relationships relates to the adequacy of the due process protections for those individuals accused under such a policy"

V. **Further Reading**

B. Dziech & L. Weiner, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* (1984).

P. Markie, *Professors, Students, and Friendship*, reprinted in S. M. Cahn, ed., *MORALITY, RESPONSIBILITY, AND THE UNIVERSITY: STUDIES IN ACADEMIC ETHICS* 134-149 (1990).

E. Keller, *Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy*, 15 *J. COL. & UNIV. L.* 21 (1988).

