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Consensual Relationships and Institutional Policy

ELISABETH A. KELLER

Most higher education institutions recognize the need for policies prohibiting sexual harassment, a behavior universally considered abhorrent. Few institutions, however, have addressed the subtle issues surrounding consensual amorous contacts between faculty members and students. While some of these relationships may be exploitative, more than a few have resulted in long-term, mutually beneficial relationships, including marriage.

Several years ago, the University of California faculty senate defeated a proposed amendment to the Faculty Code of Conduct that would have declared it unethical for faculty members to engage in romantic relationships with students. The faculty viewed this measure as an attempt to regulate private behavior between consenting adults: one professor suggested that the measure would violate civil rights. A similar proposal was also rejected by the University of Texas at Arlington.

Any expectation that faculty members and students can separate private life from university life completely is simply unrealistic. The campus is an important locus of social interaction. Intimate relations are bound to form when people who share the same interests and educational backgrounds spend considerable time together. The changing demographics of the student population reinforce this trend: the proportion of entering college students at least 25 years old jumped from 28 percent in 1972 to 38 percent in 1986. Older students, who are likely to have been married already or at least involved in intimate relationships, usually expect greater independence in establishing relationships.

University policies restricting consensual amorous relationships between faculty members and students rest on uncertain ethical and legal ground. In 1983, a federal court case challenged the legality of a university’s response to a teacher-student romance, while in a different case one year later, the United States Supreme Court noted that such relationships are protected by the right to privacy. The 1983 case involved a graduate student in music at Louisiana State University who, while serving as a temporary instructor and then as a teaching assistant, engaged in a lesbian relationship with a freshman student over the age of eighteen. The student was not enrolled in any of the teaching assistant’s classes, nor was she likely to be in the course of her studies. The student’s parents expressed concern to university officials, although the student herself did not file a complaint. The university administration, after investigating the relationship, decided in the “best interest of the university” not to reappoint the graduate student as a teaching assistant and instead to offer her a research assistantship.

In explaining its action, the university expressed concern that romantic relationships between teachers and students may give the impression of an abuse of the teacher’s authority, creating an appearance of conflict of interest even if, in fact, no such conflict exists. The university also asserted that the conduct in question could taint current and prospective students’ opinions of the teaching assistant.

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process and of the university. The graduate student sought an injunction to compel the university to restore her teaching assistantship, claiming that her civil rights had been violated. A federal court upheld the reassignment as permissible, however, recognizing a university’s duty to take “all reasonable and lawful measures to prevent activities which adversely intrude into the teaching process or which might adversely affect the university’s image and reputation.”6

Louisiana State University had no written policy prohibiting student-faculty romantic relationships. Instead, the university relied on general standards of professional conduct and ethics, assuming that avoidance of romantic relationships with students was an obvious criterion of professional conduct. In another case dealing with a consensual amorous relationship between a professor and a student, the university, in the absence of written policies, relied on AAUP guidelines to find implicit prohibitions of intimate relationships. What can explain this general lack of policies directly addressing the problem of faculty-student consensual relationships? Perhaps university officials believe, as some faculty members have suggested, that interfering with the personal relationships of faculty members and students constitutes an encroachment on privacy rights.

The United States Supreme Court reinforced this view in 1984 in Roberts v. United States Jaycees. Stating that intimate association, an intrinsic element of personal liberty, is secured generally by the Bill of Rights and the Fourteenth Amendment, the Court explained that “choices to enter into and maintain certain intimate relationships must be secured against undue intrusion by the State.”7 The Court described the spectrum of human relationships as ranging from the smallest and most selective at one end to large business enterprises at the other, with the location of a specific relationship on this spectrum determining the limits of state authority to interfere. The Court stated that personal affiliations, identified by “a high degree of selectivity in decisions to begin and maintain the affiliation and exclusion from others in critical aspects of relationship,” come under the shelter of the constitutionally protected right to privacy.

The right to privacy, however, is not absolute. A compelling state interest may permit certain infringements of that right. The asymmetry of power between faculty members and students, and the fact that what appears to be an adult, consensual, and private relationship may actually be the product of implicit or explicit duress, may present such a “compelling interest.” Regardless of a faculty member’s intention, potential coercion—in the form of uncertainty regarding the academic consequences of noncompliance, for example—can influence a student to consent to unwanted sexual involvement. Students are keenly aware of their vulnerability to the broad discretionary power of faculty members.10

Colleges and universities can take at least five different approaches to the issue of consensual relationships: they can formulate: 1) no statement of policy regarding romantic relationships (as in the Louisiana case); 2) a policy statement expressing concern with such relationships but stating no specific prohibitions or sanctions; 3) a policy prohibiting all romantic relationships between faculty members and students, and specifying grounds for dismissal and other penalties and remedial measures; 4) a policy defining and prohibiting “exploitative” relationships and specifying penalties only for these; and finally, perhaps the most effective approach, 5) a policy proscribing the formation of intimate relationships only within the instructional context, when the faculty member supervises the student’s academic work.

In the absence of a policy statement regarding romantic relationships, faculty members and students may be exposed to the whims, pressures, and prejudices of university officials and members of the community. Unwritten rules are, after all, very difficult to enforce evenlyhandedly. The faculty member in the Louisiana case, for example, could have reasonably believed that she did not breach any ethical standard of behavior. The case actually revealed that other, heterosexual, faculty-student relationships were well known in her department and yet were not investigated. The action of the university, therefore, could be construed as being aimed specifically at the instructor’s sexual preference. Fairness dictates that faculty members and students be informed of the types of relationships which the university finds unacceptable.

Sexual harassment policies not accompanied by policies regarding consensual amorous relationships also risk forcing potentially exploitative behavior into more subtle expression. Faculty members can disguise sexually harassing behavior as academic or personal attention, and, without a rule addressing intimate consensual relationships, stu-
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dents have no way of knowing whether or not they can fairly categorize a faculty member's behavior as harassment. A single request for a date, for example, unaccompanied by a threat of retaliation or the promise of gain, may not constitute sexual harassment under certain policies that focus on more intimidating and coercive behavior.11 Policy statements that do not expressly forbid amorous relationships but generally caution faculty members against such involvements are equally problematic. These statements leave faculty members with only the vague notion that such relationships are suspect and subject to unspecified consequences. Administrators, too, will find ambiguous policy statements difficult to enforce. In the event that a university takes action against a faculty member through denial of tenure or removal from teaching duties, the institution opens itself to claims of selective punishment and unfair process.

A policy prohibiting all romantic relationships between faculty members and students will appeal to many institutions. Martha Chamallas, writing on the legal control of sexual conduct, suggests that "most institutions are likely to tend toward a broad ban on amorous relationships because the threat of sexual harassment or sexual favoritism is more concrete than any countervailing advantage that workers and students gain from expanded opportunities for intimate relationships."12 Under a broad ban, students and faculty members will have less trouble recognizing unacceptable behavior. When deciding whether or not to report sexual harassment, students will no longer have to categorize the behavior as either an invitation to engage in a consensual relationship or as harassment since both are forbidden. An outright prohibition of consensual relationships may empower students to resist undesired advances.

On the other hand, proscribing all romantic relationships between faculty members and students may impose a chill on other desirable social interactions. Frances Hoffman, writing in Harvard Education Review, suggests that this type of policy could hurt those whom it purports to protect.13 Mentorship and close associations with faculty members—vital aspects of university life and key ingredients of academic success—may be denied students in a climate of fear in which such relationships may be misconstrued. Hoffman suggests that policies should not "reinforce status hierarchies and ignore or deny the right of individuals to establish relationships when, with whom and where they choose." Hoffman is particularly interested in the impact of amorous relationship policies on women. She notes that female students have a strong interest in protecting their right to forge alliances with faculty members in order to generate personal ties of trust and friendship—relationships crucial for personal growth and political strength within the organization and beyond. She writes, "It is not in women's interests, either theoretically or practically, to concede to institutions the right to delimit the formation of personal ties among community members."

The legal implications of proscribing all amorous relationships between faculty members and students are as yet untested in the courts. Because a public institution's enforcement of administrative policies constitutes state action and thus is subject to constitutional guarantees, imposing a total ban on consensual amorous relationships may impermissibly infringe on the constitutionally protected right to privacy. To present a case of "compelling interests," a public institution which adopts a total ban must defend the presumption that all consensual amorous relationships between faculty members and students are damaging to one or both of the parties involved and to the institution's academic mission.

In the middle ground between a flat ban on consensual relationships and no rule at all lie several policy alternatives. An institution may define exploitative relationships and draw up sanctions to be used against faculty members engaged in relationships fitting that definition. Such a policy would require investigations to determine if specific relationships violate the rule, focusing on such factors as whether the student felt pressured to enter into and maintain the relationship, whether the faculty member was in an evaluative role, differences in age and status of the parties, and which party actually initiated the relationship.14

The problem with this policy emerges when it is applied outside of the evaluative context. Students and faculty members have the opportunity to meet in a number of settings outside the classroom, including committees, sporting events, campus organizations, and religious groups. Any disparity in power is far less pronounced in these settings, where a faculty member cannot use the threat of reprisal or the promise of reward to manipulate students. Little reason would exist in these circum-
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stances for others to suspect academic favoritism. While the relationship could still exhibit an asymmetry in power and status, it is not at all unusual for two persons in an intimate relationship to have unequal power and social status as a result of differences in the age, wealth, personality, professional status, and experience of the people involved. Investigations into relationships could result in excessive entanglements in the private lives of faculty members and students without sufficient justification.

A policy proscribing the formation of intimate faculty-student relationships within the instructional context—namely, when the faculty member supervises the student’s academic work—would maintain the integrity of the institution’s academic mission while safeguarding the privacy interests of faculty members and students. Intimate associations between faculty members and students occurring within the zone of instruction carry the presumption of coercion and render the consensual nature of the relationship suspect. In addition, other students may assume that such relationships result in favoritism or unfair academic advantage. Because perceptions such as these damage the academic climate, and because the exact nature of such relationships is difficult to determine, the university may legitimately proscribe all intimate relationships within the instructional context.

Investigations conducted under a policy that prohibits amorous relationships only in the instructional setting are far less subjective and intrusive. It is comparatively easy to ascertain whether a faculty member had supervisory or evaluative power over a student at the time of their relationship, and it is also possible to obtain objective evidence of favoritism or unwarranted negative evaluation. The incentive to report faculty-student amorous relationships, too, is far greater when the relationship occurs within the academic setting. Those registering complaints about the relationship are likely to be fellow students, who may feel disadvantaged in competition for grades or recommendations, or fellow faculty members, who may fear that the academic integrity of their department is being compromised.

Once policymakers choose to adopt a policy addressing consensual amorous relationships, they must develop clear and manageable guidelines. Only a full understanding of the rules governing faculty-student relationships will minimize misconceptions and abuse. The policy should be published in both the faculty and student handbooks to avoid reinforcing the stereotype of the helpless student as unwitting victim of faculty imposition. Including the policy in student handbooks can help students see themselves as responsible adults with a significant degree of control.

The freedom to decline or resist intimate associations is inextricably bound up with the freedom to form desirable intimate associations. Upholding both of these freedoms simultaneously in the university setting may appear to engender inherent conflicts. However, the right to form adult consensual intimate relationships is a fundamental personal freedom which must be protected. A strong and effective university policy against sexual harassment together with recognition of the right to privacy of faculty members and students will serve the interests of both the university and the individual.

NOTES
2. Chronicle of Higher Education (September 3, 1986), 44.
6. Ibid., 1121.
7. Korf v. Ball State University, 776 F.2d 1722 (7th Cir. 1984).
8. The university relied on provisions of AAUP’s Statement on Professional Ethics that were incorporated in the faculty handbook: "(1) The professor, guided by a deep conviction of the worth and dignity of the advancement of knowledge recognized the special responsibility placed on him...; (2) He demonstrates respect for the student as an individual and adheres to his proper role as intellectual guide and counselor...”
14. As suggested by DeChiara, 137-162.