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Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education

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**GETTING TO THE NEXUS OF THE MATTER: A
SLIDING SCALE APPROACH TO FACULTY-STUDENT
CONSENSUAL RELATIONSHIP POLICIES IN HIGHER
EDUCATION**

Paul M. Secunda[†]

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INTRODUCTION

A prominent law dean is forced to resign over an alleged sexual affair with a student; a writing instructor details in a national magazine his steamy affair with his married student; a student stalks her male professor after he ends their sexual relationship, and the criminal stalking charges against her are only dropped when she agrees voluntarily to leave the country.¹ Increasingly, such tantalizing scandals are making their way into the nation's daily consciousness. Yet, behind all of these shocking tales of decadence lies the very real dilemma as to how college and university administrators should regulate consensual relationships between faculty members and students.

Although numerous scholars have posited various approaches to these seemingly intractable matters of the heart,² none of these commentators have adequately balanced the bewildering array of overlapping faculty,

1. See Sara Rimer, *Love on Campus: Trying to Set Rules for the Emotions*, N.Y. TIMES, Oct. 1, 2003, at B8 (reporting sexual harassment allegation by former law student against University of California-Berkeley's law school dean John Dwyer and his subsequent resignation); Liz Sidoti, *Clamping Down on Campus Liaisons; To Avoid Messy Litigation, More Colleges Overtly Ban Faculty-Student Dating*, WASH. POST, May 12, 2002, at A11 (discussing stalking incident at Ohio Wesleyan University and GQ magazine article describing faculty-student affair at the College of William and Mary); Rebecca Trounson, *UC Bans Dating of Faculty, Students; Professors Are Barred from Having Affairs with Those They Teach or Are Likely to Teach*, L.A. TIMES, July 18, 2003, at B1 (reporting sexual harassment allegation by former law student against University of California-Berkeley's law school dean).

2. See, e.g., Richard R. Carlson, *Romantic Relationships between Professors and their Students: Morality, Ethics and Law*, 42 S. TEX. L. REV. 493 (2001); Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777 (1988); Gary E. Elliott, *Consensual Relationships and the Constitution: A Case of Liberty Denied*, 6 MICH. J. GENDER & L. 47 (1999); Caroline Forell, *What's Wrong with Faculty-Student Sex? The Law School Context*, 47 J. LEGAL EDUC. 47 (1997); Neal Hutchens, *The Legal Effect of College and University Policies Prohibiting Romantic Relationships between Students and Professors*, 32 J.L. & EDUC. 411 (2003); Margaret H. Mack, *Regulating Sexual Relationships between Faculty and Students*, 6 MICH. J. GENDER & L. 79 (1999); Carol Sanger, *The Erotics of Torts*, 96 MICH. L. REV. 1852 (1998) (reviewing JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997)); Jerome W.D. Stokes & D. Frank Vinik, *Consensual Sexual Relations between Faculty and Students in Higher Education*, 96 ED. L. REP. 899 (1995); Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER SOC. POL'Y & L. 269 (1996).

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student, university, and third-party interests. Furthermore, current faculty-student consensual relationship policies are either underinclusive in not providing a sufficient institutional response to troubling faculty conduct, or overinclusive in ignoring the very real privacy and associational interests that individuals have in forming private intimate associations away from the workplace.³

As someone who teaches labor and employment law and education law, and who comes from a labor and employment law practice background, I approach the regulation of faculty-student consensual relationships from a distinctive viewpoint. Rather than focusing on highly indeterminate and politically charged concepts such as consent and power, as most scholars and postsecondary institutions do,⁴ my approach examines the more easily discernible impact or effect that consensual relationships have on the college and university environment. The premise underlying this approach is that a college or university may only legitimately regulate the private affairs of its employees⁵ if such private conduct spills over into the academic arena and adversely affects the college or university by damaging the school's reputation, by interfering with a professor's ability to properly perform his or her job, or by causing other faculty members and students not to want to work with the offending professor.

While this approach to consensual relationships is new in the college and university context, the idea of regulating these relationships based upon their impact on the surrounding workplace environment is not. In fact, there already exists an extensive body of labor arbitration case law concerning the regulation of employee off-duty conduct. For over a half a century, labor arbitrators in the union context have applied the so-called "nexus principle" to determine whether an employer could properly discipline or discharge an employee for private conduct away from the workplace, on the employee's own time.⁶ In such cases, arbitrators have consistently held that an employer has no business interfering with the private lives of its employees unless such conduct adversely affects the employer's business interests in some relevant manner.⁷

3. The various approaches taken by colleges and universities to faculty-student consensual relationships are examined in detail below. *See infra* Part I.

4. *See* Forell, *supra* note 2, at 50, 68; *see also* Mack, *supra* note 2, at 86.

5. The other party to such consensual relationships, the student, is generally not subject to the same regulations as faculty. *See* Sidoti, *supra* note 1, at A11. The reason that professors take the brunt of the consequences stemming from such consensual relationships is because they are considered the empowered party who can more easily choose to avoid such relationships. *See* Mack, *supra* note 2, at 89.

6. *See infra* Part II.B.

7. *See infra* Part II.B.

By applying this nexus principle to the college and university environment, a number of guideposts emerge as to how postsecondary institutions should treat faculty-student consensual relationships. First, a blanket rule either permitting or prohibiting all consensual faculty-student relationships is not appropriate, as the facts of individual cases will determine whether the private sexual conduct of the faculty member has a detrimental impact on the college or university. Second, although a general rule would appear not to be possible, useful presumptions can nevertheless be established. Where the faculty member is involved in a consensual relationship with a student, whom he or she is supervising or evaluating, the presumption is that a private relationship in these circumstances is likely to adversely affect the college or university environment in some fashion, unless the faculty member can establish that the relationship in question in fact caused a negligible detrimental impact to the college or university. On the other hand, where no such supervisory or evaluative relationship exists, the opposite presumption applies unless the college or university can establish that specific facts exist suggesting that such private conduct is directly interfering with the academic setting. In a nutshell, the nexus test supports a sliding scale approach to consensual relationships between a faculty member and a student.

In Part I of this article, I set out the current approaches taken by postsecondary institutions to faculty-student consensual relationships, explore the reasons animating such approaches, and detail the chief criticisms of such approaches. In Part II, after first reviewing the basics of labor arbitration law, I examine the nexus principle and consider its application by labor arbitrators to specific instances of employee private consensual sexual conduct. Having discussed the intricacies of the nexus principle, Part III discusses whether it is appropriate to apply this principle to faculty-student consensual relationships in the college and university setting. Concluding that the nexus principle does appropriately apply to faculty-student consensual relationships, Part IV recommends that colleges and universities adopt a sliding scale approach to faculty-student consensual relationships.

I. CURRENT APPROACHES TO FACULTY-STUDENT CONSENSUAL RELATIONSHIPS IN HIGHER EDUCATION

In adopting faculty-student consensual relationship policies, colleges and universities have generally utilized one of four approaches, spanning

the spectrum from least restrictive of faculty and student freedom to engage in consensual relationships to most restrictive.⁸

A. *The Laissez-Faire Approach to Consensual Relationships*

The least restrictive approach to faculty-student consensual relationships is the approach taken by those schools that have not adopted any direct prohibitions on such consensual relationships.⁹ This approach is most consistent with the liberal view that a governmental agency has no business interfering with the private, legal activities of consenting adults.¹⁰ If consent were absent in a faculty-student relationship, a proponent of this type of approach would argue that a student always has the ability to utilize sexual harassment law for relief.¹¹

Indeed, almost all colleges and universities now have in place some form of sexual harassment policy that regulates relations between faculty and students.¹² Such policies spring from Title IX of the Education Amendments of 1972,¹³ which generally proscribes sexual discrimination, including sexually harassing behavior, in federally funded educational programs or activities.¹⁴ Proponents of the sexual harassment approach to faculty-student consensual relationships maintain that if sexual harassment policies are good enough for the general workplace, there is no reason that such policies should not be adequate for the college or university environment.¹⁵

8. *But cf.* Mack, *supra* note 2, at 87 (employing an alternative method of categorization of consensual relationship policies).

9. Professor Young reports that most academic institutions (at least as of 1996) do not have formal restrictions on consensual relationships. *See* Young, *supra* note 2, at 272 n.17 (citing 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, 138 (1988)). As this proposition is based on an article that depended on an empirical study from 1987, it is unclear, absent more recent study, whether most schools now have some formal restrictions on consensual relationships in place. However, given the publicity devoted to these types of relationships in recent years by newspapers, legal commentators and academic organizations like the American Association of University Professors and the American Association of Law Schools, the number of schools adopting consensual relationship policies has no doubt increased substantially since 1987.

10. *See* Elliott, *supra* note 2, at 77 (maintaining that “[t]he sexual lives of consenting adults, absent a violation of law, are not the business of the academy.”); *see also* Chamallas, *supra* note 2, at 841 (describing the liberal view concerning private sexual relations).

11. *See* Elliott, *supra* note 2, at 51-52.

12. *See* Young, *supra* note 2, at 278.

13. 20 U.S.C. §§ 1681-1688 (2000).

14. *Id.* § 1681(a); *see generally* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997).

15. *See* Dan Subotnik, *What’s Wrong With Faculty-Student Sex?: Response II*, 47 J.

Although consensual relationships should generally not be subject to Title IX and sexual harassment policies since such policies only apply to unwelcome or non-consensual relations,¹⁶ it is not always so easy to determine whether a sexual relationship is consensual or nonconsensual.¹⁷ The answer to such a question may sometimes change day-to-day given the volatile nature of these relationships. Moreover, one can imagine a subtly coercive relationship that causes harm to a student but is nevertheless not covered by the institution's sexual harassment policy.¹⁸ One can also conceive of a situation in which one day a professor is engaging in a mutually-satisfying consensual relationship with a student, only to have a sexual harassment charge brought against him or her a month later when the relationship sours. Sexual harassment policies also do not address third-party injuries to other students stemming from perceived or real bias in their treatment by the involved professor.¹⁹ Critics argue that nothing less than the academic integrity of the school is at stake in this regard.²⁰

Advocates of this approach maintain that although schools without consensual relationship policies seem to be taking a *laissez-faire* approach to student-faculty relationships, the fact of the matter is that existing sexual harassment policies may inhibit faculty members from wanting to engage in such relationships in the first place given the potential dangers involved.²¹ Critics of the *laissez-faire* approach do not believe, however, that sexual harassment policies and law adequately cover all forms of harm that emanate from faculty-student sexual relationships.²² Instead, these critics believe that specific language is needed to address the problematic nature of these consensual relationships between faculty and students.²³

LEGAL EDUC. 441, 442 (1997) (making this argument in the law school context).

16. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (establishing unwelcomeness as a requisite part of a sexual harassment cause of action under Title VII of the Civil Rights Act of 1964); see also *Hutchens*, *supra* note 2, at 439.

17. See *Carlson*, *supra* note 2, at 497 (noting a "wide gray area" between sexual harassment and consensual activity).

18. See *Mack*, *supra* note 2, at 102.

19. See *id.* at 97.

20. See *id.* at 84-85.

21. See *Carlson*, *supra* note 2, at 499 ("[T]he vast gray areas of sexual harassment law leave little if any room for a truly safe relationship, and they create at least some risk in any romantic, amorous or intimate behavior with students.").

22. See *Mack*, *supra* note 2, at 86 ("The argument that a simple sexual harassment policy is all a university needs fails to acknowledge that sexual harassment policies do not address an adequate range of troubling and potentially harmful situations.").

23. See *Forell*, *supra* note 2, at 69 (arguing for the adoption of the American Association of Law School's consensual relationship policy at all law schools).

B. The Advisory Approach to Consensual Relationships

In fact, some schools have written separate faculty-student consensual relationship policies,²⁴ but without seeking to directly regulate such relationships.²⁵ Instead, the school merely advises faculty and students that such relationships are strongly discouraged because of the potential dangers inherent in such faculty-student relations for all parties involved.²⁶ In such a regime, universities and colleges appear to be making up for imperfect information, especially from the student's perspective, by spelling out for the potential participants the consequences of their actions.²⁷

One commentator has suggested in this vein that even though professors should not be sexually involved with students with whom they have a supervisory or evaluative relationship,²⁸ it is improbable that such a policy would eliminate all faculty-student sex.²⁹ Consequently, she urges colleges and universities to adopt policies which make available advisory and counseling services for students before they enter into such relationships.³⁰ Such an advisory approach appears to respect the

24. In many instances, these consensual relationship policies are a subsection of the overall sexual harassment policy. See Mack, *supra* note 2, at 86-87. For a criticism of this approach, see Sanger, *supra* note 2, at 1877-78.

25. Such schools appear to model their approach on that taken by the American Association of University Professors, which encourages faculty members to "avoid any exploitation, harassment, or discriminatory treatment of students," and with regard to faculty-student consensual relationships warns that, "[t]he 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." See AM. ASS'N OF UNIV. PROFESSORS, POLICY DOCUMENTS AND REPORTS 133, 211 (2001).

26. The University of Mississippi has adopted such a policy. It states in part: "The educational mission of The University of Mississippi is promoted by professionalism in faculty-student and supervisor-subordinate relationships. Therefore, consensual sexual relationships between the instructional staff and students, as well as those between supervisors and their subordinates, are considered unwise and are strongly discouraged." THE UNIV. OF MISS., SEXUAL HARASSMENT GUIDELINES AND PROCEDURES FOR FACULTY, STAFF AND STUDENTS, available at http://www.olemiss.edu/depts/HR/handbook/HB_sec2.html (last visited Sept. 24, 2004). The University of Michigan has a similar policy of discouragement. See UNIV. OF MICH., THE UNIVERSITY OF MICHIGAN STANDARD PRACTICE GUIDE § 201.89, at 2-3 (2004), available at <http://spg.umich.edu/pdf/201.89-0.pdf> (last visited Sept. 24, 2004).

27. See Sanger, *supra* note 2, at 1864 (maintaining that for consent to be valid it need not only be voluntary, but informed).

28. See Mack, *supra* note 2, at 85.

29. See *id.* at 80 ("Some universities impose bans in the hope that sanctions will deter sexual advances. But since these bans will not eliminate faculty-student sex, and sexual advances will continue to be a problem for some students, those students should be given an avenue of support and information by the university.").

30. See *id.* at 80, 82-83, 111-12.

autonomy of the student and the professor, while at the same time seeking to level the playing field.

The criticism of such an approach is that it is much too permissive in allowing these faculty-student relationships to occur in scenarios clearly fraught with peril for all involved, such as where the professor has an evaluative or supervisory relationship with the student.³¹ Furthermore, like sexual harassment policies, such policies do a poor job of preventing harm to the student, the university, and third parties before the relationship at issue has imploded and resulted in a sexual harassment suit or other damaging consequences. Given this reality, critics of these advisory policies would say that especially in situations where the professor has a conflict of interest in dating a student, and the professor is therefore unable to make an informed decision about his ability to separate his private and professional lives, the contemplated consensual relationship should, at the very least, be disclosed at its inception so that the conflict of interest can be effectively managed by a disinterested party.³² Most such advisory policies, however, do not even have such disclosure provisions.³³

C. *The Conflict of Interest Approach to Consensual Relationships*

Instead of relying on mere precatory language in their policies, an increasing number of colleges and universities have taken the next step by seeking to ban the most obviously troublesome type of faculty-student liaisons, while leaving other such relationships to the discretion of the parties or by discouraging such relationships.³⁴ These conflict of interest

31. See Hutchens, *supra* note 2, at 419-20; Stokes & Vinik, *supra* note 2, at 912.

32. Such a disinterested party might include the head of the faculty member's department or a member of the university administration. *But see* Elliott, *supra* note 2, at 64-65 ("[T]he requirement that the faculty member report the relationship under pain of sanctions . . . [is a] forced disclosure of the personal life of another, regardless of his or her consent to the disclosure.").

33. Such disclosure policies are reportedly rare in the college and university context. *See* Mack, *supra* note 2, at 102 n.69.

34. Professor Young reports that as of 1996, Harvard, Temple, Tufts, and the University of Virginia had policies which prohibited supervisory consensual relationships, but did not address other types of consensual relationships. *See* Young, *supra* note 2, at 274-75. Although the University of California was initially included in this list by Professor Young, the University has recently enacted a much more stringent policy. *See* Trounson, *supra* note 1, at B1 (describing new policy which bans professors from engaging in "romantic or sexual" relationships with students whom they have "or should reasonably expect to have in the future" any teaching, evaluative, or supervisory responsibility). The University of Iowa is listed as an example of a university which prohibits supervisory relationships and merely discourages other forms of consensual relationships. *See* Young, *supra* note 2, at 275.

policies³⁵ generally prohibit a faculty member from having an intimate relationship with students whom he or she teaches, supervises, or has any other type of evaluative relationship.³⁶ In other words, where a professor has a conflict of interest in engaging in the relationship with the student, the danger is great that the consensual relationship will in some form make its way into the classroom or academic environment and interfere with the learning environment for all.

For the professor, not only is there the potential for an abuse of power when it comes to grading or evaluating the student-lover,³⁷ there are also the concerns of third-party students who worry about being treated less favorably because they are not involved in an intimate relationship with the professor.³⁸ Additionally, faculty involved in a consensual relationship with a student they currently supervise face professional risks, including losing the respect of their colleagues and the very real possibility of being sued for sexual harassment.³⁹

For the student, the consequences may be just as dramatic. There may be doubts about the student's genuine intellectual ability given the

35. This term was coined by Professor Sherry Young. See Young, *supra* note 2, at 274. Professor Forell also advocates a conflict of interest approach, in line with the approach taken by the American Association of Law Schools (AALS). See Forell, *supra* note 2, at 70-71.

36. Yale University's consensual relationship policy bans, as of 1998, a relationship between a faculty member and a student "over whom [the faculty member] has direct supervisory responsibilities regardless of whether the relationship is consensual," and provides disciplinary measures for those caught engaging in such "conflicts of interest." See Mack, *supra* note 2, at 91 (quoting YALE UNIVERSITY, POLICIES ON SEXUAL HARASSMENT AND SEXUAL RELATIONS BETWEEN TEACHERS AND STUDENTS 2 (approved 1998)).

37. See Mack, *supra* note 2, at 94 ("Because the faculty member and his or her colleagues are responsible for grading the student, for writing recommendations, and for providing references that will impact the student's life and career, the faculty member's institutional role enacts a power imbalance even when faculty and students are close in age or of the same sex.").

38. See William C. Heffernan, *Privacy Rights*, 29 SUFFOLK U. L. REV. 737, 806 (1995) ("By contrast, a rationale grounded in concern with third-party harm offers more promising support for a per se ban [on faculty-student consensual relationships]. Instructors are under a duty to evaluate students' work impartially. They have an obligation to apportion benefits and sanctions without regard to personal characteristics."). Harvard Law School's policy hones in on actual or perceived favoritism as a reason to ban faculty-student relationships where the professor supervises in some form the academic progress of the student. See Mack, *supra* note 2, at 97 (quoting HARVARD LAW SCHOOL, SEXUAL HARASSMENT GUIDELINES (Apr. 1995), available at <http://www.law.harvard.edu/administration/hr/harassment.php> (last visited Sept. 24, 2004)). But see Subotnik, *supra* note 15, at 442-43 ("Students paying tuition are entitled only to be graded fairly. They are not entitled to meddle in the affairs of others.").

39. See Mack, *supra* note 2, at 98.

perceived, or real, favoritism at play.⁴⁰ Additionally, there is always the chance of sour grapes on the part of the professor leading to the student being disadvantaged in grades, references, and evaluations, as a result of the relationship.⁴¹ In all, like the professor, a student has a lot to lose when it comes to dating a professor who directly supervises the student in one capacity or another.

Criticism of these *per se* bans on supervisory consensual relationships stem from the notion that there may be some such relationships which are not coercive and may in fact lead to mutually satisfying involvement for both parties.⁴² Additionally, these critics note that such *per se* regulation in the realm of sexual conduct has already historically caused a great deal of harm to women.⁴³ The response given to these critics by proponents of conflict of interest consensual relationship policies is for the involved parties to just wait until the end of the semester to start or resume their relationship.⁴⁴ Apparently echoing the famous equity principle, “justice delayed is justice denied,”⁴⁵ opponents of these policies reject the elimination of freedom of choice in this fundamental area of human experience and instead, appear more comfortable with an advisory approach which simply discourages such relationships, rather than bans them altogether.⁴⁶

D. *The Prohibitory Approach to Consensual Relations*

Not satisfied to permit even some types of student-faculty consensual relationships, a few schools have attempted to ban all such relationships outright.⁴⁷ Finding that such relationships are never truly consensual given the apparent power disparities between male professors and their female

40. See Forell, *supra* note 2, at 59.

41. See *id.* at 58.

42. See Subotnik, *supra* note 15, at 442.

43. *Id.* at 444 n.13 (observing the historical social stigma placed on all non-marital sex); see Elliott, *supra* note 2, at 59-60 (decrying the patriarchal and neo-Victorian assumptions that women are weak and vulnerable and need the protection of consensual relationship policies).

44. See Chamallas, *supra* note 2, at 858; Forell, *supra* note 2, at 65.

45. See *Geo. Walter Brewing Co. v. Henseleit*, 132 N.W. 631, 632 (Wis. 1911) (“Gladstone has truly said: ‘When the case is proved, and the hour is come, justice delayed is justice denied.’”).

46. See Subotnik, *supra* note 15, at 442.

47. Professor Young cites her own school, Ohio Northern University, as a school with a complete ban. See Young, *supra* note 2, at 271 n.11, 276. However, Mack has pointed out that the actual language seems more discretionary than mandatory. See Mack, *supra* note 2, at 87 n.22. William and Mary and Ohio Wesleyan University have new consensual relationship policies which actually constitute absolute bans. See Trounson, *supra* note 1, at B1; Sidoti, *supra* note 1, at A11.

students,⁴⁸ that such relationships inevitably demean female students,⁴⁹ or that such relationships always disadvantage other students in the class or department who are not participating in the sexual relationship,⁵⁰ these schools seek to prohibit these relationships before they can damage the academic integrity of the institution.⁵¹

Critics of such policies argue that such outright prohibitions interfere impermissibly with the rights of privacy and association, constitutional and otherwise, and deny individual autonomy and dignity to those affected.⁵² Others argue that such absolute bans on consensual relationships force individuals to lie about their private associations, thus undermining the ability of the university to regulate itself.⁵³

Interestingly, although some feminists agree with the prohibitory approach by arguing there is no such thing as meaningful consent in a relationship with such power differentials,⁵⁴ other feminists criticize such prohibitions as being demeaning and limiting. Professor Sherry Young, for instance, sees such policies as infantilizing women (whom it is argued are generally victimized by such relationships) by not respecting women's capacity to make responsible decisions in their own best interests.⁵⁵

48. Proponents of the prohibitory approach improperly assume that the chief victims of faculty-student consensual relationships are female students involved with their male professors. *See generally* BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* (2d ed. 1990). *See also* CATHERINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 298 n.8 (1979) (“[W]hether, under conditions of male supremacy, the notion of consent has any real meaning for women . . . whether it is a structural fiction to legitimize the real coercion built into the normal social definitions of heterosexual intercourse . . .”). Although historically female students were much more at risk in a male-dominated academy to be exploited in such consensual relationships, recent trends concerning faculty hiring, the increased frequency of open homosexual relationships, and anecdotal stories concerning consensual relationships between female faculty members and their male and female students, makes the focus of such consensual relationship policies solely on the potential harm to the female student inappropriately narrow. As a consequence, I refer to the student in gender neutral terms throughout this article. *See* Forell, *supra* note 2, at 50 (“Since the central harms have to do with abuse of power, often the parties’ gender is of no particular importance.”).

49. *See* Mack, *supra* note 2, at 81 (“I cannot see much advantage to giving women the message that their value in college and graduate school is sexual.” *Id.*).

50. *Id.* at 82.

51. *See* Sanger, *supra* note 2, at 1858-59.

52. *See* Elliott, *supra* note 2, at 69; *see also* Sidoti, *supra* note 1, at A11.

53. *See* Forell, *supra* note 2, at 69 (quoting Leon Botstein, Forum, *New Rules About Sex on Campus*, HARPER’S, Sept. 1993, at 37).

54. *See supra* note 48.

55. *See* Young, *supra* note 2, at 270 (“The suggestion that otherwise competent adult women are so incapable of making decisions about their personal lives that colleges and universities should step in and regulate their sexuality is not an obviously feminist

Professor Jane Gallop goes even further by suggesting that such sexual liaisons between students and their professors help fill out the educational experience for students.⁵⁶

Since this zero tolerance approach has been the most controversial, it should not be surprising that higher education institutions have rarely adopted this type of policy.⁵⁷

II. THE LABOR ARBITRATION LAW PERSPECTIVE ON EMPLOYEE PRIVATE CONSENSUAL SEXUAL CONDUCT

Although these types of faculty-student consensual relationship policies are different in their regulatory approach to relations between faculty members and students, all are similar in their failure to recognize a fundamental truth about the professor whose behavior they seek to regulate through these policies: the professor is an *employee* of the university. And from the perspective of the professor *qua* employee, the question must be asked, as it would be in any employment relationship, “What right does a college or university employer have to interfere with the private affairs of its employees?”⁵⁸

While colleges and universities have had relatively little experience in regulating the private sexual conduct of their faculty members, labor arbitrators have been in the business of hearing off-duty conduct disputes for more than a half-century.⁵⁹ By considering the principles upon which labor arbitrators decide these off-duty conduct cases, one can gain important insight into how college and university administrators should shape their faculty-student consensual relationship policies.

position.”); *see also* Sanger, *supra* note 2, at 1853 (citing JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* 38-39 (Duke Univ. Press 1997)).

56. *See* Mack, *supra* note 2, at 93 n.39. Professor Gallop has expressed elsewhere that she is also concerned that, “The policies don’t distinguish between relations that students want and relations that students don’t want.” Sidoti, *supra* note 1, at A11.

57. *See* Mack *supra* note 2, at 110; Stokes & Vinik, *supra* note 2, at 901 (observing that proposals to ban faculty-student consensual relationships had been defeated at the University of Virginia, the University of Texas at Arlington, and the University of Washington).

58. At the very least, neither a college nor university, nor any other employer, has *carte blanche* in making any and all demands concerning its employee’s private sexual conduct. *See* Subotnik, *supra* note 15, at 442 (“For all that has been written about the relation between sex and power, to the best of my knowledge no one has advocated an absolute ban on sexual relationships between supervisor and subordinate in the workplace.”).

59. The earliest reported labor arbitration case that the author was able to find concerning discipline imposed for employee off-duty conduct is from 1944. *See* Ford Motor Co., Opinion A-132 (1944) (Shulman, Arb.).

This section is divided into three parts. In the first section, I review the basics of labor arbitration for those unfamiliar with the process. In the second part, I discuss general arbitration principles that apply to an employer's regulation of employee off-duty conduct. Last, I examine labor arbitration cases that specifically discuss whether an employer has the ability to discipline or discharge an employee for engaging in different types of private consensual sexual conduct.

A. A Primer on Labor Arbitration

For those unfamiliar with American labor law, it is helpful to first understand the origins of a labor arbitrator's decisional powers. Once a union has successfully organized a group of employees and has been selected or designated the collective bargaining representative for that group of employees,⁶⁰ the union and the employer sit down and attempt to hammer out a collective bargaining agreement across the bargaining table.⁶¹ As a quid pro quo for agreeing not to engage in a strike or other work stoppage during the terms of the agreement, parties generally agree to arbitrate their employment disputes.⁶² Generally, under such agreements to arbitrate, a procedure is established to select an arbitrator, who is then empowered by the parties to interpret the meaning of the provisions in their collective bargaining agreement.⁶³

Arbitrators use their experience and expertise in industrial relations to interpret the collective bargaining agreement in a way that best meets the expectations of the parties to the agreement.⁶⁴ This is especially important when the arbitrator is called upon to decide a discharge or discipline case in which a "just cause" or "good cause" provision must be applied to determine if the employer's discipline of an employee is consistent with the

60. Under the National Labor Relations Act, 29 U.S.C. §§ 151-169 (2000), employees are guaranteed the right to self-organization, to join or assist a labor organization, to engage in collective bargaining through a representative of their own choosing, and to engage in concerted activities for purposes of collective bargaining or for other mutual aid or protection. *See id.* § 157.

61. *See id.* § 159(a) ("Representatives designated or selected for the purposes of collective bargaining by the majority of employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . .").

62. *See* *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 455 (1957) (recognizing that agreements to arbitrate are the quid pro quo of a no-strike clause).

63. For a thorough discussion on arbitration provisions in collective bargaining agreements, *see generally* ARCHIBALD COX ET AL., *LABOR LAW: CASES AND MATERIALS* 712-20 (13th ed. 2001) [hereinafter *LABOR LAW*].

64. *See id.* at 717-18.

terms of the collective bargaining agreement.⁶⁵ Although arbitrators are not judges in the traditional sense, in making these determinations they do hear witnesses, consider evidence, and issue rulings based on their findings and their interpretation of the underlying contractual language.⁶⁶

Additionally, although arbitrators are only invested with the power to determine the contours of specific collective bargaining agreements, a consistent body of case law has developed over the years with regard to common terms in these agreements, such as “just cause.” A number of these decisions are reported in the *Labor Arbitration Reports* and similar publications, and arbitrators are generally guided by principles which can be gleaned from past arbitral decisions.⁶⁷

B. *Employee Off-Duty Conduct and the Nexus Test*

In applying the just cause provisions of a given labor contract to determine the appropriateness of employer discipline, arbitrators have had to grapple over the proper role of employers in regulating the off-duty conduct of their employees. In these cases, arbitrators seek to resolve the tension between an employer’s right to protect its business interests and the employee’s right to be free from employer interference on his or her own time.⁶⁸

In most of these off-duty cases, arbitrators are reluctant to sustain employee discharges.⁶⁹ Regardless of the egregiousness of employee conduct while away from the workplace, arbitrators have observed that society does not generally believe that employers should be endowed with powers to sanction such conduct.⁷⁰ Yet, it is also true that there is not

65. See COMM. ON ADR IN LABOR AND EMPLOYMENT LAW, AM. BAR ASS’N, DISCIPLINE AND DISCHARGE IN ARBITRATION 29 (1998) (“The central concept permeating discipline and discharge arbitrations is ‘just cause.’ Most collective bargaining agreements explicitly prohibit the employer from disciplining or discharging employees without just cause. Even in the absence of specific contract language, just cause is the touchstone by which arbitrators judge employer actions.”).

66. See LABOR LAW, *supra* note 63, at 718-19.

67. See Lone Star Gas Co., 56 Lab. Arb. Rep. (BNA) 1221, 1226 (1971) (Johannes, Arb.) (“Although the opinions of arbitrators who decided similar cases in the past are only advisory, it is worthwhile to review past decisions in determining the proper action in this case.”).

68. See *id.* at 1225.

69. See Robertshaw Controls Co., 64-2 Lab. Arb. Awards (CCH) ¶ 8748, 5613 (1964) (Duff, Arb.).

70. “The reason why the corporation . . . may not usually penalize [the employee] for actions away from the plant and on his own time is not because the corporation is no longer his employer, but because ordinarily such actions do not have a sufficiently direct effect upon the efficient performance of plant operations to be reasonably considered good cause for discipline.” *Off-Duty Misconduct*, in LABOR LAW & LABOR ARBITRATION 1998, at 62

necessarily an easily discernible line between what constitutes on-duty conduct as opposed to off-duty conduct.⁷¹ Cases involving serious employee conduct such as drug use, drug dealing⁷² and other felonious conduct away from the workplace (including assault and various types of “immoral conduct”),⁷³ have forced labor arbitrators to develop standards to determine when it is appropriate for employers to discipline or discharge its employees for conduct away from the workplace.

In the most general terms, arbitrators have only permitted employers to discipline employees for off-duty conduct if that conduct has a detrimental impact on the workplace itself.⁷⁴ In other words, there needs to be some “nexus” between the employee off-duty conduct and the business of the employer.⁷⁵ As early as 1957, arbitrators looked to three factors to

(Labor Arbitration Institute, 1998) [hereinafter *Off-Duty Misconduct*]; see also *Allied Supermarkets, Inc.*, 41 Lab. Arb. Rep. (BNA) 713, 714 (1963) (Mittenthal, Arb.) (finding that employer cannot ordinarily discipline employee for behavior off company premises and after working hours); *William H. Welsh Co.*, 20 Lab. Arb. Rep. (BNA) 175, 177 (1953) (Marks, Arb.) (same).

71. The employee relationship does not necessarily terminate when the employee’s work day is over and he or she heads home. See *Allied Supermarkets*, 41 Lab. Arb. Rep. (BNA) at 714 (“The point is that the jurisdictional line which limits the Company’s [sic] power to discipline is a functional, not a physical line.”); *Inland Container Corp.*, 28 Lab. Arb. Rep. (BNA) 312, 314 (1957) (Ferguson, Arb.) (“While it is true that the employer does not . . . become the guardian of the employee’s every personal action and does not exercise parental control, it is equally true that in those areas having to do with the employer’s business, the employer has the right to terminate the relationship if the employee’s wrongful actions injuriously affect the business.”).

72. See, e.g., *Trane Co.*, 96 Lab. Arb. Rep. (BNA) 435, 438 (1991) (Reynolds, Arb.) (employee engaging in off-duty drug dealing); *W.R. Grace & Co.*, 93 Lab. Arb. Rep. (BNA) 1210, 1212-13 (1989) (Odom, Arb.) (same).

73. See, e.g., *Westvaco Corp.*, 95 Lab. Arb. Rep. (BNA) 169, 171 (1990) (Abrams, Arb.) (employee indicted for off-duty assault of woman); *Lone Star Gas Co.*, 56 Lab. Arb. Rep. (BNA) 1221, 1226-27 (1971) (Johannes, Arb.) (employee convicted of crime of incest); *Northwest Airlines, Inc.*, 53 Lab. Arb. Rep. (BNA) 203, 205-06 (1969) (Sembower, Arb.) (criminal charges based on indecent nude photography); *Robertshaw Controls*, 64-2 Lab. Arb. Awards (CCH) at 5613-14 (employee convicted for felony involving sexual perversion with young boys).

74. See, e.g., *Ralphs Grocery Co.*, 77 Lab. Arb. Rep. (BNA) 867, 871 (1981) (Kaufman, Arb.) (off-duty conduct not subject to discipline or discharge unless adverse effect on operation of employer’s business); *Allied Supermarkets*, 41 Lab. Arb. Rep. (BNA) at 714 (“[W]here [off-duty] behavior is *directly related* to his employment, Management certainly has the power to discipline.”) (emphasis in original); *W.E. Caldwell Co.*, 28 Lab. Arb. Rep. (BNA) 434, 437 (1957) (Kesselman, Arb.) (Although employee was guilty of public intoxication, “no harm was done to the Company because he was not at work or on Company property when he became involved in his trouble.”); *Crane Co.*, 12 Lab. Arb. Rep. (BNA) 592, 595 (1949) (Gilden, Arb.) (same).

75. MARVIN F. HILL, JR. & MARK L. KAHN, *Discipline and Discharge for Off-Duty Misconduct: What are the Arbitral Standards*, in ARBITRATION 1986: CURRENT AND EXPANDING ROLES, PROCEEDINGS OF THE THIRTY-NINTH ANNUAL MEETING NATIONAL

determine if the requisite nexus existed to discipline employees for off-duty conduct.⁷⁶ In *W.E. Caldwell Co.*, Arbitrator Louis Kesselman famously held that an employee discharge for off-duty conduct is usually not appropriate unless: (1) the conduct harms the employer's product or reputation; (2) the conduct renders the employee unable to effectively perform his or her job; or (3) the conduct leads other employees to refuse to work with him or her.⁷⁷ Later cases made clear that the employer has the burden of showing any such adverse effects to justify disciplining an employee.⁷⁸

The nexus standard utilized in off-duty conduct cases suggests there can be no bright-line rule in deciding these cases.⁷⁹ More frequently, arbitrators have employed an *ad hoc* approach to determine whether an employee's off-duty conduct has injured an employer's business in a given case to decide whether employee discipline or discharge is appropriate under the circumstances.⁸⁰ Only when an employee's off-duty conduct injures an employer's business in some relevant manner do arbitrators generally permit an employer to terminate or otherwise discipline an employee for engaging in such conduct. Moreover, because there is the real potential of an employer abusing the nexus test to dispose of trouble-making or unwanted employees, arbitrators have also required that the connection between the injury caused to the employer's business and the employee's off-duty conduct be reasonable and discernible.⁸¹

ACADEMY OF ARBITRATORS 121, 124 (Walter J. Gershenfeld ed., 1987) ("In general, arbitrators are reluctant to sustain discipline or discharge based on off-duty misconduct . . . absent some relationship or 'nexus' to the job.").

76. Indeed, as early as 1949, labor arbitrators were requiring that an employee's extracurricular activities have a "direct bearing" upon their employment status before an employer could have a just basis for disciplining them. *See Crane*, 12 Lab. Arb. Rep. (BNA) at 595.

77. 28 Lab. Arb. Rep. (BNA) at 436-37.

78. *See Ralphs Grocery*, 77 Lab. Arb. Rep. (BNA) at 871.

79. In fact, many arbitrators acknowledge that a case-by-case approach must be taken in deciding these cases. *See Allied Supermarkets*, 41 Lab. Arb. Rep. (BNA) at 714 ("Absent evidence of past practice or specific agreement by the parties on disciplinary standards, the arbitrator's decision as to whether certain conduct is 'proper cause' for discharge must turn on the peculiar facts of each dispute."); *Inland Container*, 28 Lab. Arb. Rep. (BNA) at 314 ("Each [employee off-duty conduct] case must be measured on its own merits.").

80. *See St. Paul Pub. Schs. Indep. Sch. Dist.* 625, 101 Lab. Arb. Rep. (BNA) 503, 506 (1993) (Imes, Arb.) ("In determining whether there is a 'nexus', each incident must be carefully examined and the conclusion based upon the merits of that case and that case alone . . .").

81. *See Inland Container*, 28 Lab. Arb. Rep. (BNA) at 314 ("The connection between the facts which occur and the extent to which the business is affected must be reasonable and discernible. They must be such as could logically be expected to cause some result in the employer's affairs."); *see also W.E. Caldwell*, 28 Lab. Arb. Rep. (BNA) at 437 ("The

*C. Labor Arbitration Cases Applying the Nexus Test to Employee
Private Consensual Sexual Conduct*

Although there are few arbitration decisions concerning discharge of employees for engaging in private consensual sexual relationships, the existing cases provide some important insight into how labor arbitrators have historically handled such fact patterns. As will be illustrated below, arbitrators have long been hesitant in the non-criminal context to enforce discipline against employees for off-duty sexual activities that do not adversely affect the employer.⁸²

For instance, during the early development of arbitration law, male employers were more likely to act in a paternalistic and intrusive manner with regard to the off-duty conduct of their female employees. Indeed, it was not uncommon for a male employer to discharge a female employee because he disapproved of her private life outside of the workplace.⁸³ Frequent examples of this type of employer action involved instances in which an employer would justify firing a female employee because she had children without being married or engaged in an adulterous affair.⁸⁴

In spite of the more conservative climate of that time, arbitrators would generally not find the requisite nexus for upholding the employee discharge.⁸⁵ For instance, in the *Allied Supermarkets* case in which a female employee was discharged for becoming an unwed mother for the second time, Arbitrator Mittenthal overturned the discharge stating that he, “doubt[ed] that the public holds an employer answerable for the morals of his employees after working hours,” and that, in any event, it was purely speculative as to what influence the employee’s off-duty conduct would have on other employees.⁸⁶

Arbitrators’ rulings have been much the same in more recent cases as well. One such example is *In re Ralphs Grocery Co.*, in which the

charge that his experience might start a ‘bad tendency’ among the other employees is merely hypothetical and cannot be taken seriously without proof.”).

82. COMM. ON ADR IN LABOR AND EMPLOYMENT LAW, *supra* note 65, at 307.

83. *See, e.g.*, *Allied Supermarkets, Inc.*, 41 Lab. Arb. Rep. (BNA) 713, 714 (1963) (Mittenthal, Arb.).

84. *See id.* at 713 (female employee discharged because of immoral character because she had become pregnant for the second time without being married); *Ralphs Grocery Co.*, 77 Lab. Arb. Rep. (BNA) 867, 869 (1981) (Kaufman, Arb.) (female employee fired after having adulterous affair with married male manager); *Crane Co.*, 12 Lab. Arb. Rep. (BNA) 592, 595 (1949) (Gilden, Arb.) (discharge of female employee for “illegitimate pregnancy”).

85. *See Allied Supermarkets*, 41 Lab. Arb. Rep. (BNA) at 714-15.

86. *Id.* at 714; *see also Crane*, 12 Lab. Arb. Rep. (BNA) at 595 (discharge of female employee for having an illegitimate child overturned because conduct had no relevance to the nature of the employee’s job duties).

employee was constructively discharged for being a homosexual.⁸⁷ The employer was concerned that a gay man could not be an effective leader in its organization and that gay and straight employees would not want to work together if employees' sexual orientation became known.⁸⁸ Arbitrator Kaufman overturned the discharge, finding that the employer had not met its burden of establishing a discernible adverse impact on the employer's business stemming from the employee's homosexuality.⁸⁹ In this regard, Arbitrator Kaufman held that off-duty conduct is beyond employer control unless it "adversely affects the operation of the business[,] [t]hat [it] must be no less true for homosexual than heterosexual conduct," and that, "disapproval [of one's lifestyle choice] does not satisfy the contractual standard of good cause."⁹⁰

In another case, a secretary was fired for misconduct for engaging in an off-duty romantic affair with her boss.⁹¹ Overturning her discharge, the arbitrator noted that the secretary and her boss were "consenting adults," and that, "[t]here [was] more evidence that they had genuine affection for each other than there [was] that this was a case of seduction by the 'Boss.'"⁹² Under these circumstances, the arbitrator ruled that it was impossible to say with certainty what impact, if any, this consensual relationship had on the workplace.⁹³

Of course, relationships between co-employees, and employees and non-employees, do not always neatly remain off-duty and off-premises. If

87. 77 Lab. Arb. Rep. (BNA) at 869 (Although the homosexual employee was not discharged, he resigned after he was demoted and was given the midnight shift in what he considered to be a dangerous neighborhood.).

88. *Id.*

89. *Id.* For instance, Arbitrator Kaufman observed that there was no showing of customer complaints or employee complaints because the employee was a homosexual. *Id.* at 871.

90. *Id.*; see also Bazor Express, Inc., 46 Lab. Arb. Rep. (BNA) 307, 309 (1966) (Duff, Arb.). But see Chicago Pneumatic Tool Co., 38 Lab. Arb. Rep. (BNA) 891, 893 (1961) (Duff, Arb.) (upholding employer's decision to terminate employee for off-duty drug use/drug dealing).

91. Int'l Union of Operating Eng'rs Local 132, 68 Lab. Arb. Rep. (BNA) 254, 255 (1977) (Wagner, Arb.).

92. *Id.* at 256.

93. *Id.* In yet other cases, employers have attempted to institute so-called "anti-fraternization rules" in order to keep co-employees from dating one another. Arbitrators have generally only upheld such employer policies if sufficient justification was shown. See, e.g., Alterman Foods, Inc., 45 Lab. Arb. Rep. (BNA) 459 (1965) (Woodruff, Arb.). In *Alterman Foods*, a love triangle of one employee dating the wife of another employee had led to a shooting at the company. See *id.* at 460. When a similar love triangle thereafter came to the attention of the employer, one of the offending employees was discharged under a new anti-fraternization rule. *Id.* The arbitrator upheld the discharge finding that the discharge was reasonable given the company's past history. *Id.* at 461.

such relationships spill over into the work environment, arbitrators have historically not hesitated to allow the sanctioning of such conduct by employers. The crucial distinction in these cases appears to be both the inevitable third-party effects of such relationships and the conflicts of interest that are normally involved. An example of such a case is *Wyndham Franklin Plaza Hotel*, in which an employee was fired after being taped engaging in sexual relations with her supervisor during working hours on the hotel's premises.⁹⁴ Arbitrator Duff agreed with the employer that it had a legitimate interest in sanctioning such behavior because such conduct "potentially tarnish[ed] the image or reputation of the [hotel]," and because "[the employee] was having sex at work with a Supervisor who was directly responsible for reporting her hours of work for pay purposes"⁹⁵ Although the arbitrator overturned the employee's discharge for violation of her due process rights,⁹⁶ this case clearly establishes the arbitral principle that private sexual relationships that occur at the workplace are normally the proper subject of regulation because of the inevitable conflicts of interest that are involved and because of the fact that the conduct in question is "so widely known and is so deplorable that it harms the employer's business interests."⁹⁷

III. SHOULD THE LABOR ARBITRATION NEXUS PRINCIPLE APPLY IN THE COLLEGE AND UNIVERSITY SETTING?

Having established the applicable labor arbitration principles concerning employer regulation of employee private consensual sexual conduct, two pertinent questions remain. First, is the college and university setting analogous enough to the unionized employment setting so that it is appropriate to apply the nexus principle in the college and university context? Second, is the dynamic between a faculty member and a student

94. 105 Lab. Arb. Rep. (BNA) 186, 187 (1995) (Duff, Arb.). The surveillance camera had been secretly placed in the ceiling because of the employer's concern about theft by its employees. *Id.*

95. *Id.* at 188.

96. The arbitrator found that the employee's Weingarten rights were violated because her request for union representation at her disciplinary interview was refused by the employer. *NLRB v. J. Weingarten, Inc.* 420 U.S. 251 (1975); *Wyndham Franklin Plaza Hotel*, 105 Lab. Arb. Rep. (BNA) at 189.

97. COMM. ON ADR IN LABOR AND EMPLOYMENT LAW, *supra* note 65, at 305. While reputational interests and conflicts of interest were at play in the *Wyndham* case, off-duty consensual relationships which spill over into the workplace can also directly affect the ability of an employee to effectively perform his or her job. For instance, in *Warren Petroleum Corp.*, the arbitrator found, "[T]he Company was justified in discharging Mr. X on account of the fact that his marital difficulties . . . interfere[d] with the normal discharge of his duties at the plant." 26 Lab. Arb. Rep. (BNA) 184, 186 (1956) (Singletary, Arb.).

comparable enough to a supervisor-subordinate employment relationship, or any other employment relationship, so that application of the nexus principle makes sense in the college and university context?

A. The "Special" Status of Colleges and Universities Should Not Affect Utilization of the Nexus Principle in the Higher Education Context

Colleges and universities have traditionally enjoyed a special status in the eyes of the law and have been granted a large amount of deference from courts when making decisions pertaining to educational matters.⁹⁸ This deference stems from both the expertise exercised by college and university decision-makers in educational matters,⁹⁹ as well as from notions of academic freedom, including the institution's ability to make autonomous decisions for itself without interference from external actors.¹⁰⁰ Most recently, the United States Supreme Court reaffirmed this traditional deferential approach in the higher education context by permitting the University of Michigan to consider race when making law school admission decisions in order to promote diversity at the school.¹⁰¹ Thus, some may make the argument that courts and other decision-makers should grant colleges and universities a wider degree of latitude in regulating faculty-student consensual relationships than would otherwise be permissible in other employment contexts.

There are, however, at least two reasons why this deference is unwarranted in the context of regulating faculty-student consensual relationships. First, the emphasis in prior Supreme Court cases concerning deference to university and college judgments has not been on all

98. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (recognizing that colleges and universities have been traditionally granted much autonomy in decisions relating to educational matters).

99. See *Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) ("[T]he determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

100. *Ewing*, 474 U.S. at 226 n.12 ("Added to our concern for lack of standards is a reluctance to trench on the prerogatives of state and local educational institutions and our responsibility to safeguard their academic freedom, 'a special concern of the First Amendment.'") (quoting *Keyishian v. Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)); *id.* at 226 n.12 (academic freedom thrives "on autonomous decisionmaking by the academy itself") (citing *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978) (opinion of Powell, J.) and *Sweezy v. New Hampshire*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring in result)).

101. See *Grutter v. Bollinger*, 539 U.S. 306, 328-29 (2003) ("Our holding today is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits.").

university or college decisions, but on *academic* decisions.¹⁰² Indeed, there is an equal tradition of reviewing colleges' and universities' academic and disciplinary decisions under different standards.¹⁰³ Thus, courts have been more willing to review disciplinary decisions of colleges and universities than academic decisions.¹⁰⁴ This is because unlike their familiarity in reviewing disciplinary matters, "[c]ourts are particularly ill-equipped to evaluate academic performance."¹⁰⁵

Although there are no doubt many academic concerns, including perceived favoritism, regarding the regulation of faculty-student consensual relationships, disciplining a faculty member for breach of a consensual relationship policy is at essence a disciplinary decision. This is because an academic decision "by its nature [is] more subjective and evaluative than the typical factual questions presented in the average disciplinary decision."¹⁰⁶ All told, academic judgments revolve around subjective, expert decisions about merit, while disciplinary judgments concern factual conclusions about conduct.¹⁰⁷ Under this dichotomy, applying the terms of a faculty-student consensual relationship policy to discipline a professor would be a disciplinary action for which the postsecondary institution should enjoy no increased deference from a judicial decision-maker.

The counter-argument is that the college or university is taking the disciplinary action not to merely sanction unprofessional conduct, but, more importantly, to protect the academic integrity of the institution and to

102. See *Ewing*, 474 U.S. at 225 ("When judges are asked to review the substance of a *genuinely academic decision*, such as this one, they should show great respect for the faculty's professional judgment.") (emphasis added); *Horowitz*, 435 U.S. at 96 n.6 (Powell, J., concurring) ("University faculties must have the widest range of discretion in making judgments as to the *academic performance* of students and their entitlement to promotion or graduation.") (emphasis added).

103. See *Horowitz*, 435 U.S. at 86-87 ("The need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct Since the issue first arose 50 years ago, state and lower federal courts have recognized that there are distinct differences between decisions to suspend or dismiss a student for disciplinary purposes and similar actions taken for academic reasons which may call for hearings in connection with the former but not the latter.").

104. *Id.* at 88-90 ("[S]uspensions of students for disciplinary reasons have a sufficient resemblance to traditional judicial and administrative factfinding to call for a 'hearing' before the relevant school authority. . . . Like the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking.").

105. *Id.* at 92.

106. *Id.* at 90.

107. See *id.* at 89-90, 93 (Powell, J., concurring) (contrasting student dismissal for academic deficiencies rather than for unsatisfactory personal conduct).

avoid perceived favoritism in the academic environment. The problem with this argument is that it proves too much. Essentially, any disciplinary decision in the postsecondary context could be transformed through this reasoning into an academic one by claiming the discipline was taken for the greater good of the academic community. But, of course, that is true for almost any disciplinary action taken in the academic environment.¹⁰⁸ The danger is that intimate relationships between consenting adults will be held hostage to the preferences of others who may have a preexisting dislike for the professor or student under scrutiny.¹⁰⁹ To avoid these issues, the focus of the inquiry into whether a decision is a disciplinary or academic one should be the subject of the discipline (in this case, the faculty member), and not the hypothetical impact that such conduct is having on third parties.¹¹⁰ Focusing on the faculty member, the employee being sanctioned, the school's actions are clearly of a disciplinary nature.

However, even if one were to maintain that this regulation of consensual relationships involves academic judgments, there is still a second reason why institutions should not be given more latitude to promulgate consensual relationship policies. Although academic institutions have been historically portrayed as the protectors of academic freedom, there is also equally important language in these decisions to support the proposition that colleges and universities must be especially vigilant of constitutional freedoms.¹¹¹ Because the privacy and associational rights of its faculty members are at stake when their consensual relationships are regulated, and these interests are of a constitutional nature in at least the public university context,¹¹² the college and university employer should be even more wary before attempting to regulate a consensual relationship that does not have a detrimental impact

108. For instance, when the school suspends a student for hazing another student in the fraternity or sorority context, the action is no doubt a disciplinary action taken for unsatisfactory personal conduct, but the discipline also has the beneficial effect of fostering a better learning environment for all.

109. See *Off-Duty Misconduct*, *supra* note 70, at 59.

110. See Subotnik, *supra* note 15, at 442-43. Of course, if the surrounding circumstances suggest that the faculty member has engaged in illegitimate acts of favoritism, a concerned student could still always file a complaint with the proper academic administrator. See *id.* at 443 n.7. Professor Subotnik argues that it is the fear of such an investigation following a complaint being filed that has kept known abuses to a minimum. *Id.*

111. See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

112. See generally Paul M. Secunda, *Lawrence's Quintessential Millian Movement and Its Impact on the Doctrine of Unconstitutional Conditions*, 50 VILL. L. REV. (forthcoming 2005).

on the college and university environment. In such instances, the college or university should not be seen as having a legitimate reason for interfering with the privacy and associational rights of their faculty and students.¹¹³

In all, the “special” status of colleges and universities under the law for academic decision-making and for protection of academic freedom should not require a different standard than the nexus principle when a college or university, in its employer capacity, seeks to regulate the off-duty conduct of its faculty members. If anything, efforts to limit the private behavior of employees in the public, postsecondary setting must be even more narrowly tailored given that the constitutional freedoms of faculty members and students are at stake.¹¹⁴

B. Faculty-Student Relationships Are Akin to Supervisor-Subordinate Relationships Which Are Subject to the Nexus Principle

In the non-academic employment world there typically exists a supervisor or manager who is responsible for reviewing a subordinate employee’s work and who may also play a significant role in making decisions concerning that employee’s future career.¹¹⁵ In many work places, the control the supervisor exercises over his or her subordinate is especially comprehensive because the supervisor and subordinate work closely together during the day and over a significant period of time.¹¹⁶ Conversely, unless a professor is a thesis advisor to a graduate student, students will only have most professors once during their academic careers, and such associations are short-lived given the length of the semester.¹¹⁷ Moreover, a student, unlike a subordinate employee usually can avoid a boorish professor by not registering for his or her class.¹¹⁸ Finally, most

113. And, of course, paternalism and stereotyped notions of women’s ability to take responsibility for their own actions are not legitimate reasons. See Young, *supra* note 2, at 270 (“The notion that (predominantly male) administrators should feel free to ignore a woman’s own perceptions and stated preferences about her life and her exercise of her own sexuality is deeply anti-feminist.”). But see Forell, *supra* note 2, at 63-64 (“The reason for regulating faculty-student sex is not that students are immature, or that women don’t know what they want: the reason is that the power disparity is too great.”).

114. See Secunda, *supra* note 112.

115. For instance, a supervisor not only could be instrumental in terminating an employee from his current employment, but depending on the nature of the employment, the supervisor may also drastically limit future work opportunities for the employee with other employers. This type of situation can be of special concern when an employee is limited by his or her skill set to a relatively narrow group of potential jobs.

116. See Subotnik, *supra* note 15, at 442.

117. See *id.*

118. See *id.*

students are early enough in their careers that one professor cannot substantially interfere with their future careers the way that a supervisor can.¹¹⁹

All told, then, supervisors appear to exercise more power over their subordinates than professors do over their students.¹²⁰ In spite of the obvious power differentials between supervisors and subordinates, labor arbitrators apply the same nexus standard to private consensual relations between a supervisor and a subordinate as they do in co-employee or employee/non-employee off-duty relationships.¹²¹ The arbitral focus is not on the power disparity between the supervisor and subordinate, but rather on whether the employer has a legitimate concern that the relationship will have a discernible and detrimental impact on its business.¹²² If the employer can show no such impact, then the employer has no cognizable interest in regulating that relationship.¹²³ Thus, although faculty members play an important, and in some respects, unique role in the lives of their students, it is not at all clear to this author why such a power relationship differs significantly from a typical supervisor-subordinate relationship in the ordinary employment setting.¹²⁴

119. See *supra* note 115.

120. See, e.g., Subotnik, *supra* note 15, at 442 (arguing that there is a greater power differential between a supervisor and a subordinate than a professor and a student). Professor Forell argues that professors have a fiduciary duty to act in the best interests of their students because there are issues of trust and a significant imbalance in the parties' power. See Forell, *supra* note 2, at 50, 54. Based on this view, one wonders if Professor Forell would find that supervisors in an ordinary employment relationship have a fiduciary duty to their subordinate employees because of the even greater power imbalance and similar trust issues involved. Such a view would certainly be remarkable given that fiduciary duties have never been recognized in normal employment relationships. See Edward Greer, *What's Wrong with Faculty-Student Sex?:* Response I, 47 J. LEGAL EDUC. 437, 439 (1997) (arguing that Professor Forell's theory of a professor having a fiduciary duty toward a student "is a *deus ex machina* whose sole purpose is to provide a rationale for sanctions.").

121. Compare Int'l Union of Operating Eng'rs Local 132, 68 Lab. Arb. Rep. (BNA) 254, 256 (1977) (Wagner, Arb.) (overturning discharge of secretary where unclear what impact, if any, her consensual relationship with her boss had on the workplace) with Warren Petroleum Corp., 26 Lab. Arb. Rep. (BNA) 184, 186 (1956) (Singletary, Arb.) (upholding an employee termination where off-duty marital difficulties between the employee and his non-employee spouse had started to detrimentally impact the work environment).

122. See Chamallas, *supra* note 2, at 854 (arguing that focus of consensual relationship policies should not be on the actual nature of the relationship, but rather on the potential of the relationship to cause exploitation or external harm).

123. See *supra* notes 74-78 and accompanying text.

124. See Subotnik, *supra* note 15, at 442; see also Sanger, *supra* note 2, at 1868 (recognizing that as in the normal employment context, faculty-student consensual relationships in the college and university setting may also "cause divisiveness among co-workers as a result of blurring the line between one's private life and one's

Faculty-student relationships are also similar to normal off-duty employee conduct in at least three other relevant ways. First, and most obviously, faculty members are employees. Indeed, labor arbitrators have applied the same nexus principles in the educational milieu as they have in non-educational employment contexts.¹²⁵ Second, the fact that employees subject to labor arbitration principles have increased job security through just cause provisions in their collective bargaining agreements, while many faculty members do not, is not a distinction with any significance for purposes of this analysis. Just cause is just another way of establishing that an employer cannot fire an employee for an unfair reason.¹²⁶ Similarly, tenured and untenured professors would not generally be disciplined or discharged under a faculty-student consensual relationship policy without sufficient evidence to substantiate the institution's claims of such a relationship.¹²⁷ Third, and finally, although students are not employees of the university in most instances, this fact should not affect the application of the nexus principle insofar as consensual relationship policies are directed primarily at faculty members and not students.¹²⁸ In this regard, such faculty-student relationships are similar to a regular employment situation in which an arbitrator applies the nexus principle to determine whether the discipline of an employee for private consensual conduct with a non-employee is permissible.¹²⁹

To sum up, neither the faculty-student power dynamic, nor the union setting of labor arbitration cases, nor the fact that the student is not an employee of the university, drastically affects the imposition of the nexus principle on faculty-student relationships. Of course, that being said, our inquiry does not end there. It is still necessary to determine which of the previously discussed approaches to faculty-student consensual relationships, if any, is most consistent with the nexus principle, or whether an altogether new approach should be implemented.

workplace . . .”).

125. See, e.g., *St. Paul Pub. Schs. Indep. Sch. Dist.* 625, 101 Lab. Arb. Rep. (BNA) 503, 506 (1993) (Imes, Arb.).

126. See COMM. ON ADR IN LABOR AND EMPLOYMENT LAW, *supra* note 65, at 29.

127. Additionally, tenured faculty members have job security in line with the just cause protections that union members enjoy. See *Gilbert v. Homar*, 520 U.S. 924, 928-29 (1997).

128. See *supra* note 5.

129. See, e.g., *Warren Petroleum*, 26 Lab. Arb. Rep. (BNA) at 186 (nexus principle applied in upholding discharge of employee when marital difficulties with non-employee spouse started to affect the work environment).

IV. A PROPOSAL: THE SLIDING SCALE APPROACH TO FACULTY-STUDENT CONSENSUAL RELATIONSHIP POLICIES

Reevaluation of current faculty-student relationship policies in light of labor arbitration law's nexus principle clarifies the inappropriateness of existing approaches to regulating these relationships. Because of the fact-specific nature of such consensual relationships and their variable impact on the college and university environment, labor arbitration principles suggest that previous approaches to faculty-student consensual relationships are underinclusive, overinclusive, or both.

For instance, the *laissez-faire* approach (where there is only a sexual harassment policy in place) appears to be substantially underinclusive in its coverage. Although such approaches may cause faculty members to hesitate before engaging in such relationships because of the potential dangers involved, relying on sexual harassment policies alone does not appear to directly confront all the dangers that supervisory or evaluative relationships pose to the university, including subtle coercion by professors not easily reached by the terms of sexual harassment policies, and the potential harm to third-party students caused by perceived favoritism.¹³⁰ On the other hand, the advisory approach (where consensual relationships are merely discouraged and/or forced to be disclosed) is both underinclusive and overinclusive. It is underinclusive in that it does not provide a sufficient institutional response to those particularly harmful consensual relationships in which the professor has a current evaluative or supervisory relationship with the student, and the faculty member is inappropriately using the power of his or her position to favor or disfavor his or her lover. The advisory approach is overinclusive in that not all consensual relationships should be discouraged without specific consideration of how the specific relationship impacts the college or university environment.

Although the conflict of interest approach does differentiate properly between supervisory and non-supervisory consensual relationships, it is also both underinclusive and overinclusive in that it differentiates between these types of consensual relationships without recognizing that supervisory relationships may be permissible and non-supervisory may be impermissible, again depending upon the impact of the relationship upon the college or university.¹³¹ Lastly, the prohibitory approach is significantly overinclusive. Although some feminist legal scholars argue

130. See *supra* notes 18-20 and accompanying text.

131. See Greer, *supra* note 118, at 437 (finding "power disparity" to be "a radically overinclusive criterion for barring sexual relations.").

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that concepts such as consent have no meaning in a power relationship between a female student and a male faculty member,¹³² such views ignore that some consensual relationships, especially non-supervisory ones, are never harmful to their participants or other relevant third parties.¹³³

A remaining approach to faculty-student consensual relationships that is neither underinclusive nor overinclusive is a sliding scale approach. Under this approach, consensual relationships are neither always permitted nor strictly prohibited.¹³⁴ Rather, the sliding scale approach is consistent with the idea that there can be no bright line rules in applying the nexus principle.¹³⁵ Instead, the focus of such a consensual relationship policy is on the discernible impact or effect that the specific consensual relationship is having on (1) the college's or university's reputation in the community, (2) the ability of the professor to effectively perform his or her job, or (3) the desire of other third-party students or faculty members to interact with the professor in question.¹³⁶ Although there cannot be a bright-line rule concerning when a college university can properly regulate such relationships, certain presumptions can nevertheless be established based on whether the professor has current academic responsibility for the student.¹³⁷

If the professor is currently supervising or evaluating a student with whom he or she is romantically involved, such consensual relationships presumptively impact the university in a negative manner and therefore, such a relationship should normally be prohibited. This is because when a professor engages in a consensual relationship with a student with whom

132. See *supra* note 48.

133. Additionally, and as discussed above, such views also improperly assume that the exploited individual is always a female student. See *supra* note 48.

134. See Forell, *supra* note 2, at 52 ("I was struck by the extremity of the positions expressed: faculty-student sexual relationships are either always good or always bad. Obviously, neither extreme is true.").

135. See Mack, *supra* note 2, at 103 ("Sex between faculty and students resists any attempt at generalization, because individual experiences vary greatly."); Chamallas, *supra* note 2, at 861 (arguing for a context sensitive and fact specific assessment of power relationships).

136. See W.E. Caldwell Co., 28 Lab. Arb. Rep. (BNA) 436, 436-37 (1957) (Kesselman, Arb.); Inland Container Corp., 28 Lab. Arb. Rep. (BNA) 312, 314 (1957) (Ferguson, Arb.). Concerns over real or perceived favoritism by other students would be covered by the third type of impact a consensual relationship could have on the academic setting.

137. I am uncomfortable extending the reach of consensual relationship policies to prohibit relationships between faculty members and students that they are likely to teach as the University of California actually does. See Trounson, *supra* note 1, at B1. The better approach is to wait until the relationship becomes a supervisory one before treating it like other supervisory relationships in order not to be overinclusive.

the professor has a supervisory or evaluative relationship, it is difficult for such a relationship to truly exist in an off-campus manner.¹³⁸ For one thing, because the student will be interacting with the professor in class or within some other institutional context, there would seem to be an obvious conflict of interest between the professor's interests as educator versus the professor's interests as lover.¹³⁹ Moreover, other students would most likely believe that the beloved student would be benefiting from preferential treatment from the professor and lose confidence in the integrity of the academic system.¹⁴⁰ Last, because such relationships may lead to a spurned lover and a vindictive sexual harassment charge being filed, the university may believe that such a relationship will inevitably lead to a high profile lawsuit, which will scar the institution's reputation.¹⁴¹ As a result, in such supervisory or evaluative instances, faculty-student consensual relationships will presumptively have an adverse impact on the educational setting and should be proscribed, unless the professor can carry his or her very heavy burden of showing that the relationship has no more than a negligible, detrimental impact on the college or university community.

A potential criticism of this approach is that the sliding scale approach establishes a presumption that can never be overcome. In other words, the sliding scale approach only makes more sense than a conflict of interest approach if there exist hypothetical situations in which the professor, in a supervisory relationship, will be able to overcome this heavy burden.¹⁴² In

138. For instance, Professor Young argues that perceptions of favoritism are most likely and most harmful when there is a conflict of interest. *See* Young, *supra* note 2, at 280.

139. *See* Heffernan, *supra* note 38, at 806 ("Admittedly, some instructors may not exhibit bias toward their lovers. However, it is reasonable to assume that the inclination toward partiality is very substantial and that instructors will often act on it.").

140. *See* Mack, *supra* note 2, at 82.

141. Some argue, with good reason, that this is the very reason why the conflict of interest approach that bans all supervisory consensual relationships makes the most sense. In addition to the fact that these relationships are fraught with peril, there does not appear to be a good way to regulate these relationships before the damage is done because a sexual harassment complaint will not come to a university's attention until the relationship has gone south. *See supra* notes 31-33 and accompanying text. Although I appreciate the concerns of university counsel in protecting his or her institution from legal liability, like Professor Elliott, I wonder "when constitutionally and statutorily protected liberties and rights became secondary to insulating educational institutions from damage suits . . ." Elliott, *supra* note 2, at 47. Because we must take seriously the privacy and associational rights of both professors and students, the door to supervisory faculty-student consensual relationships must remain slightly ajar for those rare instances when such supervisory relationships are not shown to have a detrimental impact on the university.

142. Clearly, a professor engaged in a supervisory consensual relationship with one student will not be able to call other students in his or her classes to present evidence at a

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fact, there are situations in which a professor will be able to show that his supervisory consensual relationship with a student has had only a negligible, detrimental impact on the college or university. For instance, in a small classroom setting of three or four students, where all the students receive A's and none of the students receive recommendations, letters of reference, or any other benefit from the professor, a romantic affair between one of the students and the professor may be possible. Another instance may be where other students remain completely oblivious to the supervisory relationship and there is no perceived favoritism, and the situation must only be addressed because another faculty member or administrator has found out and filed a complaint (which also remains confidential). In either of these situations, and depending upon other circumstances (including whether real favoritism exists), the faculty member may be able to show that his or her supervisory relationship has had little detrimental impact on the college or university.

Although the instances of when such supervisory relationships are permissible may not be many, and most such relationships should be prohibited, I am nevertheless unwilling to countenance an approach to faculty-student consensual relationships that completely ignores the very real privacy and associational interests, constitutional and otherwise, that exist in this context.¹⁴³ The importance of these rights in this fundamental area of human experience cannot be overstated and makes a blanket prohibition on supervisory relationships in the higher education setting inappropriate.¹⁴⁴

On the other hand, if there is no current evaluative or supervisory relationship between the professor and student, such a consensual relationship presumptively does not impact negatively the college or

hearing that they did not believe the professor to be biased as a result of the relationship. Moreover, any testimony by the involved student or professor will be self-serving.

143. See Mack, *supra* note 2, at 92 ("If the potential for harm is minimal and the consent is informed, the university's interest in preventing a sexual relationship may be low. Policy and enforcement procedures may benefit by maintaining flexibility, so an evaluation of harm and consent in individual cases is possible.").

144. Alternatively, for those uncomfortable with permitting supervisory relationships under any circumstances because of perceived favoritism or because of the liability risks to the university, a less satisfactory way of still giving due consideration to a faculty member's privacy or associational interests is by making the professor's evidentiary showing in these hearings go solely to the penalty the institution may impose. In other words, the college or university can still sanction the professor for the supervisory relationship with his or her student, but reduce the severity of the sanction from discharge to a suspension or warning if the professor is able to show a minimal impact on the college or university environment as a result of the consensual relationship.

university.¹⁴⁵ Accordingly, the burden, which may or may not be difficult to overcome, should be on the postsecondary institution to prove such a detrimental impact before disciplinary action can be taken against the professor. Then again, colleges and universities should not just ignore, or only discourage, consensual relationships merely because the professor has no academic responsibility for the student in question.¹⁴⁶ If the non-supervisory relationship has a discernible and detrimental impact on the college or university environment, the professor should be subject to discipline, as he or she has just as much interfered with the learning atmosphere as the professor who has engaged in a normal supervisory consensual relationship. Thus, under the sliding scale approach, a professor in a non-supervisory consensual relationship with a student still undertakes a considerable professional risk in commencing such a relationship and must think twice before doing so.

All told, this sliding scale approach to faculty-student consensual relationships respects the overlapping, and sometimes contradictory, interests of the faculty member, student, university, and third parties, and provides a workable framework under which such faculty-student relationships can be consistently and uniformly analyzed. Because the sliding scale approach has its basis in the well-established nexus principle of labor arbitration law, an added advantage is that college and university administrators not only can be confident that such an approach will yield fair and equitable results, but also that there will be an available source of case law to consult when their universities face these complicated scenarios.

CONCLUSION

As faculty-student sexual liaisons continue to intrigue some and irritate others, universities and colleges remain faced with the daunting problem of how to appropriately regulate these relationships in order to minimize their impact on the college or university community, while simultaneously respecting the privacy and associational interests of those involved. Relying on over a half-century of labor arbitration law, this article asserts that colleges and universities should adopt a sliding scale approach, based on the nexus principle, to faculty-student consensual relationships. The sliding scale approach to faculty-student consensual

145. See Young, *supra* note 2, at 288 (“Where the professor is not responsible for evaluating the student, however, the ‘coercion’ argument becomes quite weak.”).

146. Professor Forell seems to also argue for such an approach to non-supervisory consensual relationships. See Forell, *supra* note 2, at 68-69.

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relationships properly limits a college or university's regulation of consensual relationships to those instances in which a discernible and detrimental effect on the academic environment has been demonstrated, rather than centering regulation on highly indeterminate, and politically charged, concepts such as consent and power.