LEGAL IMPLICATIONS SURROUNDING UNIVERSITY POLICIES ENACTED TO
GOVERN THE CONSENSUAL PROFESSOR-STUDENT RELATIONSHIP

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I. INTRODUCTION

Strong relationships between teachers and students are important for success in the classroom. In certain instances, however, these relationships may cross the line from appropriate to inappropriate. For example, when a high school teacher engages in a romantic relationship with a high school student, the risk of harm to the student, coupled with the “disparity in age and maturity,” is so substantial that most view this relationship as inappropriate.1 By contrast, there is little consensus on the appropriateness of the relationship when a college-aged student is involved in a relationship with his or her professor.

Many universities within the last two decades have begun to regulate the morality of their professors by enacting policies governing the relationships between professors and students. One important reason given for the adoption of these policies is an attempt on the part of the universities to avoid liability for possible sexual harassment claims.2 Although it can be argued that this is a plausible justification, universities that implement these consensual romantic relationship policies may also expose themselves to lawsuits challenging the legality of these policies.

This article provides a general discussion of the practice which requires professors to uphold certain professional standards as a condition of employment. It also discusses legal applications of university policies regulating the professor-student relationship, including applications demonstrating enforcement of these policies. Although the article does not reach a conclusion on the validity of consensual sexual relationship policies,3 it does analyze justifications given for implementing these policies. The article concludes with legal considerations that may serve as a basis for guiding universities and their counsel in contemplation of whether to adopt or maintain consensual romantic relationship policies.

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3 The authors have not reached a conclusion on the propriety of consensual sexual relationship policies in order to avert the inclusion of moral judgment into the article.
II. REGULATING PROFESSOR MISCONDUCT

Requiring professors to uphold certain professional standards—like refraining from engaging in immoral behavior—is not a new concept. In fact, professors are frequently subject to, as a condition of employment, morals clauses or other contractual clauses that can protect their employers from the harmful effects of any inappropriate or immoral behavior. Further, professors’ morality is regulated through universities’ tenure policies and procedures. For professors teaching at public universities, the terms of tenure are typically governed by state statutes and employment contracts. In contrast to public institutions, the tenure policies for professors teaching at private universities are usually defined solely through contractual provisions contained in or incorporated into their employment contracts.

An example of a tenure policy regulating professor behavior is the policy of the University of California System, which provides that the “termination of a continuous tenure appointment or the termination of the appointment of any other member of the faculty before the expiration of the appointee’s contract shall be only for good cause, after the opportunity for a hearing.” Although good cause is not specifically defined, the University of California System has a Faculty Code of Conduct that enumerates conduct that is considered to be unacceptable and for which a professor can be disciplined for professional misconduct. These disciplinary actions can include sanctions such as written censure, reduction in salary, demotion, suspension, denial of emeritus status, or dismissal from the employ of the university. Particularly, this Code of Conduct encompasses as unacceptable behavior a professor’s actions of “[e]ntering into a romantic or sexual relationship with any student for whom

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5 See, e.g., Jim Leggett, LC Policy Encourages Alcohol Abstinence, ALEXANDRIA DAILY TOWN TALK (Alexandria, LA), Apr. 13, 2006, at 1-3A (describing how the contracts for Louisiana College, a private college, contain a clause stating that employees are “expected to abstain from serving, using or advocating the use of alcoholic beverages in public and/or in settings in which students are or are likely to be present”).


the faculty member has, or should reasonably expect to have in the future, academic responsibility (instructional, evaluative, or supervisory).”12

Interestingly, the teaching profession is not the only profession requiring that its professionals uphold certain professional standards.13 As a matter of fact, the professional licensing boards for physicians and lawyers regulate their conduct.14 Certain violations of these regulations or other governing state statutes could result in the revocation of a medical or law license.15 For example, in Finucan v. Maryland Board of Physician Quality Assurance, a physician was charged with “imoral or unprofessional conduct in the practice of medicine” under Maryland’s Medical Practice Act after the physician over a five-year period engaged in a series of sexual relationships with several of his patients.16 After a hearing was conducted before an administrative law judge, the medical licensing board revoked the physician’s license to practice medicine.17 The court in Finucan affirmed the administrative law judge’s order revoking the physician’s license and found that the physician failed to satisfy his duty to put his patients’ needs ahead of his personal needs.18 Other professions requiring that their professionals refrain from engaging in immoral conduct include architects, accountants, and engineers.19

III. POLICIES REGULATING THE PROFESSOR-STUDENT CONSENSUAL RELATIONSHIP

In the teaching profession, the practice of requiring teachers to uphold certain professional standards has been expanded significantly by various universities’ efforts to govern the extent of the relationship between professors and students.20 In the last two decades,21 a significant number of higher education institutions have adopted formal policies regarding consensual romantic relationships between faculty members.

12 FACULTY CODE OF CONDUCT, supra note 10, at 6.  
13 See, e.g., Hainline v. Bond, 824 P.2d 964, 965 (Kan. 1992) (stating that conviction of a felony is grounds for license revocation of an attorney, physician, architect, land surveyor, or engineer).  
15 See, e.g., Hainline, 824 P.2d at 965.  
17 Id. at 379-80.  
18 Id. at 392.  
19 See Hainline, 824 P.2d at 965.  
20 See, e.g., Anne Neville, When Students and Professors Do More than Study, BUFFALO NEWS, Mar. 3, 2004, at D1 (“Now many colleges, fearful of sexual harassment lawsuits, have rules discouraging or prohibiting even consensual romantic relationships between faculty and students.”); Paul Tosto, Dating your Students? MnSCU Wants to Know, SAINT PAUL PIONEER PRESS (St. Paul, MN), Nov. 4, 2006, at 1A (stating that in 2006, Minnesota State Colleges and Universities banned romances between professors and students).  
21 See Piper Fogg & Sharon Walsh, The Question of Sex Between Professors and Students, CHRON. OF HIGHER EDUC., Apr. 5, 2002, at A8 (describing a 1986 University of Iowa policy and a 2002 Ohio Wesleyan University policy banning certain consensual sexual relationships between faculty members and students).
The adoption and implementation of these policies has not been without controversy. On one side of the controversy are those individuals and entities who claim that the only proper policy of this sort is one that completely bans these relationships, based on the premise that “the unequal power relationships between student and faculty members mean that no relationship is truly consensual.” On the other side are those individuals and entities who claim that, among other reasons, because postsecondary “students are usually beyond the legal age for consent,” or because there is no other basis for the vitiation of consent, these types of policies “infringe on the constitutional rights of free association or risk invasion of privacy claims.” Others fall somewhere in the middle of this spectrum.

Given this vast range of opinion, ideology, and advocacy, institutions of higher education have taken different approaches in the adoption and implementation of policies concerning consensual romantic or sexual relationships between students and professors. A key differentiation among these policies is whether they serve: (1) as compulsory, complete prohibitions on consensual romantic relationships between students and faculty members; (2) as compulsory, partial or provisional prohibitions on these types of relationships; or (3) as non-compulsory, advisory recommendations regarding these types of relationships. Within the array of these policies, additional

22 See Gary Haber & Michael Fechter, USF Defines Date Rules for Faculty, Students – Proposal OKs Relations but Disallows Supervision, TAMPA TRIB., Jan. 24, 2005, at Metro 1 (discussing various approaches that institutions of higher education have taken with respect to policies on romantic relationships between students and faculty members).
23 See Kathy Lynn Gray, Ohio State Professors Bristle at Proposed Ban, COLUMBUS DISPATCH (Columbus, OH), Feb. 26, 2006, at 1C (discussing the backlash among certain Ohio State University faculty members in response to the drafting of a policy regarding consensual relationships between faculty members and students).
25 Id.
26 See Sherry Young, Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education, 4 AM. U. J. GENDER SOC. POL’Y & L. 269, 292 (1996) (stating that “the proponents of total bans have failed to demonstrate that there is any reason to question the capacity of adult students to consent to sexual relationships with professors, at least where the professor does not exercise academic authority over the student”).
27 KAPLIN & LEE, supra note 24, at 956; see also Paul R. Abramson, The Right to Romance - Why Universities Shouldn’t Prohibit Relations Between Teachers and Students, BOSTON GLOBE, Sept. 30, 2007, at 1D (arguing that complete bans on faculty-student consensual romantic relationships violate the U.S. Constitution).
28 See, e.g., Paul M. Secunda, Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education, 55 SYRACUSE L. REV. 55, 57 (2004) (eschewing the principles of consent and constitutional law with regard to faculty-student consensual relationships for an “approach [that instead] examines the more easily discernible impact or effect that consensual relationships have on the college and university environment”).
30 See Secunda, supra note 28, at 58-65 (classifying the different approaches to consensual relationships between faculty members and students as laissez-faire, advisory, conflict of interest,
differentials may be made based on whether the faculty member serves in a supervisory role to the student;\textsuperscript{31} on whether the involved student is an undergraduate student or a graduate (or professional) student;\textsuperscript{32} or on other considerations, such as whether the involved student and faculty member are married.\textsuperscript{33} Finally, some colleges and universities have opted to adopt no formal policies on this subject.\textsuperscript{34}

Some universities and colleges ban all romantic relationships between students and faculty members, and they provide for express disciplinary action if such relationships occur.\textsuperscript{35} For example, St. Michael’s College, a small, Catholic, liberal arts college in Vermont,\textsuperscript{36} has adopted such a compulsory and complete prohibition on all

\textsuperscript{31} See, e.g., THE UNIVERSITY OF MICHIGAN FACULTY HANDBOOK ANN ARBOR CAMPUS 8.D.12. PERSONAL RELATIONSHIPS BETWEEN FACULTY AND STUDENTS POLICY (2008) (strongly discouraging consensual romantic relationships between faculty and students and requiring that these relationships be disclosed if the faculty member has supervisory responsibility over the student).

\textsuperscript{32} See, e.g., BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, HUMAN RESOURCES ADMINISTRATIVE PRACTICE MANUAL: EMPLOYEE RELATIONS, POLICY ON AMOROUS RELATIONSHIPS (2008), available at http://www.usg.edu/employment/policies/hr_manual/employee_relations/#amorous (providing a prohibition on all amorous relationships between faculty and “undergraduates whom they are currently supervising or teaching” and then providing that the “University also strongly discourages amorous relationships between faculty or administrators and graduate/professional students and/or employees whose work they supervise”); SYRACUSE UNIVERSITY FACULTY MANUAL SEXUAL HARASSMENT POLICY 3.11 (1995), available at http://provost.syr.edu/provost/Faculty/policies/facpolicies.aspx#11 (providing that the policy “prohibits individuals employed by Syracuse University from pursuing sexual relationships with undergraduate students they teach or supervise[,]” but only “strongly discourages sexual relationships with graduate students and any subordinate whose work the individual supervises”).

\textsuperscript{33} See, e.g., Young, supra note 26, at 271 n.11 (noting that the 1995-1996 Ohio Northern University Faculty Handbook provided that “[f]aculty and staff members should not have sexual relations with students to whom they are not married”).

\textsuperscript{34} See Tim Johnson, Academic Affairs Rile Campus, BURLINGTON FREE PRESS (Burlington, VT), Feb. 10, 2008, at 1C (“At American higher-education institutions, policies on consensual faculty-student relations vary considerably, and some schools have no policy at all.”); see also Billie Wright Dziech et al., “Consensual” or Submissive Relationships: The Second-Best Kept Secret, 6 DUKE J. GENDER & L. 83, 88 (1999) (citing a 1998 survey on “universities’ consensual relationship policies [that] concluded that only about 17 percent of institutions have policies”).

\textsuperscript{35} See, e.g., REGENT UNIVERSITY 2007-2008 SCHOOL OF UNDERGRADUATE STUDIES FACULTY HANDBOOK 12.3 FACULTY/STAFF-STUDENT RELATIONSHIPS POLICY 64 (2007), available at http://www.regent.edu/acad/undergrad/pdf/UndergradFacultyHandbook0708.pdf (“It is misconduct [subject to disciplinary action] for faculty . . . to have an amorous relationship, whether face to face, or by written, or by any electronic means, with students in any instance. . . . Regent University prohibits amorous (romantic or sexual) relationships between students and employees.”).

\textsuperscript{36} See St. Michael’s College – College Facts, http://www.smcvt.edu/about/facts.asp (last visited
romantic relationships between students and faculty members. Specifically, the St. Michael’s College Professional Conduct in Relationships Policy provides: “Amorous, sexual or other inappropriate relationships with students violate the trust that should be at the foundation of professional relationships. Such relationships can be exploitative and constitute unprofessional conduct. . . . You will be subject to serious disciplinary action, up to and including dismissal . . . for unprofessional conduct in relationships.”

Small, private colleges are not the only institutions of higher education to expressly adopt compulsory, complete prohibitions on consensual relationships between faculty members and students. In fact, “the second oldest college in the nation,” The College of William & Mary, a large, public university in Virginia, has also adopted a ban on specific faculty-student relationships. Pursuant to the Consensual Amorous Relationships with Students Policy, “The College prohibits consensual romantic and/or sexual relationships between faculty members and undergraduate students, as well as between faculty members and those graduate students for whom the faculty member has direct professional responsibility.” Faculty members who violate this policy will be subject to sanctions, which could include termination of their employment with the institution.

A significant number of higher education institutions have developed policies that officially prohibit romantic relationships between faculty members and students when certain conditions are met. These can be classified as partial, compulsory prohibitions or as provisional prohibitions. For example, the University of North Carolina System has implemented policies that prohibit faculty members from engaging in consensual amorous relationships with “(1) students they evaluate or supervise by virtue of their teaching, research, administrative, or other employment responsibility and (2) students who are minors below the age of eighteen.” Other universities that have adopted similar policies that only expressly prohibit relationships between professors and students where the professor exercises some position of authority over the student

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38 Id.
41 Id.
42 See id.
43 See, e.g., THE NORTHERN ARIZONA UNIVERSITY POLICY REGARDING PROHIBITED DISCRIMINATION, HARASSMENT, AND OTHER INAPPROPRIATE BEHAVIORS, IV. A. CONSENSUAL AMOROUS RELATIONSHIPS (2004), available at http://home.nau.edu/diversity/swale.asp (“The university prohibits any consensual amorous relationships involving a faculty member/instructor and student . . . where the faculty member/instructor . . . has direct authority, influence, or responsibility with regard to that student.”).
include the University of Missouri System, the University of Vermont, and Washington State University.

From a review of many of the policies of institutions of higher education, it appears that the predominant trend in this area of rulemaking is to adopt these types of partial, compulsory prohibitions on consensual relationships between faculty members and students. The process of the adoption and implementation of Middlebury College’s Policy on Sexual Relationships Between Faculty and Students illustrates this trend. In January 2008, faculty and administrators at Middlebury College met to discuss a proposed policy on amorous relationships between faculty members and students. During that meeting, some faculty members expressed a preference for a complete ban on these types of relationships; others argued that such a complete, compulsory prohibition would be wrong. Ultimately, Middlebury decided to adopt an intermediate policy that provided a partial prohibition:

The integrity and trust of the faculty-student relationship is central to the mission of Middlebury College. A sexual relationship between a faculty member and a student for whom he or she has current direct academic or other professional responsibilities violates

45 See THE UNIVERSITY OF MISSOURI SYSTEM COLLECTED RULES AND REGULATIONS, 330.065 CONSENSUAL AMOROUS RELATIONSHIP POLICY (2006), available at http://www.umsystem.edu/ums/departments/gc/rules/personnel/330/065.shtml (“[C]onsensual amorous relationships between members of the University community are prohibited when one participant has direct evaluative or supervisory authority over the other because such relationships create an inherent conflict of interest.”).

46 See THE UNIVERSITY OF VERMONT, AMOROUS RELATIONSHIPS WITH STUDENTS POLICY, § V.3.0.3.2 (2008), available at http://www.uvm.edu/~uvmppg/ppg/general_html/student_relation.pdf (“[A] faculty or staff member is prohibited from engaging in an amorous relationship with a student for whom s/he has current and direct professional responsibilities. In recognition of interests in privacy and free association, this Policy does not prohibit amorous relationships between faculty or staff and students under other circumstances. Relationships in the latter category are nonetheless strongly discouraged due to their potential for abuse of power, conflict of interest, impact on the quality of the student experience, and significant risk of subsequent claims of sexual harassment.”).

47 See WASHINGTON STATE UNIVERSITY EXECUTIVE POLICY MANUAL, EXECUTIVE POLICY # 28, POLICY ON FACULTY-STUDENT AND SUPERVISOR-SUBORDINATE RELATIONSHIPS (2007), available at http://www.wsu.edu/~forms/HTML/EPM/EP28_Faculty-Student_and_Supervisor-Subordinate_Relationships.htm (“Faculty or anyone in a supervisory role is prohibited from having supervisory responsibility over a student or subordinate with whom he or she is currently having a romantic and/or sexual relationship. . . . Relationships between individuals in which neither party is in a position to evaluate or supervise the other party are not within the scope of this policy so long as neither party participates in decisions that may reward or penalize the other so long as such an evaluative relationship is not reasonably anticipated by the parties.”).


50 See id.

51 See id.
the standards articulated by the American Association of University Professors. It undermines—in fact or by perception—the integrity of the evaluative process as well as the trust, respect and fairness essential to the educational environment. Such relationships are inappropriate and members of the Middlebury faculty are expected to avoid them and the potential conflicts of interest, favoritism, or bias they may bring about.52

Although partial prohibitions are becoming more of the norm within higher education, in some instances, postsecondary schools have drafted policies that discourage, but that do not expressly prohibit, consensual relationships between faculty members and students.53 Brown University has implemented this type of policy.54 Specifically, Brown University’s policy states:

Faculty members and graduate teaching assistants are advised against having an amorous relationship with a student who is enrolled in a course taught by the faculty member or graduate teaching assistant or whose academic work (including work as a teaching or research assistant) is supervised or evaluated by the faculty member. This includes the medical school which has many categories of faculty or staff who work with medical students. Likewise, supervisors are discouraged from having an amorous relationship with students or an employee who is in their line of supervision.55

Brown’s policy is, perhaps, the quintessential example of an advisory, non-compulsory policy.56 Other colleges and universities have adopted recommendatory policies, which have concomitant compulsory requirements, if certain conditions are met. For example, the University of Michigan at Ann Arbor has a policy that “strongly discourages—but does not prohibit—a professor from engaging in a consensual sexual relationship with a student.”57 However, under this policy, if the consensual relationship involves “a

52 See MIDDLEBURY COLLEGE’S POLICY ON SEXUAL RELATIONSHIPS BETWEEN FACULTY AND STUDENTS, available at http://www.middlebury.edu/about/handbook/appendices/.
53 See, e.g., UNIVERSITY OF MIAMI FACULTY MANUAL 2007-2008, POLICY STATEMENT ON CONSENSUAL, AMOROUS, ROMANTIC, OR SEXUAL RELATIONSHIPS 84, available at http://www.miami.edu/um_global_static_files/sacs_department_files/Faculty%20Manual%20---%202007-2008.pdf (“Members of the University community are strongly discouraged from entering into amorous relationships with persons over whom they have such evaluative authority or from attaining evaluative authority over those with whom such a relationship exists.”).
55 Id.
56 See Hutchens, supra note 2, at 418 (discussing the advisory nature of Brown University’s consensual relationships policy between students and faculty members).
faculty member and a student for whom the faculty member has supervisory responsibility,” then “the faculty member must disclose the relationship so that a resolution to the [inherent conflict of interest from the relationship] can be sought.”

Arizona State University’s Policy on Amorous Relationships is similar to that of the University of Michigan. This policy expressly does not prohibit consensual relationships between faculty members and students in “recognition of interests in privacy and free association.” However, if the relationship involves a faculty member with supervisory authority over the student, that faculty member “must remove himself or herself from any participation in recommendations or decisions affecting evaluation, employment conditions, instruction, or the academic status of the other person in the relationship, and must inform his or her immediate supervisor.”

Finally, some colleges and universities have, to this point, determined to not adopt or implement any formal policies on consensual romantic relationships between faculty members and students. An example of this type of institution of higher education is Hampden-Sydney College. Given the increased numbers of colleges and universities that have adopted specific policies on consensual relationships between faculty members and students, it seems very likely that institutions without formal policies will formulate such policies in the near future.

IV. JUSTIFICATIONS FOR ADOPTING CONSENSUAL ROMANTIC RELATIONSHIP POLICIES

Although institutions of higher education have adopted a variety of types of policies to address romantic relationships between faculty members and students, many of these colleges and universities have utilized similar justifications in the adoption and implementation of these policies. These justifications include preservation of the mission of the institution; promotion of an effective and non-coercive learning environment; the provision of short and long-term economic and reputational safeguards for the institution; and protection of the institution from

60 Id.
61 See Johnson, supra note 34, at 1C.
62 See HAMPDEN-SYDNEY COLLEGE FACULTY HANDBOOK (2008), available at http://www.hsc.edu/hr/facultyhandbook/ (containing a harassment and discrimination policy but not containing a formal consensual relationship between faculty members and students policy).
63 See, e.g., Secunda, supra note 28, at 59-60 (discussing the marked increase in the adoption of consensual relationship policies since the mid-1980s).
64 See, e.g., BARNARD COLLEGE - POLICY AGAINST HARASSMENT IN EMPLOYMENT PRACTICES AND IN STUDENT ACADEMIC AND CAMPUS LIFE, available at http://www.barnard.edu/hr/policies_harass.html (providing that “consensual relationships [between faculty members and students] are deemed sexual harassment when they are found to compromise the educational mission of the College”).
65 See, e.g., Miranda Oshige, Note, What’s Sex Got To Do with It?, 47 STAN. L. REV. 565, 586 (1995) (discussing how some postsecondary institutions have adopted policies prohibiting consensual romantic relationships between faculty members and students based on a desire to curb any inherent coerciveness that accompanies these types of relationships).
66 See, e.g., Dziech et al., supra note 34, at 109-110 (discussing the subsequent shifts in attitudes of
exposure to potential liability for sexual harassment claims.67

Each of these justifications appears vital to the success of a university because they ensure that the university’s main purpose of providing an atmosphere of learning for its students is preserved.68 In particular, if universities prove unable to maintain this atmosphere of learning, their reputations and missions of educating students will be significantly compromised. Offering students an educative environment encompasses providing a comfortable environment that facilitates the learning process.69 An atmosphere where professors misuse their power to take advantage of students—such as when a professor sexually harasses a student—would not constitute a comfortable environment where students can learn.70 Universities that fail to take precautions to avoid sexual harassment may be vulnerable to harassment lawsuits. Although the university may ultimately prevail in such a lawsuit, litigation costs can be expensive.71 Therefore, universities would be wise whenever possible to take whatever precautions necessary to avoid sexual harassment claims.

Even opponents of consensual romantic relationship policies, who may contend that the drawbacks of adopting these policies far outweigh the benefits of adopting these policies, would have significant difficulty presenting a plausible argument that the aforementioned justifications given for adopting consensual romantic relationship policies are not important to universities and their success. However, the uncertainty seems to lie in whether implementing consensual sexual relationship policies will adequately address each of these justifications. Accordingly, it will be necessary to discuss each of these justifications separately.

A. TO PROTECT A UNIVERSITY’S EDUCATIONAL MISSION

students who were formerly involved with faculty members with respect to whether those relationships were actually consensual).

67 See, e.g., BROWN UNIVERSITY OFFICE OF EQUAL EMPLOYMENT OPPORTUNITY & AFFIRMATIVE ACTION SEXUAL HARASSMENT POLICY - I.C.3. CONSENSUAL RELATIONSHIPS PROFESSIONAL POWER DIFFERENTIAL, available at http://www.brown.edu/Administration/diversity/documents/SexualHarassmentPolicy.pdf. (“Romantic and sexual relationships between faculty members and students and between supervisors and their employees do not necessarily involve sexual harassment. . . . [but] it may be exceedingly difficult to prove mutual consent.”).


69 See Mack, supra note 30, at 84 (“Universities must create an effective learning environment for students”).

70 See generally Henry Seiji Newman, Note, The University’s Liability for Professor-Student Sexual Harassment under Title IX, 66 FORDHAM L. REV. 2559, 2562 (1998) (stating that “sexual harassment has an impact upon the student-victim’s behavior, especially as it relates to her education: a student may avoid classes taught by certain professors; she may change her major or educational program; she may forsake research opportunities; or, she may change or forfeit educational and career plans”).

71 See, e.g., Eric J. Conn, Note, Hanging in the Balance: Confidentiality Clauses and Postjudgment Settlements of Employment Discrimination Disputes, 86 VA. L. REV. 1537, 1561 (2000) (discussing an early 1990’s survey that estimated litigation costs “to a single defendant in an employment discrimination case at $ 81,000” and “estimated the annual cost to the average Fortune 500 company of complaints of . . . sexual harassment . . . at $ 6.7 million”)
One important justification cited in favor of consensual romantic relationship policies is a desire to protect a school’s educational mission “by promoting appropriate standards of conduct among faculty in their dealings with students.”\textsuperscript{72} An example of a university system that has adopted a consensual romantic relationship policy that appears to be based in part on upholding the school’s educational mission is the University of California System.\textsuperscript{73} Under this system, teachers are described as “intellectual guides and counselors”\textsuperscript{74} and “[t]he integrity of the faculty-student relationship is the foundation of the University’s educational mission.”\textsuperscript{75} Additionally, the relationship of the faculty and the student is described as vesting “considerable trust in the faculty member, who in turn, bears authority and accountability as mentor, educator, and evaluator.”\textsuperscript{76}

It is this professor-student relationship upon which advocates of consensual romantic relationship policies largely base their arguments in support of these policies. For instance, the relationship between the professor and student has been described as a type of “fiduciary relationship” where an “inherent imbalance of power” exists, thereby causing a conflict of interest and probable damage to a student when he or she is sexually involved with his or her professor.\textsuperscript{77} This argument has even been made in those situations where a faculty member does not have direct authority for issuing a grade or evaluating a student’s performance.\textsuperscript{78} Further, this claim is not limited to the undergraduate context; instead, it has also been asserted in the case of relationships between professors and graduate students, like law students, where the “aspect of power imbalance rooted in disparity of age and experience is . . . minimized.”\textsuperscript{79}

Proponents of consensual romantic relationship policies have also raised the issue of whether a student can give true consent to the relationship.\textsuperscript{80} This contention is based on the premise that in those situations where the professor has direct authority over the student, “[v]oluntary consent by the student in such a relationship is suspect, given the fundamental nature of the relationship.”\textsuperscript{81} Further, these proponents argue that, even in those situations where the professor does not have this type of direct authority, the “student may feel pressured to consent to the relationship, and would be exercising less than free will in making [his] or her decision.”\textsuperscript{82}

\textsuperscript{72} Hutchens, supra note 2, at 413.
\textsuperscript{73} See FACULTY CODE OF CONDUCT, supra note 10, at 4-5.
\textsuperscript{74} Id. at 4.
\textsuperscript{75} Id. at 5.
\textsuperscript{76} Id.
\textsuperscript{77} See Mack, supra note 30, at 96 (citing Caroline Forell, What’s Wrong with Faculty Student Sex? The Law School Context, 47 J.L. & EDUC. 47, 54 (1997)).
\textsuperscript{78} See, e.g., Gerdes, supra note 30, at 1041 (“When a faculty member has direct authority for issuing a grade or evaluating a student’s performance, the power differential is readily observable. However, even when no such direct power relationship is readily discernable, the faculty member still possesses many forms of power, both real and perceived, over the student.”).
\textsuperscript{79} See Mack, supra note 30, at 95 (citing Caroline Forell, What’s Wrong with Faculty Student Sex? The Law School Context, 47 J.L. & EDUC. 47, 52 (1997)).
\textsuperscript{80} See Gerdes, supra note 30, at 1041 (discussing the perspective that consent between faculty members and students is questionable when “the power differential is great”).
\textsuperscript{82} Peter DeChiara, The Need for Universities to Have Rules on Consensual Sexual Relationships Between
As part of the goal of protecting the school’s educational mission, universities adopt consensual romantic relationship policies to prevent potential harm to third parties resulting from romantic relationships between professors and students.\(^83\) For example, the professor may actually treat, or appear to treat, the student with whom he or she is romantically involved differently from other students.\(^84\) An example of a consensual romantic relationship policy that has focused on both the promotion of its mission and the intent to combat favoritism, or the appearance of favoritism, is the policy of Tufts University, which states:

Tufts University seeks to maintain a professional educational environment. Actions of faculty members and academic administrators that are unprofessional or appear to be unprofessional are inconsistent with the university’s educational mission. It is essential that those in a position of authority not abuse, nor appear to abuse, the power with which they are entrusted. Faculty members and academic administrators exercise power over students, whether by teaching, grading, evaluating, or making recommendations for their further studies or their future employment. Amorous, dating, or sexual relationships between faculty members, academic administrators, and students are impermissible when the faculty members and academic administrators have professional responsibility for the student. . . . Moreover, other students may be affected by such behavior, because it places the faculty member and academic administrator in a position to favor or advance one student’s interest to the potential detriment of others. Therefore, it is a violation of university policy for a faculty member or academic administrator to engage in an amorous, dating, or sexual relationship with a student whom he/she instructs, evaluates, supervises, or advises, or over whom he/she is in a position to exercise authority in any way.\(^85\)

Using this example, at their most basic level, consensual romantic relationship policies are important university safeguards as they (1) seek to protect students from differential treatment than that given to a student involved in such a relationship and (2) attempt to protect the faculty member from creating a situation where there is preferential treatment or an impression of preferential treatment.\(^86\)

B. TO SERVE AS ECONOMIC OR REPUTATIONAL PROTECTORS OF A UNIVERSITY

In addition to protecting the school’s educational mission, universities are motivated to enact consensual romantic relationship policies to serve as an economic or reputational protector of the university. Generally, it is appropriate for employers,
including non-profit and government employers, to protect and advance their legitimate financial interests. Maintaining its reputation and being aware of the public’s opinions about its products and services are important components of advancing an employer’s financial interest. As such, employers, including universities, tend to be apprehensive of any employee actions that weaken the employer’s position in the market and result in a loss of customers.

Specifically, when professors, as school representatives, engage in what could be considered inappropriate relationships with students, this can affect the willingness of students to remain at that particular educational institution and can inevitably cause financial hardship to schools from the loss of students and other university support from the neighboring community. Consequently, enforcing these relationship policies can benefit the university by protecting their financial interests of maintaining their “customers”—their students.

The need to govern the professor-student relationship has evolved because of a concern for the emergence of recurrent instances of inappropriate relationships between professors and students. Today, these examples are widespread and have gained significant media attention. For instance, in September 2007, an economics professor at East Stroudsburg University in Pennsylvania was removed from his position after a jury convicted him of sexual assault and aggravated assault for attacking a student. Also, many universities, seeking to protect their reputations, have been motivated to establish consensual romantic relationship policies to avoid negative publicity or in response to negative publicity arising from allegations of inappropriate relationships between professors and students.

C. TO AVOID LIABILITY FOR SEXUAL HARASSMENT CLAIMS AGAINST THE UNIVERSITY

Finally, a justification given for implementing and enforcing consensual romantic relationship policies has been to avoid liability for sexual harassment claims. Although the case law and academic writing addressing sexual harassment liability within the

88 See id.
89 See id.
90 See, e.g., Joe McDonald, ESU Professor Guilty of Sex Assault Against Student; Is Acquitted of Rape Charge. Lesser Crime Can Mean 10-Year Term, MORNING CALL (Allentown, PA), Sept. 11, 2007 at B6 (discussing the sexual assault and rape criminal prosecution of an East Stroudsburg University professor for conduct perpetrated against a university student).
91 See, e.g., Neville, supra note 20, at D1 (discussing several incidents in which universities throughout the country have cited to fear of sexual harassment claims as the basis for the adoption and implementation of consensual romantic relationship policies between faculty members and students).
92 See McDonald, supra note 90, at B6.
93 See Hutchens, supra note 2, at 415 (describing the University of California System’s adoption of this type of policy after sexual harassment charges were lodged against the dean of Berkeley University’s Boalt Hall Law School; Ohio Wesleyan University’s decision to adopt this type of policy following the stalking of a professor and his wife after the termination of a consensual relationship with a student; and the College of William & Mary’s adoption of this type of policy after a former employee published an article in GQ about an affair with a student).
university setting is more limited than that for secondary level schools, universities can be held liable when their employees sexually harass students. In fact, a student who opts to bring sexual harassment claims against a university for acts committed by his or her professor may do so through the following causes of actions: (1) Title IX; (2) 42 U.S.C. Section 1983; and (3) state law claims.

1. TITLE IX

Title IX applies to all public and private educational institutions that receive federal funds. Particularly, Title IX provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.” Title IX has been held by the United States Supreme Court to be a viable basis for bringing a sexual harassment claim. The Court, in *Canon v. University of Chicago*, held that although Title IX does not expressly authorize a private cause of action, the intent of the statute is to provide injured persons with this remedy. In reaching this holding, the Court examined the “genesis of Title IX” and explained that this statute was enacted for the purpose of addressing sexual discrimination in educational institutions. In 1992, approximately thirteen years after deciding *Canon*, the Supreme Court in *Franklin v. Gwinnett County Public Schools* specifically held that monetary damages are available as a remedy to enforce Title IX when a teacher sexually harasses a student.100

Subsequently, in the cases of *Gebser v. Lago Vista Independent School District*101 and *Davis v. Monroe County Board of Education*,102 the United States Supreme Court, again presented with the specific issue of whether a school could be held liable for sexual harassment, defined the standards for liability under Title IX. In *Gebser*, the plaintiff, a minor student, alleged that a teacher at a school district initiated sexual contact with

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94 See, e.g., Jennings v. Univ. of N. Carolina, 482 F.3d 686, 702 (4th Cir. 2007) (vacating the district court’s grant of summary judgment on both Title IX and 42 U.S.C. § 1983 claims for sexual harassment alleged against a university by a student based on the actions of athletics department employees at the university).
95 See, e.g., Grove City Coll. v. Bell, 465 U.S. 555, 569-70 (1984) (holding that a private university that received tuition money from students who received federal funding was a recipient of federal financial assistance and, as a result, it had to comply with Title IX); see also Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability Under Title IX of the Education Amendments of 1972 for Student and Faculty Sexual Harassment*, 8 AM. U. J. GENDER SOC. POL’Y & L. 575, 579-581 (2000) (discussing the application of Title IX to educational institutions).
97 See, e.g., Canon v. Univ. of Chicago, 441 U.S. 677 (1979) (finding that a woman who alleged that because of her sex she was denied admission to an educational institution which received financial assistance brought a viable claim under Title IX).
98 See id. at 694.
99 See id. at 694 n.16; see also Newman, supra note 70, at 2573.
100 503 U.S. 60, 76 (1992) (stating that “a damages remedy is available for an action brought to enforce Title IX”).
The teacher and the student had intercourse on multiple occasions during class time, although never on school property. After a police officer discovered the student and the teacher had engaged in sexual intercourse, the teacher was arrested and was terminated from his employment. Subsequently, the student filed suit against the school district for sexual harassment under state law, Title IX, and 42 U.S.C. § 1983. The Court held that damages may not be recovered in these “circumstances unless an official of the school district who at a minimum had authority to institute corrective measures on the district’s behalf had actual notice of, and [was] deliberately indifferent to, the teacher’s misconduct.”

In Davis v. Monroe County Board of Education, the plaintiff brought suit against a school district “alleging that her fifth grade-daughter had been the victim of sexual harassment by another student in her class.” The Supreme Court held that a private damages action could be properly asserted against a recipient of Title IX funding in cases of student-to-student, or peer, harassment, “but only where the recipient [acted] with deliberate indifference to known acts of harassment in its programs or activities.” Further, the Court concluded that such an action would “lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” Thus, in what has been described as the “Gebser-Davis’ deliberate indifference’ standard on a student’s ability to allege and prove a school’s Title IX liability for prohibited sexual harassment,” a student plaintiff must establish: “(1) that the unwelcome sexual conduct was so severe, pervasive, and objectively offensive that it denied the student equal access to the school’s educational opportunities or benefits; (2) that the school had actual notice of the alleged harassment; and (3) that the school was ‘deliberately indifferent,’ to the sexual harassment and failed to take appropriate corrective action to remedy it.”

In April 2007, the United States Court of Appeals for the Fourth Circuit in Jennings v. University of North Carolina—applying this Gebser-Davis “deliberate indifference” standard—held that a university could be sued under Title IX for a sexually hostile environment allegedly created by a women’s soccer coach. This high-profile case involved Anson Dorrance, who has served as the head women’s soccer coach at the University of North Carolina at Chapel Hill (“UNC”) since 1979. In the case, Melissa Jennings, a woman who was cut from the soccer team in May 1998 at the end of her sophomore year, brought suit against the university, Dorrance, and other university officials under Title IX, alleging that Dorrance asked the team questions about their sex

103 Gebser, 524 U.S. at 277-78.
104 Id. at 278.
105 See id.
106 See id. at 278-79.
107 Id. at 277.
108 Davis, 526 U.S. at 632.
109 Id.
110 Id.
111 Harris & Grooms, supra note 95, at 595.
112 Id. at 595.
113 Jennings v. Univ. of N. Carolina, 482 F.3d 686, 701 (4th Cir. 2007).
lives and made inappropriate comments about their bodies. Jennings claimed that “UNC discriminated against her in violation of Title IX by allowing Dorrance . . . to subject her to severe and pervasive sexual harassment.”

Although the United States District Court for the Middle District of North Carolina initially granted the defendants summary judgment, ultimately, the United State Court of Appeals for the Fourth Circuit reviewed the decision en banc. After examining the evidence before it, the court in Jennings concluded that “a jury could find that the total impact of Dorrance’s severe and pervasive harassment, including the severe emotional distress it caused Jennings to suffer, had a concrete, negative effect on her ability to participate in the soccer program.” According to the court, Jennings also proffered evidence that UNC officials “failed to act and thereby allowed Dorrance’s sexual harassment to continue unchecked.” Specifically, Jennings alleged that she provided University counsel with her complaint, and University counsel took no action on it. As such, the Fourth Circuit found that “[t]his notice and the University’s failure to take any action to remedy the situation would allow a rational jury to find deliberate indifference to ongoing discrimination.” Therefore, the court vacated the district court’s grant of summary judgment on Jennings’ Title IX claim against the university. Although it does not address allegations of a consensual romantic relationship, the court’s ruling has the potential to expand the bounds of sexual harassment liability for universities beyond the context of the locker room and into the very type of romantic relationships that institutions are trying to regulate.

2. 42 U.S.C. SECTION 1983

Title IX is not the only cause of action that could be brought when a professor engages in sexual harassment or misconduct directed at a student. Another cause of action could be based on a claimed violation of 42 U.S.C. Section 1983 (“Section 1983”). Section 1983 prohibits anyone acting under color of state law from depriving individuals of any right secured by the Constitution. In addition to her Title IX claim, the plaintiff in Jennings v. University of North Carolina brought a Section 1983 against her

115 Jennings, 482 F.3d at 691-92.
116 Id. at 694.
118 See Jennings, 482 F.3d at 691.
119 Id. at 700.
120 Id. at 701.
121 See id. at 700.
122 Id. at 701.
123 See id. at 702.
124 Ultimately, however, the Jennings case never made it to trial. See Jane Stancill, Cash, Apology Settle UNC-CH Soccer Suit, RALEIGH NEWS & OBSERVER, Jan. 15, 2008, at A1 (stating that the case was settled in January 2008 “with the university agreeing to pay . . . Jennings $385,000 and Dorrance issuing an apology to all his players”).
125 See 42 U.S.C. § 1983 (2008) (“Every person who, under color of any statute . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress”).
soccer coach. Jennings claimed that Dorrance acted “under color of state law to deprive her of rights, privileges or immunities secured by the Constitution and laws of the United States.” Specifically, she alleged that Dorrance’s conduct deprived her of “her Fourteenth Amendment equal protection right to be free from sexual harassment in an educational setting.” The District Court initially granted summary judgment to Dorrance on the Section 1983 claim. In reviewing this claim, the Fourth Circuit determined that Jennings had “proffered evidence that: (1) Dorrance was a state actor, functioning in his capacity as a coach, when he engaged in sexual harassment and (2) the harassment was sufficiently severe or pervasive to interfere with her educational activities.” As a result, the appellate court resolved that the trial court erred in granting summary judgment to Dorrance on the Section 1983 claim for sexual harassment. Accordingly, the United States Court of Appeals for the Fourth Circuit vacated the District Court’s grant of summary judgment on Jennings’s Section 1983 claim against her coach.

Additionally, Jennings asserted a Section 1983 action against UNC’s counsel. In reversing the District Court’s grant of summary judgment on this claim, the Fourth Circuit asserted that the plaintiff had produced sufficient evidence that UNC’s counsel “failed to act and thereby allowed Dorrance’s sexual harassment to continue unchecked.” Taken as a whole, the court concluded that Jennings’ evidence would allow a jury to find that the university’s counsel had actual knowledge of the coach’s misconduct; the counsel’s response was “so inadequate as to show deliberate indifference to or tacit authorization of the alleged offensive practices;” and there existed an “affirmative causal link” between the counsel’s inaction and the student’s constitutional injury.

The Court’s holding in Jennings v. University of North Carolina is significant as it illustrates the view that courts may be more willing to hold a university and its employees liable for these harassment claims if the facts establish the requisite elements. Therefore, Jennings arguably could validate an asserted university rationale of avoiding sexual harassment claims by establishing consensual romantic relationship policies. The case also emphasizes the position that universities and their counsel must take seriously all sexual harassment claims, including those made by students. Moreover, following Jennings, universities that do not have consensual romantic relationship policies may opt to earnestly consult with their counsel as to whether adopting such a policy may be a possible avenue for avoiding potential harassment claims against the university.

126 See Jennings, 482 F.3d at 701.
127 Id.
128 Id.
129 See Jennings v. Univ. of N. Carolina, 340 F. Supp. 2d 666, 678 (M.D.N.C. 2004).
130 Jennings, 482 F.3d at 701.
131 See id.
132 See id. at 702.
133 See id. at 701.
134 Id.
135 Id. at 701-02.
3. STATE LAW CLAIMS

A student pursuing a lawsuit against a university for sexual harassment that the student endured at the hands of his or her professor may also choose to bring claims under specific state laws that prohibit this conduct in educational institutions. For instance, New Jersey makes it unlawful to subject people to sexual harassment in places of public accommodations, including public schools.

Other state law claims in a university context include claims for emotional distress and negligent supervision and retention. In Urie v. Yale University, Stephanie Urie, a former student and teaching fellow at Yale Divinity School, alleged that the university failed to protect her as a student against sexual harassment by Professor Gilbert I. Bond. Specifically, Urie claimed that Yale failed to take effective actions to address her concerns about the professor’s behavior toward her while she was employed as a teaching fellow. The court reasoned that since the university knew that Bond had a propensity to engage in sexual harassment toward female students he was mentoring, it was foreseeable to the university that Bond would sexually harass Urie. For that reason, the court determined that the university had a duty to take steps to protect Urie from this sexual harassment. Since the university failed to warn or protect Urie and this was a substantial factor causing the sexual assault, the court denied the university’s motion to dismiss Urie’s negligent retention and supervision claims.

V. LEGAL CONSIDERATIONS OF CONSENSUAL ROMANTIC RELATIONSHIP POLICIES

While the justifications for postsecondary romantic relationship policies are often very persuasive, the enforcement of these policies may expose universities to legal challenges from professors who have been subject to the enforcement of these policies. As a result, in considering whether to enact or maintain consensual sexual relationship policies, universities and their counsel should weigh the possible impact of any of the justifications used to support these policies with the potential legal implications of enforcing these policies.

However, universities will not be able to rely on specific directives from the courts.

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136 See, e.g., L.W. v. Toms River Reg’l Sch. Bd. of Educ., 915 A.2d 535, 547 (N.J. 2007) (holding that New Jersey’s Law Against Discrimination “permits a cause of action against a school district for student-on-student harassment based on an individual’s perceived sexual orientation if the school district’s failure to reasonably address that harassment has the effect of denying to that student any of the school’s ‘accommodations, advantages, facilities, or privileges’”).
139 See id. at 95.
140 See id. at 96.
141 Id. at 98.
142 See id.
143 See id. at 99.
144 See, e.g., Abramson, supra note 27, at 1D (arguing that complete bans on faculty-student consensual romantic relationships violate the U.S. Constitution); Hutchens, supra note 2, at 424-28 (discussing the potential legal challenges to a consensual relationship policy).
when considering the potential legal implications of consensual relationship policies. At present, there are no cases specifically addressing the issue of consensual sexual relationship policies within the university setting. Yet, this area is developing as many universities have not adopted consensual sexual relationship policies but may do so in the near future. Furthermore, the widely debated issue regarding the appropriateness of consensual sexual relationships between university faculty and students supports the assertion that this is a fertile area lending itself to the future emergence of litigation.

The basis of legal challenges to university consensual sexual relationship policies could potentially involve constitutional challenges. Indeed, one author, Neal Hutchens, in his article *The Legal Effect of College and University Policies Prohibiting Romantic Relationships between Students and Professors*, argues that consensual sexual relationship policies may have potential legal implications affecting the professors’ privacy rights, associational rights, due process rights, and free speech rights. Until this issue is addressed by the courts, any conclusion as to the outcome remains tentative at best. However, one conclusion that can be reached is that, with the degree of uncertainty as to how courts will decide cases when confronted with consensual romantic relationship policies, universities must be cognizant of the potential for liability when drafting and enforcing these policies.

Perhaps universities may best insulate themselves from liability when choosing to enact consensual sexual relationship policies by refraining from completely prohibiting consensual romantic relationships between students and faculty members. Instead, universities choosing to adopt consensual sexual relationship policies should consider following the predominant trend of adopting policies that do no more than provide for partial, compulsory prohibitions on consensual relationships between faculty members and students. This may prove to be the most balanced approach to a considerably thorny issue.

**VI. CONCLUSION**

Establishing a close relationship between professors and students is an integral part of the university experience for students and is a requisite to the professors’ roles of serving as intellectual guides and mentors. The extent of this relationship, however, has become a controversial issue and has led to extensive media attention on inappropriate relationships between professors and students. This media attention, along with asserted university justifications such as the need to protect the university’s educational missions and the need to shield the university from potential sexual harassment claims, has caused many institutions within the last twenty years to enact consensual romantic relationship policies governing the professor-student relationship. Although the validity of these consensual romantic relationship policies has not yet

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145 See Johnson, *supra* note 34, at 1C (noting that some universities have yet to adopt policies regarding consensual romantic relationships between faculty members and students).


147 See *id.* at 416 (“Opponents of consensual relationship policies contend the policies threaten to intrude needlessly into the private lives of adults [and some critics] tend to limit criticism to standards that apply when the professor exercises no authority over a student.”).

148 See *supra* text accompanying notes 48-52.
been specifically addressed by the courts, universities should carefully consider the legal implications and the potential for liability before adopting these policies.