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Consensual Relationships and the Constitution: A Case of Liberty Denied

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CONSENSUAL RELATIONSHIPS AND THE CONSTITUTION: A CASE OF LIBERTY DENIED

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On many university and college campuses, there exists an anti-civil-libertarian spirit reminiscent of the McCarthy period. During the 1940s and early 1950s, regents, trustees, academic administrations, and the American Association of University Professors (AAUP), although each for a different reason, persuaded the Academy to repress personal liberty. It is difficult to pinpoint precisely when constitutionally and statutorily protected liberties and rights became secondary to insulating educational institutions from damage suits in their pursuit of a selective social and political agenda.

In the late 1980s many public educational institutions adopted hate speech codes. For example, the University of Michigan adopted a code proscribing certain kinds of speech, which was later challenged as an infringement on First Amendment freedoms.[1] The United States District Court for the Eastern District of Michigan ruled the speech code unconstitutional.[2] Two years later, the United States District Court in Eastern Wisconsin struck down a similar code at the University of Wisconsin as a violation of speech protected by the First Amendment.[3] While principled scholars argued against the government restraint of speech and prevailed at several institutions, it took

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1. *See* Doe v. University of Mich., 721 F. Supp. 852, 853 (E.D. Mich. 1989).
2. *See Doe*, 721 F. Supp. at 853.
3. *See* UWM Post, Inc. v. Board of Regents of the Univ. of Wis. Sys., 774 F. Supp. 1163, 1164 (E.D. Wisc. 1991). The AAUP opposition to proscriptions on speech is effectively presented by *Forum: Discouraging Hate Speech Without Codes*, ACADEME, Jan.–Feb. 1994, at 18; Henry Louis Gates, Jr., *Truth or Consequences: Putting Limits on Limits*, ACADEME, Jan.–Feb. 1994, at 14; Paul McMasters, *Free Speech Versus Civil Discourse: Where Do We Go From Here*, ACADEME, Jan.–Feb. 1994, at 8. The position taken throughout this Essay is that the AAUP has been selective in its advocacy and support for protected freedoms. Its stand on protected speech and privacy interests highlights this inconsistency. For a spirited defense of hate speech codes within the context of affirmative action, see CHARLES R. LAWRENCE III & MARI J. MATSUDA, WE WON'T GO BACK: MAKING THE CASE FOR AFFIRMATIVE ACTION 218–20 (1997).

court action to reaffirm the principle of freedom of speech at many colleges and universities.[4]

Not long after the hate speech debacles, sexual harassment proscriptions were adopted at many institutions of higher learning. In many cases these policies were hastily drafted, resulting in imprecise language, vague terms with conflicting interpretations, and confusion over exactly what was being proscribed: gender discrimination or sexual language and activity. Much of the language used in the policy statements was taken from the Equal Employment Opportunity Commission (EEOC) Guidelines to assist employers' implementation of Title VII of the Civil Rights Act of 1964. The EEOC Guidelines were designed for workplace situations and are not applicable to faculty-student relationships. Whether public or private, universities and colleges are not businesses, do not provide a consumable commodity, and do not fall under the same rules. The lack of precision in the adopted language has given license to academic administrators, unencumbered by standards of academic freedom and personal privacy rights, to fashion highly subjective sexual harassment policies. As a result, university and college administrators have forced many professors to defend their behavior before disciplinary committees and even in federal court.[5]

Conceivably the poor draftsmanship of these sexual harassment policies caused unanticipated consequences such as damaged reputations and financial loss. However, more recent consensual relationship policies (CRPs), proscribing lawful consensual relations between faculty and students, present an even greater harm. CRPs and their advocates threaten to emasculate the guarantees of personal liberty embodied in the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the Constitution, adopting a standard for government action

4. *See, e.g.*, Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996); Silva v. University of N. H., 888 F. Supp. 293 (D.N.H. 1994).

5. For professors forced to seek redress in federal court in support of academic freedom and free speech, see *Cohen*, 92 F.3d 968; *Silva*, 888 F. Supp. 293. Both the *Silva* and *Cohen* cases concerned alleged gender discrimination due to a hostile learning environment. Seventy years earlier, the Supreme Court decided *Meyer v. Nebraska*, 262 U.S. 390 (1923), addressing the state-enacted statute prohibiting the teaching of German. The Court found the statute violated the liberty interests of teacher and pupil and held that this privilege of teaching and acquiring useful knowledge is "essential to the orderly pursuit of happiness by free men." *Meyer*, 262 U.S. at 399. See NATIONAL ASSOCIATION OF SCHOLARS, SEXUAL HARASSMENT AND ACADEMIC FREEDOM (Feb. 1994), for a general catalog of injustices inflicted on faculty members.

disfavored by the Supreme Court. This Essay will focus on the threats posed by the CRP to the academy and constitutionally protected rights.

I. Gender Discrimination and Lawful Consensual Sexual Relationships: Confusion Elevated to Principle

At its annual meeting in 1995, the AAUP adopted a sexual harassment policy.[6] One policy directive entitled, "Bringing a Complaint," states, "[d]issemination of information relating to the case should be limited, in order that the privacy of all individuals involved is safeguarded as fully as possible."[7] This concern for the privacy interests of a complainant and a respondent are misplaced in the context of an allegation of gender discrimination, because there is no statutory provision that protects the complainant or the perpetrator in connection with Title VII or IX violations, and there is no constitutionally recognized privacy interest to be protected. The AAUP is taking a contradictory stand on privacy interests; while taking steps to protect the privacy of persons involved in sexual harassment claims, it invades the privacy of others by regulating adult consensual relationships.

The AAUP linked two very dissimilar relationships when issuing the policy statement on consensual relations and simultaneously endorsing the sexual harassment statement. In fact, both policy statements were presented to AAUP members in the same document, thereby creating the false impression that the two subjects are similar and of equal import. The AAUP position on consensual relationships states:

> Sexual relations between students and faculty members with whom they also have an academic or evaluative relationship are fraught with the potential for exploitation. The respect and trust accorded a professor by a student, as well as the power exercised by the professor in an academic or evaluative role, make voluntary consent by the student suspect. Even when both parties initially have consented, the

6. *See Sexual Harassment: Suggested Policy and Procedures for Handling Complaints*, Academe, July–Aug. 1995, at 62–64 [hereinafter *Suggested Policy*].

7. *Suggested Policy*, *supra* note 6, at 63.

> development of a sexual relationship renders both the faculty member and the institution vulnerable to possible later allegations of sexual harassment in light of the significant power differential that exists between faculty members and students.
>
> In their relationships with students, members of the faculty are expected to be aware of their professional responsibilities and avoid apparent or actual conflict of interest, favoritism, or bias. When a sexual relationship exists, effective steps should be taken to ensure unbiased evaluation or supervision of the student.[8]

Unlike the statement on sexual harassment,[9] the CRP lacks references to statutory prohibitions on consensual relationships because, with only a few exceptions,[10] the government has not intruded into private consensual matters as proposed by the CRP.

There is little evidence indicating that lawful consensual sexual relations[11] are widespread or pose any significant problem for the academy. In fact, it is not clear to me what evidence the AAUP considered in issuing its CRP statement.[12] It appears that the AAUP relied on an article by Peter DeChiara.[13] In the article, DeChiara defines consensual relationships between a teacher and student as those which arise "free from any intentional threat by the teacher."[14] Notwithstanding this lack of threatening behavior and the fact that the frequency of such unions is difficult to estimate, he posits that such

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8. *Consensual Relations Between Faculty and Students*, ACADEME, July–Aug. 1995, at 64 [hereinafter *Consensual Relations*].
9. *See Suggested Policy*, *supra* note 6, at 62–63.
10. *See infra* part IV.
11. I use the term "consensual relationship" refer to a lawful association between consenting adults.
12. *See* Letter from Ann H. Franke, Associate Secretary and Counsel, American Association of University Professors, to Gary E. Elliott (Apr. 15, 1997) (on file with the author). Included with the letter were four articles from the AAUP file on consensual relationships. There was no indication that only the enclosed material was considered, however, this Essay is based on the information provided to the author by the AAUP.
13. *See* Peter DeChiara, *The Need For Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students*, 21 COLUM. J.L. & SOC. PROBS., 137 (1988).
14. DeChiara, *supra* note 13, at 138.

relationships should be banned because they could result in harm or favoritism.[15]

Consensual sexual relationships are not unlawful. Furthermore, those involved do not violate any specific duty owed to the public, and no harm is done to any individual. Still, DeChiara and the AAUP, who are both unharmed third parties, have claimed for the government or the academic institution, other unharmed third parties, the right to step in and require conditions in which neither they nor society have any direct interest. Certainly, the government has a primary and legitimate role in preventing harm to members of society; however, this governmental power is susceptible to abuse, thereby threatening the individual liberty of the people.

Concern about favoritism arising from consensual sexual relationships between faculty and students is one reason for DeChiara's proposed ban on such unions.[16] The AAUP expanded this rationale to include "*apparent* or actual conflict of interest, favoritism, or bias."[17] This is an extension of the Association's Statement on Professional Ethics, mentioned in the sexual harassment policy, which refers to "the ethical responsibility of faculty members to avoid 'any exploitation of students for . . . private advantage.'"[18] This concern with professional ethics and favoritism is merely a pretext for an inappropriate and misplaced activist political and social agenda.

The heightened sensitivity to "apparent or actual conflict of interest, favoritism, or bias" is selectively applied to sexual relationships and is not uniformly applied across the academy. It is mere speculation to conclude that consensual sexual relations between a faculty member and a student would inevitably result in favoritism. While the prospect of favorable treatment is increased if the student is enrolled in one of the professor's courses, there is no reason to conclude that favoritism will necessarily flow from the relationship. The student might well have no need, or interest, in gaining favor with the professor. The fear of favoritism is even less viable if the student is not attending the professor's classes, majoring in the same discipline, or attending classes on the same campus.

The AAUP's concern with "apparent favoritism" is particularly problematic because it is selectively applied. Professor Peter J. Markie

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15. *See* DeChiara, *supra* note 13, at 138–139, 144–45.
16. *See* DeChiara, *supra* note 13, at 144–45.
17. *Consensual Relations*, *supra* note 8, at 64 (emphasis added).
18. *Suggested Policy*, *supra* note 6, at 62.

argues that professors should not fraternize with students because to do so would compromise the moral obligations of professors.[19] On one hand, this is a moral and compelling argument. However, the Markie thesis has been misapplied—proscribing consensual sexual behavior rather than any relationships that have the potential for, or appearance of, favoritism. For example, the AAUP has not suggested banning faculty participation in student clubs. Likewise, no one has suggested restricting minority or women faculty from actively advising minority or women campus organizations.

Remarks by Professor Randall Kennedy illustrate the potential bias inherent in even nonsexual faculty-student relationships. Professor Kennedy, discussing the actions of Professor Stephen Carter, who regularly invites African-American law students to his home for refreshments and discussion, expressed concern about the favoritism and bias that arises from such closeness to a select group of students and the extraordinary difficulty of separating the personal and professional sphere. Kennedy admits that "[t]he students invited to the professor's home are surely being afforded an opportunity denied those who are not invited—an opportunity likely to be reflected in, for instance, letters of recommendation."[20] What is unsettling is not Professor Kennedy's "apparent favoritism," but the realization that the AAUP would not be at all concerned with this form of favoritism, while consensual sexual relations inspire a heightened interest.

Favoritism and "apparent favoritism" run deep throughout the academy. However, hiring goals, personal connections, pressure placed on faculty selection committees by academic administrators to hire more minority faculty, politicization of the curriculum under the guise of "cultural diversity," selection of spouses and family members for positions within the same university system, entrance preferences to sons and daughters of alumni, athletic scholarships given to those who would not otherwise qualify, have all failed to inspire the high-sounding condemnation seemingly reserved only for consensual sexual relationships.

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19. *See* Peter J. Markie, *Professors, Students, and Friendship, in* MORALITY, RESPONSIBILITY, AND THE UNIVERSITY: STUDIES IN ACADEMIC ETHICS 134, 135 (Steven M. Cahn ed., 1990).

20. Randall Kennedy, *My Race Problem—And Ours,* THE ATLANTIC MONTHLY, May 1997, at 55.

II. The Missing Links Between Sexual Harassment and Lawful Consensual Sexual Relations

Jane Gallop, Professor of English and Comparative Literature at the University of Wisconsin, was charged with sexual harassment.[21] While she was partially cleared of the allegation by the affirmative action office, Professor Gallop was found to have violated the university's policy on "consensual amorous relations," included within the university ban on sexual harassment.[22] Professor Gallop was not romantically involved with the student complainant, but did have a close working relationship that eventually became strained following Professor Gallop's criticism of the student's performance.[23] The university found that the intense personal relationship, which later escalated into a volatile encounter, amounted to a consensual amorous relationship in violation of the sexual harassment policy.[24] In a similar situation, a male university professor was suspended for one year without pay for violating a ban on consensual relations, although the student did not file a complaint.[25]

Clearly, something is remiss when someone is punished for violating a ban on "consensual amorous relations" absent a sexual relationship or suspended for having a consensual relationship absent a complaint of wrongdoing. The typical response to these two incidents is one of disbelief that a university would overreact and censure two professors under such circumstances.

Sexual harassment in an educational institution involving a teacher and student is prohibited by Title IX of the Education Amendments of 1972.[26] Some principles applicable to the workplace under Title VII are relevant to Title IX cases. For example, sexual harassment of a student by a school employee is a form of gender discrimination in the following circumstances:

1. *Quid Pro Quo Harassment*—A school employee explicitly or implicitly conditions a student's participation in an education program or school activity or bases an

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21. *See* Jane Gallop, *Sex and Sexism: Feminism and Harassment Policy*, Academe, Sept.–Oct. 1994, at 16, 16.
22. *See* Gallop, *supra* note 21, at 16.
23. *See* Gallop, *supra* note 21, at 18.
24. *See* Gallop, *supra* note 21, at 16, 18.
25. *See* Gallop, *supra* note 21, at 22.
26. *See* 20 U.S.C. § 1681 et seq. (1994).

> educational decision on the student's submission to *unwelcome* sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature. *Quid pro quo* harassment is equally unlawful whether the student resists and suffers the threatened harm or submits and thus avoids the threatened harm.
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> 2. *Hostile Environment Harassment*—Sexually harassing conduct by an employee (that can include *unwelcome* sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature) [that] is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.[27]

The Department of Education (DOE), Office of Civil Rights, provides guidance to educational institutions on sexual harassment under Title IX. In its March 1997, publication, entitled *Sexual Harassment*, the DOE concludes that sexual conduct must be unwelcome in order to constitute sexual harassment.[28] Thus, *welcome* sexual conduct, implicit in consensual relationships, is lawful—rendering it unlawful for a state to ban consensual relationships as a proper means of curbing gender discrimination. Furthermore, the DOE regulations do not establish a prohibition on consensual sexual relations between students and employees at post-secondary institutions.[29] The proper and exclusive focus is on sexual harassment as a component of gender discrimination, under Title VII or Title IX. The law does not proscribe the sexuality of either men or women because not all

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27. Office for Civil Rights Sexual Harassment Guidance: Harassment of Students by School Employees, 61 Fed. Reg. 52172 (1996) (citations omitted) (emphasis on unwelcome added). *See also Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986) ("The gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'").

28. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12040 (1997). *But see supra* at 12040 n.41 (stating concerning consensual relationships: "Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees."). The author believes this statement is incorrect. Protectionist legislation violates the Fourteenth Amendment's equal protection clause and thus Title IX.

29. *See* Verna Williams & Deborah L. Blake, *Sexual Harassment: Let the Punishment Fit the Crime*, THE CHRONICLE OF HIGHER EDUCATION, April 18, 1997, at A56.

communications of a sexual nature are unwelcome, discriminatory, or sexist in content or meaning. Nevertheless, despite reason and controlling law, CRP advocates persist in their belief that sexuality is, *per se*, harmful to the academy and a proper subject for sanction. This is simply sex phobia.

CRP proponents and academic administrators, acting as spokespersons for chancellors, regents, and trustees, joined to bridge the otherwise impossible gap between the statutory definitions of sexual harassment and the CRP. To this end, they define consensual sexual relations between students and faculty with language that mimics sexual harassment law and expand the scope of prohibited sexual conduct itself. Peter DeChiara notes that, "[i]n deciding whether to enter a sexual relationship with a teacher, a student *may* take into account the teacher's power."[30] He continues by saying that "the student *may* see the teacher's power as a direct threat, and that threat *may* strongly influence *her* decision ... the student *may* feel pressured ..."[31] Similarly, Nancy ("Ann") Davis, in her article *Sexual Harassment in the University*, articulates concerns regarding the authenticity of a student's consent to sexual relationships with a professor.[32] Davis encourages universities to move beyond legal definitions of sexual harassment to include a whole range of activity loosely referred to as "sexually inappropriate behavior."[33] The university, according to Davis, should spend its energies on "formulating policies that emphasize education and sensitization of the faculty [rather] than on the more legalistic enterprise of defining sexual harassment."[34]

The AAUP incorporated the arguments of these academics by including the following language in their policy statement on consensual relationships: "[T]he power exercised by the professor in an academic or evaluative role, makes voluntary consent by the student suspect."[35] This clause reflects the "power differential" theory rooted in radical feminist discourse and the writings of Catharine A. MacKinnon, who questions "whether, under conditions of male supremacy, the notion

30. DeChiara, *supra* note 13, at 141 (emphasis added).
31. DeChiara, *supra* note 13, at 141–42 (emphasis added).
32. Nancy ("Ann") Davis, *Sexual Harassment in the University*, *in* MORALITY, RESPONSIBILITY, AND THE UNIVERSITY, *supra* note 19, at 150, 155.
33. Davis, *supra* note 32, at 166.
34. Davis, *supra* note 32, at 166. This is exactly what the National Association of Scholars has condemned as an assault on the dignity of individuals who hold "incorrect views." *See* NATIONAL ASSOCIATION OF SCHOLARS, *supra* note 5.
35. *Consensual Relations*, *supra* note 8, at 64.

of consent has any real meaning for women."[36] This, however, denies women the right to consent. As Professor Gallop correctly observes, the "[p]rohibition of consensual relations is based in the assumption that when a woman says yes she really means no. I cannot help but think that this proceeds from the same logic in which when a woman says no she really means yes. The first assumption is protectionist; the second reflects the logic of harassment."[37]

Under the guise of professional standards, high ideals, fairness, and concern for less powerful individuals in the academy, the focus has shifted from gender-based discrimination to sex itself. Nadine Strossen, President of the ACLU and Professor of Law at New York University Law School, has characterized sexual harassment law as a "Trojan horse for smuggling [radical feminist] views on sexual expression into our law and culture."[38] Strossen notes that a "distorted concept of sexual harassment" has arisen from the "false equation of . . . sexual expression and sexual harassment," a falsehood that has been "widely accepted by employers, employees, campus officials, students, and policy makers, too often without serious examination."[39]

Academic administrators have joined with the AAUP and feminist ideologues in an attempt to bridge the rather large gap between proscribed conduct, i.e., gender discrimination, and lawful consensual sexual relationships. For example, the AAUP has aided university and college administrators in their quest to monitor consensual sexual relationships by arguing that the CRP is desired and endorsed by the teaching profession. Furthermore, building on the works of feminist scholars, CRP supporters rest their arguments on the notion of a "power differential,"[40] thereby camouflaging proposals banning consensual relationships in protectionist language linked to sexual harassment.

The AAUP policy on consensual relationships constitutes an improper attempt to impose an affirmative professional duty for an illegitimate purpose. First, no objective empirical data has been cited

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36. CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 298 n.8 (1979).

37. Gallop, *supra* note 21, at 22. For another critique of the radical feminist view on consensual relationships, see *New Rules About Sex on Campus*, HARPERS MAGAZINE, Sept. 1993, at 33–42.

38. NADINE STROSSEN, DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN'S RIGHTS 119 (1995).

39. STROSSEN, *supra* note 38, at 119–20.

40. *See Consensual Relations*, *supra* note 8, at 64.

to justify the ban. Rather, the rationale underlying the policy is based on stereotypical notions about men and helpless women needing protection. Second, the ostensible concern with sexual harassment conceals the ulterior motive of avoiding financial liability in the event of a lawsuit. Agency principles dictate that educational institutions, like private employers, are responsible for the sexual harassment of their employees.[41] Finally, neutral principles, even-handed enforcement, and logic dictate that both parties be prevented from creating the risk of injury; the risk-creating conduct imposes a potential penalty on only one of the two participants—usually the male professor. Typically the female student, presumed to be at great risk for exploitation and harm, is exempt from sanctions.

Institutional administrators have seized the moment to implement this newly minted affirmative professional duty to serve their own ends. The ban imposes an affirmative duty on professors to refrain from lawful conduct and curtail intimate associations in order to insulate, not themselves, but institutions from any possible legal action. Professors breaching this duty and failing to notify the institution of consensual relationships face disciplinary action for sexual harassment even though no harassment has occurred. The danger is that colleges and universities may at some future time elect to impose a duty to restrict other associations deemed detrimental; speech, writing, and research could all be limited to protect the institution. A duty that limits lawful conduct is an unacceptable infringement on personal liberty, not to mention the academic freedom that organizations such as the AAUP exist to protect.

The "power differential" thesis is important to academic administrators for other reasons. State colleges and universities are administrative agencies of the state and can only make rules when the constitution or statute gives them the authority to do so. Ostensibly acting under the statutory authority of Title IX and the educational amendments to the Civil Rights Act of 1964, "consensual relationship bias" constitutes an administrative attempt to fill in the outline of the

41. Recently, the Supreme Court has severely limited the liability of school districts under Title IX. In *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 1999 (1998), the Court said damages may not be recovered unless an official of the school district, with the authority at least to institute corrective measures on the district's behalf, has actual notice of and is deliberately indifferent to the teacher's misconduct. The lack of a sexual harassment policy or grievance procedure alone does not establish deliberate indifference. *See Gebser*, 118 S. Ct. at 2000.

statute by linking professor-student relationships to gender discrimination through the "power differential" thesis. Like all administrative regulations, it can be challenged on the ground that it is inconsistent with the statute.[42]

Statutes are construed narrowly by the courts,[43] and Title IX does not include a proscription on consensual sexual relations. Still, the "doctrine of analogy" is often used by courts to include within the purview of a statute that which is very similar but not specifically mentioned.[44] The question then is whether consensual sexual relations are so much like gender discrimination as to fall within the statute and are similarly punishable.

Sexual harassment may be defined legally to include criminal acts ranging from lewdness to sexual assault and rape.[45] Indeed, Dr. John Gottman, a psychologist at the University of Washington, has said that "[s]exual harassment is a subtle rape, and rape is more about fear than sex."[46] Likewise, Dr. Louise Fitzgerald of the University of Illinois believes that nearly 70 percent of all sexual harassments involve assertions of power.[47] The Supreme Court has been even more explicit. In *Harris v. Forklift Systems, Inc.*,[48] Justice O'Connor held that harassment, to be actionable under Title VII, requires an *objectively* hostile or abusive environment and a *subjective* perception of a hostile or abusive environment.[49] Title VII, and by extension Title IX, prohibits discrimination with respect to employment and covers "the entire spectrum of disparate treatment of men and women in employment."[50] Justice Ginsburg, in a concurring opinion, said that a determination of whether sexual discrimination has occurred is based on "whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[51] Both the Civil Rights Division of the DOE and courts

42. *See* LAWRENCE BAUM, AMERICAN COURTS: PROCESS AND POLICY 3 (3d ed. 1994).
43. *See* HAROLD J. BERMAN ET AL., THE NATURE AND FUNCTIONS OF LAW 116 (5th ed. 1996).
44. *See* BERMAN, *supra* note 43, at 116–20.
45. *See* BERMAN, *supra* note 43, at 802.
46. Daniel Goleman, *Sexual Harassment: It's About Power, Not Lust*, N.Y. TIMES, Oct. 22, 1991, at C1.
47. *See* Goleman, *supra* note 46, at C1, C12.
48. Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993).
49. *Harris*, 510 U.S. at 21–22.
50. *Harris*, 510 U.S. at 21 (quoting Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)) (internal quotation marks omitted).
51. *Harris*, 510 U.S. at 25 (Ginsburg, J., concurring).

have made clear that Title VII and Title IX prohibit discrimination in employment and education. Lawful, nonproscribed consensual sexual relations do not fall under this ban, because they do not constitute discrimination.

III. Muller v. Oregon Revisited: A Problem of Equal Protection

In 1903 Oregon passed a law limiting the employment of women in factories and laundries to ten hours a day.[52] Curt Muller, a laundry owner, was convicted of violating the statute by keeping a woman at work for longer than ten hours.[53] Muller appealed to the Supreme Court, arguing that the equal protection clause of the Fourteenth Amendment mandates equal treatment of men and women, and the legislature could not, under the guise of its police power, deprive women of their liberty and property.[54] In January 1908, the United States Supreme Court upheld the Oregon law.[55] Speaking for the Court, Justice Brewer said, "the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[56] Thus began a new era as protective legislation for women swept the country.

The CRP attempts to return to the sexual mores of the nineteenth century, when patriarchal and sexist assumptions permeated American society. CRP enthusiasts, with a neo-Victorian view of sex, have simply reinvigorated sexism under a banner of protectionism. Perhaps more disturbing is the vast power that advocates of the CRP would give to administrative agencies. Today, the famous "Brandeis Brief," filed by Louis D. Brandeis in support of the Oregon law, is seen as a flawed document containing data derived from sloppy procedures and a methodology lacking adequate controls or testing for independent variables.[57] The Brandeis brief was laced with "common knowledge" and notions that women were weak and vulnerable, the

52. *See* Muller v. Oregon, 208 U.S. 412, 416 (1908).
53. *Muller*, 208 U.S. at 417.
54. *Muller*, 208 U.S. at 417.
55. *Muller*, 208 U.S. at 423.
56. *Muller*, 208 U.S. at 421.
57. *See* Nancy Woloch, Muller v. Oregon: A Brief History With Documents 31–33 (1996).

very same assumptions relied on by the AAUP in their attempts to protect women from consensual sexual relationships.

Brandeis appealed to the Court to sustain the Oregon law as a valid exercise of the state's police power to legislate for the health, safety, and welfare of its citizens.[58] The Court upheld Brandeis's view, rejecting Muller's substantive rights claim that the Oregon law violated freedom of contract—a liberty and property right protected by the United States Constitution from the state's police power.[59] In rejecting Muller's argument, the Court stressed that women, unlike men, were a special class who needed protection from the greed and passion of men.[60] Justice Brewer placed considerable emphasis on the public welfare in protecting potential mothers and bearers of the race who, by nature, were dependent persons.[61]

The Brewer protectionist rationale is stretched well beyond the snapping point when state universities and colleges invoke the police power of the state to regulate sexual partners for the public welfare. Academic administrators who endorse, support, and enforce the ban on consensual relationships make women and their sexual activity the special concern of the state. In fact, it is difficult to envision any limits on the state's police power should the CRP prevail. The concomitant and more devastating threat to the public welfare is the tyranny flowing from administrative agencies exercising unchecked power, not consensual sex between a student and a professor. Given the dearth of objective evidence proffered to support the ban, opinion has been construed as fact and CRP supporters have sought government intervention to regulate consensual sexual behavior when no societal interest is at stake.

Gender specific legislation that treats women as a separate class, as in the *Muller* case, necessarily emphasizes differences rather than similarities and inequities rather than equality. For example, protective laws often implicitly define women as weak and dependent, like children. Not until the 1960s did gender equality become law—as embodied in Title VII of the Civil Rights Act of 1964. Afterward, protective laws that treated women differently than men fell before the

58. *See Muller*, 208 U.S. at 419 n.1.
59. *See Muller*, 208 U.S. at 421, 422.
60. *Muller*, 208 U.S. at 421–22.
61. *Muller*, 208 U.S. at 421–22.

banner of equality.[62] *UAW v. Johnson Controls, Inc.*,[63] dealt with company policies designed to protect employees exposed to concentrates of lead during manufacturing processes.[64] To protect the health of pregnant employees and women of childbearing years, the company adopted a fetal protection policy barring all women from jobs involving lead exposure, absent medical documentation of infertility.[65] The company conceded that its fetal protection policy was prompted in part by fears of possible lawsuits.[66] The Court unanimously rejected the company's argument, finding that the exclusionary plan constituted a form of sex discrimination prohibited by Title VII.[67]

Whether gender distinctions are based on state statutes, or government regulations, the Supreme Court applies an intermediate-level scrutiny test to gender classification under the Fourteenth Amendment.[68] In *Craig v. Boren*,[69] the Supreme Court ruled that "classifications by gender *must* serve important governmental objectives and *must* be substantially related to achievement of those objectives."[70]

The substantial burden imposed by the Court to sustain gender classifications forces CRP supporters to argue alternate positions. First, CRP proponents may argue that the proscriptions are gender neutral, applying to both men and women in the academy. However, this would be an embarrassingly disingenuous position for an institution and profession that prides itself on searching for truth.

This gender-neutral argument resembles that made by the State of Virginia to sustain its anti-miscegenation law. Virginia contended that its law banning interracial marriages did not violate either the equal protection or due process clauses of the Fourteenth

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62. *See, e.g.*, Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969); Rosenfeld v. Southern Pacific Company, 293 F. Supp. 1219 (C.D. Cal. 1968). In 1969, the EEOC proclaimed that occupational exclusions designed to protect women were discriminatory. *See* 29 C.F.R. § 1604.2(a)(i) & (iii) (1998).
63. UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991).
64. *Johnson Controls, Inc.*, 499 U.S. at 191.
65. *Johnson Controls, Inc.*, 499 U.S. at 192.
66. *Johnson Controls, Inc.*, 499 U.S. at 210.
67. *Johnson Controls, Inc.*, 499 U.S. at 211.
68. *See* Frontiero v. Richardson, 411 U.S. 677, 682 (1973). Justice Brennan, writing for the Court, noted that distinctions based on "romantic paternalism" put women in a cage. *See Frontiero*, 411 U.S. at 684.
69. Craig v. Boren, 429 U.S. 190 (1976).
70. *Craig*, 429 U.S. at 197 (emphasis added).

Amendment, because the statute equally punished both the white and black participants.[71] Chief Justice Warren rejected the "equal application" argument in race classification cases.[72] Although classifications based on race are inherently suspect and subject to strict scrutiny under the equal protection clause of the Fourteenth Amendment, whereas gender classifications require only intermediate scrutiny,[73] the positions of Virginia and the AAUP are analogous and similarly faulty.

In 1973, the Supreme Court demanded that all classifications further some legitimate, articulated, nonillusory state purpose.[74] For gender classifications the state purpose must be substantially related to an important government objective.[75] Moreover, the "test for determining the validity of a gender-based classification . . . must be applied free of fixed notions concerning the roles and abilities of males and females. Care must be taken in ascertaining whether the statutory objective itself reflects archaic and stereotypic notions."[76] The purpose of protecting female students, while it may be important, is not valid because it is based on these "stereotypical notions."

Further, the CRP cannot be rescued simply by maintaining that it is a benign sex classification that aids women in furthering their education unencumbered by a sexual environment. The Court applies exactly the same standard to benign aid to women as it does to disadvantaging classifications.[77] Considerable proof of the intent of the policy is required through actual and articulated legislative purposes, and the Court will carefully scrutinize the statutory scheme itself and the legislative history.[78] Justice Brennan articulated the problem inherent in benign gender classification in *Orr v. Orr*:[79] "Legislative

71. *See* Loving v. Virginia, 388 U.S. 1, 3, 7–8 (1967).
72. *See Loving*, 388 U.S. at 8.
73. *Compare* City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989), *and* Brown v. Board of Educ., 347 U.S. 483 (1954), *with* Harris v. Forklift Sys., Inc., 510 U.S. 17 (1993) *and Craig*, 429 U.S. 190. Indeed, even under the courts equal protection jurisdiction, which requires an exceedingly persuasive justification for a gender-based classification, it remains an open question whether classifications based on gender are inherently suspect.
74. *See, e.g.*, McGinnis v. Royster, 410 U.S. 263, 276 (1973).
75. *See Craig*, 429 U.S. at 197–98.
76. Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724–25 (1982).
77. *See, e.g.*, Caban v. Mohammed, 441 U.S. 380, 388 (1979); Orr v. Orr, 440 U.S. 268, 279 (1979).
78. Weinberger v. Wiesenfeld, 420 U.S. 636, 639 (1975).
79. *Orr*, 440 U.S. 268.

classifications which distribute benefits and burdens on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection. Even statutes purportedly designed to compensate for and ameliorate the effects of past discrimination must be carefully tailored."[80]

Since the passage of the Equal Pay Act of 1963,[81] women's organizations active in the legislative process have emphasized constitutional equality (Equal Credit Opportunity Act of 1974,[82] Women's Educational Equity Act of 1988,[83] Equal Rights Amendment,[84] Pregnancy Discrimination Act of 1988[85]). The CRP is a large step backward from an equalizing standard, once again making women and their sexual activity the special concern of the government. It is ironic that policies designed to protect women are being smuggled through the back door and into regulations that deny gender equality and concomitantly limit and degrade the freedom of women.

IV. The Consensual Relationship Policy Versus a Liberty/Substantive Due Process Claim

The most distressing aspect of the position advanced by the AAUP and academic administrators is their failure to acknowledge the constitutional philosophy underlying privacy interests. Personal autonomy, the basis of constitutional privacy, supports individuals' right to control information about themselves and to prevent intrusion into their lives.[86] Privacy is at the core of our value system. For example, personal choices concerning religion and political preferences are two legally recognized privacy interests formally protected from government intrusion by the First and Fourteenth Amendments of the United States Constitution.

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80. *Orr*, 440 U.S. 268 at 283.
81. 29 U.S.C. § 206(d) (1994).
82. 15 U.S.C. § 1691 (1994).
83. 20 U.S.C. § 3041 (1994).
84. H.R.J. Res. 208, 92nd Cong., 2d Sess. (1972).
85. 42 U.S.C. § 2000(e) (1994).
86. *See* William Cohen & John Kaplan, Constitutional Law: Civil Liberty and Individual Rights 515 (1992). For a good general treatment of the vanishing right of privacy, see The Center for Public Integrity, Nothing Sacred: The Politics of Privacy (1998).

Private conduct is not an absolute right. However, there are both legal and natural limits. Legal limitations in the name of public interest and well-being are confined to conduct that is morally wrong—conduct lawmakers believe would cause deep revulsion in ordinary people.[87] However, the politically powerful elite members of society have on occasion adopted laws restricting the behavior of many, while only reflecting the morality of a few.[88] The AAUP-supported ban on consensual relationships is an example of such a situation—the expression of the morality of a few who wish to regulate personal conduct within the academy.

Contemporary America risks undervaluing privacy rights. Consider the following excerpt from a standard consensual relationship policy statement now being considered by many colleges and universities:

> In a consensual relationship, the individual in direct professional power or authority over the other person, is encouraged to consult with the department chair, appropriate Vice President, or the Office of Affirmative Action. Reassignment of duties and responsibilities can serve to eliminate the power or authority of one individual over the other.
>
> If the consensual relationship between a faculty member and student or a supervisor and supervisee is not reported and effective steps are not taken to ensure unbiased evaluations or supervision, sanctions the same as those possible for a violation of the sexual harassment policy may be instituted.[89]

What is significant about this proposal, within the context of a privacy claim, is not only the requirement that the faculty member report the relationship under pain of sanctions, but the forced disclosure of the personal life of another, regardless of his or her consent to

87. *See* DAVID A. J. RICHARDS, TOLERATION AND THE CONSTITUTION 238 (1986). For a limited, but excellent treatment of privacy interests, see ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY (1995).

88. *See* COHEN & KAPLAN, *supra* note 86, at 526–27.

89. FACULTY WELFARE COMM., COMMUNITY COLLEGE OF SOUTHERN NEVADA (April 1996).

the disclosure. Instead of political suppression, this represents an unregulated state of "sexpression."[90]

The similarity between McCarthyism, consuming university campuses in the late 1940s, and the current consensual relationship phenomenon is disconcerting. During the McCarthy era, the academy collaborated in curtailing political freedom by excluding members for their associations, personal and organizational. Throughout the period, academic administrators, faculty, trustees, regents, and government officials set political tests for academic fitness and put in motion a system for monitoring the activities of nonconformists.[91]

The most common tactic for weeding out communists used by congressional committees, state agencies, the FBI, academic administrators, and faculty committees involved summoning suspect professors and inquiring into their political choices. If the suspect convinced interrogators that the taint of the Communist Party was simply a past flirtation, there remained the issue of student corruption and the required disclosure of names of people involved with communism. Refusal to identify others with whom the suspect had a relationship immediately provoked a threat of a public hearing, thus discrediting the professor's reputation in the public eye. Most often, naming others got the professor off the hook, while those who refused to name "known communists" faced disciplinary action for "conduct unbecoming a member of the academy."[92] The unbecoming conduct involved the reputation and prestige of the institution, which the professor was guilty of allowing to fall into disrepute.

The process of repression in the McCarthy years mandated professional exclusion, even if no law was broken. The era demonstrated that "suppression is more effective as an agency of freedom than is freedom itself."[93] Today, the prospect of a university requiring disclosure of a professor's political philosophy would be considered intrusive, a threat to First Amendment rights, and is a requirement consistently opposed by the AAUP. Now, however, the political winds have shifted; the AAUP supports the right, indeed the need, for employers to demand that employees reveal their private sexual relations. Just as students might have been corrupted by dangerous political

90. STROSSEN, *supra* note 38, 83–106.

91. *See generally* ELLEN W. SCHRECKER, NO IVORY TOWER: MCCARTHYISM AND THE UNIVERSITIES (1986).

92. SCHRECKER, *supra* note 91, at 96, 97, 100–103.

93. SCHRECKER, *supra* note 91, at 110.

views in the 1950s, the AAUP argues that students are now in a similar danger, corrupted by the influence of sex. Once repression was justified in the name of political orthodoxy, now it is justified in the name of sexual orthodoxy.

It is not surprising that the AAUP and faculty colleagues are complicit in this "sexual McCarthyism."[94] During the 1950s, faculty neither organized nor protested against the disciplinary actions ranging from suspensions to dismissals. They did not challenge the blacklisting of colleagues, instead resolving "to study the problem."[95] Ultimately, the AAUP did not censure any school or publish a report on the widespread abuses until the crisis passed. This unfortunate performance is being repeated today for many of the same reasons. The AAUP does not consider privacy and autonomy as issues deserving the same protection as speech, publication, or research. Their selective protection of liberty interests creates a precedent for more intrusion by the government.

Similar to the atmosphere of repression generated by the McCarthy inquiries, refusal to cooperate today means the possible imposition of sanctions for failing to perform an academic duty. The AAUP believes that faculty have a duty to disclose personal facts of legitimate concern to the institution. That is, professors are obligated to protect the institution from harm, when, in fact, the AAUP, tenure, and academic freedom are supposed to assure the opposite: that the professor is protected from the institution. The AAUP argues that the rights of some must be sacrificed for the larger goal of the whole.

CRP opponents must show the existence of a right abridged by government action. Unlike the McCarthy era, when it took years to decide cases of first impression involving significant First Amendment rights,[96] CRP opponents have a century of constitutional law defining

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94. The term "sexual McCarthyism" has been used by many others and the author makes no claim on its originality.

95. SCHRECKER, *supra* note 91, at 312.

96. *See, e.g.*, Barenblatt v. United States, 360 U.S. 109 (1959) (5–4 decision holding that First Amendment rights could be overridden by Congress to insure the self-preservation of society). Significantly, in *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963), the Court in another 5–4 ruling restricted the power of state legislative investigations. Florida began investigating the link between the N.A.A.C.P. and the Communist Party. Restating previous rulings on associational rights, the Court held that "[f]ree speech and free association are fundamental and highly prized, and need breathing space to survive." *Id.* at 542. Addressing the power of the state to intrude into the area of fundamental rights, Goldberg said the state may investigate "in order . . . to protect its legitimate and vital interest." *Gibson*, 372

privacy rights. As early as 1888, Judge Thomas Cooley, in his treatise on the law of torts, took notice of the right to be "let alone."[97] Two years later, Samuel Warren and Louis D. Brandeis, then private attorneys, published *The Right to Privacy*.[98] However, it was not until 1928 that Brandeis had an opportunity to expound on his views in a judicial forum. In *Olmstead v. United States*,[99] the Supreme Court held that the Fourth Amendment did not require search warrants for police interception of telephone conversations because things, not conversations, were protected.[100] Dissenting, Justice Brandeis said:

> The protection guaranteed by the [Fourth and Fifth] Amendments is much broader in scope. The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure, and satisfaction of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.[101]

While the Supreme Court has been reluctant to declare a general constitutional right of privacy and has instead proceeded on a case-by-case

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U.S. at 542. The state must show "a substantial relation between the information sought and a subject of overriding and compelling state interest." *Gibson*, 372 U.S. at 542. In *Bates v. Little Rock*, 361 U.S. 516, 524 (1960), *noted in Gibson*, 372 U.S. at 544, the Court said, "Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling."

97. *See* 2 DAVID M. O'BRIEN, CONSTITUTIONAL LAW AND POLITICS: CIVIL RIGHTS AND CIVIL LIBERTIES 1168 (1995).

98. Samuel Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). By 1960, thirty-one states had recognized privacy rights. *See* O'BRIEN, *supra* note 97, at 1169.

99. Olmstead v. United States, 277 U.S. 438 (1928).

100. *Olmstead*, 277 U.S.

101. *Olmstead*, 277 U.S. at 478. Brandeis's conception of Fourth Amendment protections was later adopted by the Supreme Court in *Katz v. United States*, 389 U.S. 347 (1967). *Katz* overruled *Olmstead*. *See Katz*, 389 U.S. at 353.

basis, its decisions clearly evince a trend toward less government intrusion into areas of personal choice.

The link between the Fourteenth Amendment and privacy interests properly begins with *Griswold v. Connecticut.*[102] Griswold was the executive director of the Planned Parenthood League of Connecticut. Planned Parenthood gave advice to married couples on contraception, in violation of the state's anti-contraception law, and Griswold was found guilty as an accessory to the illegal use of contraceptives. The Court concluded that privacy is a substantive right protected by the due process clause of the Fourteenth Amendment.[103] Indeed, Justice Douglas elucidated privacy rights in the penumbras of the First, Third, Fourth, Fifth, and Ninth Amendments, applicable to the states by virtue of the Fourteenth Amendment.[104] In another case, Justice Douglas said that there is a "zone of privacy" contained within the meaning of the First and Fifth Amendments such that the government may not force disclosure or surrender to the detriment of the individual.[105]

Justice Goldberg stated in his concurring opinion that the concept of liberty protects fundamental personal rights and is not confined to those rights enumerated in the Bill of Rights.[106] Linking liberty and due process, he declared that the latter protects those liberties "so rooted in the traditions and conscience of our people as to rank as fundamental."[107]

Griswold recognized that private marital decisions are a fundamental, constitutionally protected right. Likewise, consensual relationships prior to marriage logically enjoy similar protection,

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102. Griswold v. Connecticut, 381 U.S. 479 (1965). In an earlier case, *Skinner v. Oklahoma*, 316 U.S. 535 (1942), the Court struck down the state's Habitual Criminal Sterilization Act mandating compulsory sterilization after a third felony conviction for a "crime of moral turpitude." Justice Douglas, delivering the opinion of the Court, looked to the equal protection clause of the Fourteenth Amendment to protect fundamental interests, using substantive due process to protect basic liberties not linked to a specific constitutional guarantee.

103. *See Griswold*, 381 U.S. at 480.

104. *See Griswold*, 381 U.S. at 485.

105. *See* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958); *see also Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539 (1963) (refining the associational right first articulated in the *N.A.A.C.P.* case); *see generally Boyd v. United States*, 116 U.S. 616, 633–34 (1886) (providing additional discussion of this issue).

106. *See Griswold*, 381 U.S. at 486–87.

107. *Griswold*, 381 U.S. at 485 (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

otherwise the marriage protection would be a hollow right. In *Griswold*, Connecticut argued that its anti-contraceptive law would help curb incidents of extra-marital relations.[108] The Court rejected this argument as lacking a compelling state interest.[109] Likewise, in *Eisenstadt v. Baird*, the Court struck down a Massachusetts law prohibiting distribution of contraceptives to unmarried persons,[110] and in *Carey v. Population Services International*, the Court upheld the distribution of contraceptives to persons under the age of sixteen.[111] In *Eisenstadt*, Justice Brennan extended the *Griswold* ruling beyond the narrow confines of marriage:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. 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.[112]

The Supreme Court has consistently sought to keep the government out of individuals' sex lives, with the exception of limited areas, such as the age and capacity to consent.

The personal autonomy protected by the Constitution is fundamental to the individual pursuit of happiness. The CRP allows academic administrators to coerce information from employees about their private lives, effectively denying their constitutional right to be let alone. The AAUP has placed undue reliance on procedural due process guarantees, rather than upon substantive rights guaranteed by the Constitution.[113] Their insistence upon adequate safeguards misses the point; consensual sexual behavior of citizens is not the business of any governing body.

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108. *Griswold*, 381 U.S. at 485.
109. *See Griswold*, 381 U.S. at 485.
110. Eisenstadt v. Baird, 405 U.S. 438 (1972).
111. Carey v. Population Serv. Int'l, 431 U.S. 678 (1977).
112. *Eisenstadt*, 405 U.S. at 453.
113. *See Suggested Policy*, *supra* note 6, at 62, 63 n.5.

V. The Consensual Relationship Policy Versus Autonomy as a Right Guaranteed by the Constitution

Section one of the Fourteenth Amendment reads, "nor shall any State deprive any person of life, liberty, or property, without due process of law."[114] Professor Laurence H. Tribe has persuasively argued that the due process clause insulates aspects of individual behavior from government intrusion,[115] prohibiting state governments from enacting legislation beyond their sphere of authority. In fact, the Supreme Court has never enumerated an exclusive list of the substantive rights protected by the due process clause, because to do so would give state governments nearly unlimited control to intrude into the lives of its citizens. And as Professor Tribe notes, "[t]he threat of government regulation of these kinds of intimate personal choices cannot lightly be dismissed."[116] The state must show a compelling reason to proscribe conduct that infringes on personal privacy because "a person belongs to himself and not others nor to society as a whole."[117] This obstacle to state action under the Fourteenth Amendment is to protect the individual from both the excesses of the majority and a politically energized minority. Persons cannot be forced to relinquish their privacy rights to become instrumentalities of the state.

Included in the right of privacy is personal autonomy: the freedom to make certain decisions free from regulation. This is the heart of *Roe v. Wade*,[118] and the antithesis of the AAUP which adopted the philosophical position advanced by the State of Texas to support its anti-abortion law in *Roe*. Texas argued that a compelling state interest justified a prohibition of abortions, and the AAUP believes a compelling state interest justifies prohibiting consensual relationships. However, a woman's right to choose abortion is no different from her ability to choose a sexual partner. Therefore, according to *Roe*, neither interest rises to the level of "compelling" to justify proscription.

In *Roe*, Justice Blackmun began his constitutional analysis of the issue by stressing the appellant's reliance on *Griswold*.[119] Blackmun reaffirmed the traditional right of personal privacy, or a "zone of pri-

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114. U.S. Const., amend. XIV, § 1.

115. *See* Laurence H. Tribe, Abortion: The Clash of Absolutes 77–112 (1990).

116. Tribe, *supra* note 115, at 95.

117. Tribe, *supra* note 115, at 102.

118. Roe v. Wade, 410 U.S. 113 (1973).

119. *Roe*, 410 U.S. at 129, 152 (citing Griswold v. Connecticut, 381 U.S. 479 (1965)).

vacy," invaded by the state through its newly created abortion law.[120] Interestingly, the American Association of University Women submitted an *amicus curiae* brief supporting women's absolute right to choose whether to terminate a pregnancy and arguing the lack of a legitimate state interest. The majority in *Roe* acknowledged that privacy must be balanced against legitimate state interests, finding that limits on fundamental rights can be justified only by a compelling state interest advanced through narrowly tailored legislation.[121]

In a concurring opinion, Justice Stewart wrote that the liberty protected by the due process clause of the Fourteenth Amendment covers more than the freedoms explicitly named in the Bill of Rights.[122] Justice Rehnquist, dissenting, did not disagree with the proposition that liberty embraces more than the rights expressed in the Bill of Rights.[123] However, unlike the majority, Rehnquist would eschew the compelling state interest test, preferring a rationality standard—whereby the state need only show that the regulation bears a "rational relation to a valid state objective."[124] This rationality standard, applied to economic and social legislation, is the same position as that advanced by the AAUP.

DeChiara's article limits liberty and privacy interests in order to support the CRP and states that the due process clause of the Fourteenth Amendment applies to state, not private, actors. The cases cited by DeChiara do not support state proscription of consensual relationships. For example, one case involved the romance between a graduate student and an undergraduate; another involved sexual harassment, not consensual sexual relations; and a third concerned secondary institutions rather than colleges and universities.[125] DeChiara concludes that:

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120. *See Roe*, 410 U.S. at 152–54.

121. *Roe*, 410 U.S. at 155.

122. *See Roe*, 410 U.S. at 168–170 (Stewart, J., concurring). It is important to note that Stewart was in the minority in *Griswold*. By the time of *Roe*, he realized that the line of cases since *Griswold* involved the unconstitutionality of invading a person's liberty, *not* a pure right of privacy. *See* JETHRO K. LIEBERMAN, THE EVOLVING CONSTITUTION: HOW THE SUPREME COURT HAS RULED ON ISSUES FROM ABORTION TO ZONING 18 (1992).

123. *See Roe*, 410 U.S. at 172–73 (Rehnquist, J., dissenting).

124. *Roe*, 410 U.S. at 173 (Rehnquist, J., dissenting). *See also* Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).

125. *See* DeChiara, *supra* note 13, at 149–154.

> Since faculty-student relationships are probably not shielded by the right to privacy, intervention by universities is probably constitutional. For intervention to pass a test of constitutionality, a university would need only show that the intervention is a *rational* means of achieving legitimate ends. Since *protecting* students from *coercion* and *favoritism* are legitimate ends, and intervening in a faculty-student relationship is an arguably rational means of achieving these ends, the university actions would probably pass this low level of constitutional scrutiny with ease.[126]

In accord with DeChiara, the AAUP has adopted a rational relation standard for resolving due process clause issues, contradicting the line of cases beginning with *Griswold* and extending through *Roe.* The rational relation standard, reserved since 1938 for the resolution of economic substantive due process issues, is now advanced to support a ban on consensual relationships that is both irrational and protectionist.

In 1977, the Supreme Court decided *Whalen v. Roe,*[127] a milestone for privacy rights. In *Whalen* the Court upheld a New York State statute requiring the computer storage of prescriptions for lawful drugs. Although opponents of the statute contended that disclosure violated privacy rights and could deter patients from seeking medical treatment, the Court determined that the state provided adequate safeguards for the stored information.[128] Speaking for the Court, Justice Stevens recognized that certain personal information is important and constitutionally protected. Justice Stevens noted that the cases protecting privacy "have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters and another is the interest in independence in making certain kinds of important decisions."[129]

Building on *Whalen,* several federal courts held that required disclosure of consensual sexual relationships is unconstitutional. In *Thorne v. El Segundo,*[130] a female applicant for the police department was forced to reveal that she had an affair with a married police offi-

126. DeChiara, *supra* note 13, at 152 (emphasis added).
127. Whalen v. Roe, 429 U.S. 589, 599–600 (1977).
128. *Whalen,* 429 U.S. at 600–01.
129. *Whalen,* 429 U.S. at 591.
130. Thorne v. El Segundo, 726 F.2d 459 (9th Cir. 1983).

cer. As a result, Ms. Thorne was removed from the department's eligibility list, prompting her to sue the city for invasion of her constitutional rights to privacy and free association. The Ninth Circuit held that,

> [t]he Constitution protects two kinds of privacy interests. "One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions." . . . [The] defendants invaded her right to privacy by forcing her to disclose information regarding personal sexual matters. . . . [They also] . . . interfer[ed] with . . . her freedom of association.[131]

In *Briggs v. North Muskegon Police Department*,[132] a North Muskegon police officer was fired when he informed the chief of police that he separated from his wife and was living with another woman. Briggs sued the city, contending that his right to privacy and association was violated, as off-duty living arrangements bore no relationship to job performance. The District Court agreed, finding that "infringement of an important constitutionally protected right is [not] justified simply because of general community disapproval of the protected conduct. The very purpose of constitutional protection of individual liberties is to prevent such majoritarian coercion."[133]

State-imposed bans on consensual relationships also constitute state interference with the fundamental right of marriage. In *Zablocki v. Redhail*,[134] the Supreme Court struck down a Wisconsin law mandating state permission for marriage licenses if the person had a child from a previous marriage and was required to pay child support. Redhail's marriage license application was denied for nonpayment of child support from a previous relationship, prompting Redhail to challenge the statute under the equal protection and due process clauses. Speaking for the majority, Justice Marshall applied a strict scrutiny analysis because the right to marry is fundamental.[135] Justice Marshall found that it would be incongruous to recognize the right of privacy

131. *Thorne*, 726 F.2d at 468 (citation omitted).
132. Briggs v. North Muskegon Police Dep't., 563 F. Supp. 585 (W.D. Mich. 1983).
133. *Briggs*, 563 F. Supp. at 590–91.
134. Zablocki v. Redhail, 434 U.S. 374 (1978).
135. *See Zablocki*, 434 U.S. at 383.

in family life without similarly protecting the right to enter into a relationship that gives rise to a family.[136] Justice Marshall indicated that the right to procreate "must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place."[137] In his dissent, Justice Rehnquist argued for the traditional presumption of the validity of a state regulation as expressed in *Williamson v. Lee Optical Co.*[138]

The compelling state interest standard under the due process clause of the Fourteenth Amendment applies only to those fundamental liberty interests traditionally valued by society.[139] Family life, the home, and incidents of marriage fall within the orbit of constitutionally protected activity.[140] Similarly, consensual sexual relationships among heterosexual adults is valued and protected by society, as reflected in the line of cases challenging state laws criminalizing sodomy.

Sodomy statutes help clarify whether the *Griswold-Roe* precedents extend to consensual sexual behavior. In *Doe v. Commonwealth's Attorney for Richmond*,[141] the Court upheld the dismissal of a challenge to Virginia's sodomy law. A decade later, in *Board of Education of Oklahoma City v. National Gay Task Force*,[142] the Court struck a law firing teachers who advocated homosexual relations. One year later, in 1986 the Court heard *Bowers v. Hardwick*,[143] in which Hardwick, charged with violating Georgia's sodomy law, challenged the constitutionality of the statute as violative of his due process rights. After losing at the appellate level, Georgia appealed to the Supreme Court.[144]

Professor Tribe, representing Hardwick, argued that the statute exceeded the government's power to criminalize the private sexual conduct between consenting adults. Justice White, speaking for the

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136. *See Zablocki*, 434 U.S. at 386.
137. *Zablocki*, 434 U.S. at 386.
138. *See Zablocki*, 434 U.S. at 407 (Rehnquist, J., dissenting); Williamson v. Lee Optical Co., 348 U.S. 483, 491 (1955).
139. *See supra* Part IV.
140. *See supra* Part IV.
141. Doe v. Commonwealth's Attorney for Richmond, 425 U.S. 901 (1976), *aff'g* 403 F. Supp. 1199 (E.D. Va. 1975).
142. Board of Educ. of Okla. City v. National Gay Task Force, 470 U.S. 903 (1985), *aff'g per curiam*, 729 F.2d 1270 (10th Cir. 1984).
143. Bowers v. Hardwick, 478 U.S. 186 (1986).
144. *See Hardwick*, 478 U.S. at 189.

Court, avoided the broader implications of the case as suggested by Professor Tribe and narrowed the question presented: "We express no opinion on the constitutionality of the Georgia statute as applied to *other* acts of sodomy. . . . Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause."[145] In Justice White's words, "[t]he issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy. . . ."[146] Relying on the country's historical opposition to homosexual sodomy, the Court declined to recognize such a right.[147] Moreover, Chief Justice Burger, in his concurrence, stated that "[c]ondemnation of those practices is firmly rooted in Judeao-Christian moral and ethical standards."[148]

The four Justices in the minority insisted on adherence to the holding in *Griswold*: Privacy, or the right to be let alone, establishes the right to make certain decisions independent of the state.[149] Justice Blackmun maligned Georgia's argument that the statute was necessary to protect public health, to slow the incidents of communicable diseases, and to maintain a decent society; Georgia failed to offer evidence to support these claims.[150]

CRP supporters have advanced reasons why the policy is needed, even required. They have failed, however, to show a compelling state interest to justify the liberty restrictions that inhere in the CRP. Furthermore, some of the purported reasons are invalid, based on inappropriate gender stereotypes. The CRP violates the right to privacy, by intruding into and prohibiting consensual sexual relationships, associations which are fundamental according to post-*Roe* decisions. Additionally, by forcing professors to disclose information about these relations, the CRPs further invade their privacy.

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145. *Hardwick*, 478 U.S. at 188 n.2, 194 (emphasis added).
146. *Hardwick*, 478 U.S. at 190.
147. *See Hardwick*, 478 U.S. at 189, 192–94.
148. *Hardwick*, 478 U.S. at 196 (Burger, C.J., concurring). Justice Powell was the swing vote creating the five-person majority. Justice Powell, concerned with overturning the statute because Hardwick had not been convicted, made clear that had Hardwick been convicted, he might be protected by the Eighth Amendment to the Constitution barring cruel and unusual punishments. *See Hardwick*, 478 U.S. at 197–98; *see also* O'BRIEN, *supra* note 97, at 1239–42.
149. *See Hardwick*, 478 U.S. at 199–200.
150. *See Hardwick*, 478 U.S. at 208–213 (Blackmun, J., dissenting).

Without a valid compelling state interest, CRP proponents have no ground on which to stand.

CONCLUSION: THE BURDEN OF UNANTICIPATED CONSEQUENCES

The ban on consensual relationships imposes an affirmative duty on members of the academy to become instruments of the state, imposing the CRP proponents' moral and ethical vision in derogation of fundamental liberties protected by the Constitution. The CRP placed in the hands of those who have demonstrated an inclination to care more about their own interests than advancing the pursuit of knowledge is a dangerous weapon.

Professors Silva and Cohen[151] exemplify academy members victimized by an academy that fails to understand Title IX. Both were charged with sexual harassment under ill-conceived and hastily-drawn policies, and although neither discriminated nor made improper sexual advances creating a hostile learning environment, they were disciplined for their teaching styles. Their cases led to promulgation of DOE guidelines including First Amendment protections in the definition of sexual harassment. While both the First Amendment and the role of academic freedom in higher education protect Silva's and Cohen's conduct, their loss of reputation, financial burden, and emotional strain are the result of poorly informed administrators' intent on banning all things sexual.

Arguments supporting CRPs often center on the notion that consent is questionable given the power differential between a student and professor. There are several problems with this approach. First, a lack of consent is not sexual harassment, but rape, a felony for which an offender may be prosecuted and punished. CRP proponents' arguments define a *prima facie* case for rape, a crime that should not be pursued by human resource personnel or administrators untrained in criminal investigation and prosecution.

Some colleges and universities pursue investigations using procedures that attempt to guarantee due process. Because these investigations verge on becoming criminal prosecutions, these overtures do not go far enough to protect normal constitutional protections afforded criminal suspects such as the Fifth Amendment

151. *See* Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996); Silva v. University of N.H., 888 F. Supp. 293 (D.N.H. 1994).

privilege against self-incrimination. Professors targeted in an investigation are further disadvantaged because of an assumed legitimacy of an academic investigation, rendering failure to answer questions professionally unacceptable.[152] The academy has simply changed the taint of being a Fifth Amendment Communist to being a Fifth Amendment rapist.

The academy has once again demonstrated a rather remarkable ability to vigorously defend some freedoms while simultaneously abandoning others. Unrecognized, however, is that the failure to defend all protected freedom with equal vigor jeopardizes the liberty interests of all. Academic freedom has little meaning without free speech, research, and association, integral parts of higher education. Rules proscribing interpersonal association erode fundamental privacy and association rights and risk other relationships that may be deemed threatening or harmful in the future. The CRP, like the attempts to proscribe what is acceptable speech in the academy, is the slippery slope leading to less, rather than more, freedom.

To support the CRP one must accept its core that women need protection. Gender equality is compromised on the altar of protectionism, consistently the argument of those who would curtail the role of women in society. The long range implications of such a policy are serious. Is a woman's right to choose a credible and viable concept in the context of an abortion, but limited in the choice of a sexual partner? Even if the government has a limited interest in the former, it has no interest in the latter.

The AAUP has elected to embrace a policy selectively supporting some liberty interests, while regrettably excluding the privacy interests of professors and students. The sexual lives of consenting adults, absent a violation of law, are not the business of the academy. Lost careers and damaged reputations have resulted from overzealous administrations who seek to rid their institutions of sexual liaisons of which they disapprove. The tyranny of administrative agencies continues unabated as it did in the 1940s and 1950s. This new repression is simply McCarthyism in new clothing. But unlike the earlier period when the AAUP did virtually nothing to protect the privacy rights of professors, they now seek to actively support their invasion.

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152. For example, Rutgers University fired a professor for invoking the Fifth Amendment during the McCarthy years. *See* SCHRECKER, *supra* note 91, at 196.