Cutting Cupid out of the Workplace: The Capacity of Employees' Constitutional Privacy Rights to Constrain Employers' Attempts to Limit Off-Duty Intimate Associations

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Cutting Cupid Out of the Workplace: The Capacity of Employees' Constitutional Privacy Rights to Constrain Employers' Attempts to Limit Off-Duty Intimate Associations

by

ANNA C. CAMP

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JAN: I need you to sign these, Michael. It’s a waiver of some of your rights. You should read it carefully. It releases the company in the event that our relationship, in your opinion or in reality, interferes with work. You get a copy, I get a copy, and a third copy goes to HR.

MICHAEL: Awesome. I’m going to frame mine. I could frame yours, too.

JAN: You realize this is a legal document that says you can’t sue the company.

* Anna C. Camp is a 2010 Juris Doctor candidate at the University of California, Hastings College of the Law.
MICHAEL: Over our love.
JAN: I’ve never told you that I love you.
MICHAEL: You don’t have to, Jan. This contract says it all.¹

I. Introduction

Despite the prevalence and increased acceptance in American society of intimate relationships among co-workers, courts and legislatures refuse to recognize, and often strongly oppose, the trend.² Courts in most states, including California, have not yet struck down co-worker dating bans, often called “no-fraternization” policies.³ In stark opposition to these legislative and courtroom tendencies, American workers’ habits reveal a divergent trend. Agence-France Presse (“AFP”) reports that although one-third of companies in the United States have a policy forbidding romantic relationships among co-workers, nearly four in ten workers ignore the ban.⁴ Unfortunately, for many of these employees who choose to date in violation of company policy, the quest to find love occasionally ends with a pink slip (or at least the threat of one).⁵

Regardless of its increased popularity, many employers (supported by the courts) have created legal barriers through no-fraternization policies which prohibit employees from dating co-workers.⁶ With increasing levels of litigation over sexual harassment

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¹ The Office: Cocktails (NBC television broadcast February 22, 2007).
² Phil Stott, Office Romance Survey 2010, Vault, http://www.vault.com/wps/portal/usa/ut/p/c5/04_S8K8xLLM9MSszPy8xBe9CPO0s3gQ0u_YHMPfWp_gABTA09npXDgKAAYx6c68JL8oLGLGadBSjv6Zmg7GPIQHd4SD7cKswM0WXzzQfjGAAzga4Dc_1FDfzyM_N1W_IDCINNT1xEAv8usDw/di3/d3/L2dJQSEvUt3QS9QnZ3LzZFnjESTIM3DIwTB0NTBJQUrYBSUDNEVTE/ ?WCM_GLOBAL_CONTEXT=/wps/wcm/connect/Vault_Content.Library/other_content/workplace+survey/Office+Romance+Survey+2010/ (last visited Mar. 31, 2010) (presenting a 2010 survey that reveals up to 59 percent of American workers admit dating a co-worker). See also infra note 3.
³ See MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW 478 (3d ed. 2005) (“Courts have upheld the discharge of employees for dating or marrying coworkers.”); infra Part III (discussing the current state of wrongful termination law when discharge is based on co-worker intimate association).
⁵ See infra note 7.
⁶ See Rebecca J. Wilson, Christine Filosa & Alex Fennel, Romantic Relationships at Work: Does Privacy Trump the Dating Police?, 70 DEF. COUNS. J. 78, 78–79 (2003) (stating that employers “adopt prophylactic policies in an effort to avoid the potentially complicated and unsavory outcomes of office affairs and to maintain a strictly professional environment” but that “problems of implementation and enforcement” often lead them to “rely on unwritten rules”).
claims in recent years, some employers have required employees to sign contracts permitting legal termination for engaging in what employers perceive as problematic "fraternization" (normally interpreted as engaging in intimate relationships) with their co-workers. These policies typically forbid dating among supervisors and their co-workers beneath them. In their strictest form, no-fraternization policies may ban dating among all levels of co-workers or restrict all social interaction between co-workers after hours. If employees disobey these policies, they are often terminated.

For some employers, a no-fraternization policy has resulted in unexpected litigation over the validity of the policies themselves. Many employee complaints brought up in lawsuits regarding enforcement of or challenges to no-fraternization policies focus on constitutional issues: complaints of employers' interference with personal relationships, concerns of violations of freedom of association, and allegations of invasion of privacy. Even in states such as California, where the respective state constitution includes a right of privacy for all citizens, no-fraternization policies have not currently been upheld under this right.

Consistently, United States Supreme Court and federal appellate court cases have upheld no-fraternization policies, even in their strictest forms. In fact, courts affirmed no-date policies where co-
worker relationships had no impact on the employer's business interests or the workplace environment.\textsuperscript{14} However, the most recent opinions seem to reveal uneasiness in upholding the strictest policies.\textsuperscript{15} These opinions reveal desires to protect an employee's rights to engage in off-duty intimate associations.\textsuperscript{16}

I propose that the strictest no-fraternization policies, those that restrict co-worker dating regardless of the parties' employee position or pay, should be struck down under a right to privacy claim. I will specifically address the situation in California, a state that incorporates the federal right to privacy into the state's constitution.

This Note begins, in Part II, with an examination of the widespread social acceptance of co-worker dating, as conveyed through popular culture. This background section also includes an assessment of the nature and scope of the most typical no-fraternization policies. Also discussed in this section are common arguments made by employers to support these policies and by employees in opposition to them. Part III consists of an analysis of the major lawsuits concerning no-fraternization policies and the messages courts are sending in these opinions. Part IV includes my proposal for a solution to the problems presented—alleged infringements on employees' constitutional rights through these restrictive policies. This proposal specifically focuses on the most viable solution in California, under the California State Constitution. Finally, Part V concludes the Note with a summary of the major points presented.

\section*{II. Background}

\subsection*{A. Widespread Societal Acceptance of Co-Worker Dating}

Amid the glow of fluorescent lights, the boss's constant nagging about the next deadline and the smell of microwave popcorn and stale coffee, are the conditions ripe for romance? Almost sixty percent of American employees admitted to dating a co-worker in 2010; they all seem to be screaming, "Yes!" \textsuperscript{17}

\begin{thebibliography}{99}
\bibitem{Watkins} See Watkins, 797 F. Supp. 1349.
\bibitem{Ellis} See infra Parts II.A, II.B.1, IV (discussing the recent Seventh Circuit case of Ellis v. UPS).
\bibitem{Stott} Id.
\bibitem{Stott supra note 2} See Stott supra note 2.
\end{thebibliography}
Contributing to the increase in co-worker romances, Americans now work longer hours than ever before, and more of these workers are single.\(^8\) New studies reveal that Americans perceive their jobs as increasingly demanding of their time.\(^9\) Additionally, a Bureau of Labor Statistics study reveals that Americans who count themselves as single increased over eighteen percent from 1995 to 2005.\(^{20}\) To the chagrin of some company lawyers, Human Resource directors, and employers, the result is that American workers are finding more opportunities to meet their next date or soul mate at the office. The Seventh Circuit observed:

As the work force grows and people spend more time at work, the workplace inevitably becomes fertile ground for the dating and mating game. It is certainly not unusual, and it may even be desirable, for love to bloom in the workplace. Contiguity can lead to sexual interest, which can lead to soft music, candle-light dinners, serious romance, and marriage, or any stops along the way.\(^{21}\)

1. **Pervasiveness of Workplace Dating in Popular Culture**

Due to its popularity, workplace romance has become a common fixture in pop culture. The topic pervades the film, book, television, and magazine industries, and appears on blogs all over the Internet.

Hollywood has produced a multitude of films filled with workplace romance issues portraying both the positive and negative side effects of the practice. Although some movies are wholly optimistic about finding love at work, many reflect the problems that arise as a result of workplace dating.\(^{22}\) The 1957 film, *The Desk Set*, portrays Katharine Hepburn's character as initially clashing with her officemate, Spencer Tracy's character, but she soon finds herself romantically attracted to him.\(^{23}\) Even the tagline for the film appears

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18. See infra notes 19, 22.
to encourage dating among co-workers: "Make the office a wonderful place to love in!" 24

Some of the real-life results of dating a co-worker are exposed in the 1960 film, The Apartment. 25 Although somewhat more dramatic than average workplace romances, the film reveals a truth that once employees know each other intimately, vulnerabilities often create catastrophes at work. In the film, C.C. Baxter climbs the career ladder by lending his apartment to his boss for his extramarital trysts. 26 Meanwhile, Baxter falls in love with his co-worker, Fran. 27 All seems fine until he discovers that Fran is also his boss's mistress. 28 The film presents the following issue: how will they all emerge from the confounded dynamics and preserve their jobs? 29

In Disclosure, there is an abuse of power between co-workers that occurs after a break-up. 30 A former lover-turned-boss sues a computer specialist for sexual harassment. 31 The boss' intention is to incriminate the specialist, thereby destroying both his career and his personal life. 32

In A Time to Kill, the message seems to be to honor your work first, and then your sexual fantasies. 33 There, a young and handsome lawyer is assigned both an extremely demanding criminal case and a very attractive assistant. 34 Even with the sexual chemistry between the lawyer and his assistant, he chooses to channel his passion into the case, which he wins. 35

In The 40-Year-Old Virgin, when viewed in the context of workplace dating, one could recognize the following lesson: employees should be careful to deal professionally with sexual advances from co-workers. 36 The central character, Andy, neutralizes his female boss's advances by staying loyal to his values. 37 His boss

26. Id.
27. Id.
28. Id.
31. Id.
32. Id.
33. A TIME TO KILL (Regency Enterprises 1996).
34. Id.
35. Id.
37. Id.
comes to understand his decision, and when Andy is eventually promoted, it is not the result of sexual favors but rather job performance.38

There are other forms of entertainment that offer inconsistent advice about co-worker dating. A recent book entitled Office Mate: Your Employee Handbook for Romance on the Job optimistically purports that the greatest pool of potential mates is not at the bar, online, or at the gym, but in the workplace.39 Magazines such as Marie Claire and Cosmopolitan recently included articles on how to date at work without getting hurt, caught, or terminated.40 Popular television shows such as Grey's Anatomy and The Office are filled with co-worker dating.41 In dramatic fashion, these shows convey some of the tremendously negative side effects of workplace dating, specifically dating among supervisors and their subordinates.42

Workplace dating has permeated the entertainment industry.43 Workers receive many different mixed signals from movies, books, and other forms of amusement: that workplace dating can be a blessing, a curse, or somewhere in the middle. Movies and books also seem to send the message that employers are either unwilling or unable to enforce no-fraternization policies, further complicating the message sent to employees. Due to these varied signals and faced with legal limitations on workplace dating by employers, workers (many of whom are single and spend a significant part of their lives in the office) are left mystified.

38. Id.
42. Grey's Anatomy: The Becoming (ABC television broadcast May 8, 2008) (hospital directors require doctors to sign love contracts as a reaction to increased sexual promiscuity at the workplace); The Office: Cocktails (NBC television broadcast February 22, 2007) (after corporate employers discover an employee and his supervisor are in a romantic relationship, employers fear sexual harassment suits and require both employees to sign a contract relinquishing rights to sue the company regarding the relationship).
43. See supra Part II.A.1 (examining popular mediums of entertainment and their depictions of workplace romance issues).
B. Legal Limitation by Employers—"No-Fraternization" Policies

In recent years, employers have been forced, by the prospect of unwelcome litigation, to take proactive steps to minimize what they perceive as inevitable lawsuits arising out of intimate relations among co-workers. Former-President Bill Clinton's relationship with a White House intern, Monica Lewinsky, was revealed in 1998. Immediately after this incident, employers' anxiety rose over potential sexual harassment litigation regarding consensual sexual relations among co-workers. Attorneys and other professionals often encourage employers to self-regulate. They urge employers to adopt no-fraternization policies and inquire into the sexual activity of their workers to combat the tendency for consensual sexual relationships to culminate in sexual harassment claims. The goal of these policies is to limit or eliminate harassment in the workplace. Cases regarding sexual favoritism in the workplace further entice employers to institute no-date policies. In Miller v. Department of Corrections, the California Supreme Court concluded that widespread sexual favoritism created an actionable "hostile work environment." After Miller and other cases like it, many employers have, out of fear, banned all dating among employees.

Some experts use a spectrum to explain and analyze the differing levels of intrusiveness of employment policies. Most experts agree

44. Billie Wright Dziech, Robert W. Dziech II & Donald V. Hordes, "Consensual" or Submissive Relationships: The Second-Best Kept Secret, 6 DUKE J. GENDER L. & POL'Y 83, 194 (noting that the public exposure of Monica Lewinsky and Bill Clinton's sexual relations resulted in increased acceptance of no-fraternization policies because employers felt "'amorous' relations between those with unequal power produce hostile work environments that intimidate and offend innocent third parties and create enormous risks for employers.").

45. Id.

46. Gary M. Kramer, Limited License to Fish off the Company Pier: Toward Express Employer Policies, 22 W. NEW ENGL. L. REV. 77, 77-78 (2000) ("An emerging consensus among business academics, labor and employment law attorneys, human resource management specialists, training consultants, and other personnel professionals encourages and recommends these policies.").

47. Id.

48. 36 Cal. 4th 446, 451 (Cal. 2005) (discussing the destructive work environment created in the aftermath of multiple workplace romances between employees of differing ranks at a state prison, including physical assault, sexual favoritism, and sexual harassment).


that there is an affirmative right to privacy for workers’ off-duty behavior.\textsuperscript{51} Many experts in privacy rights also agree that all forms of no-fraternization policies are limitations on workers’ off-duty conduct.\textsuperscript{52} As a result, these experts argue for severe restrictions on the employers’ ability to monitor and restrict this off-duty conduct.\textsuperscript{53}

The various versions of no-fraternization policies also range in their level of intrusiveness. Standard policies are generally the least invasive and most narrowly tailored to serve the employer’s interests in preventing favoritism and sexual harassment among co-workers who must report to one another.\textsuperscript{54} These policies restrict workers from dating a direct inferior or superior co-worker in their department.\textsuperscript{55}

At the other end of the spectrum, policies encompassing the strictest are more broadly construed.\textsuperscript{56} These stricter policies may prohibit dating among employees of the same company altogether, regardless of pay, rank, or position. Similarly, some broadly construed policies may prohibit dating among supervisors and subordinates even if the supervisor does not oversee the subordinate.\textsuperscript{57} While many of the strictest no-fraternization policies have not been directly challenged in court, a few have been addressed.\textsuperscript{58} For example, the Seventh Circuit recently upheld the United Postal Service’s termination of an employee for violating a strict no-fraternization policy.\textsuperscript{59} In spite of this, the court clearly did not endorse the company’s strict policy.\textsuperscript{60}

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\textsuperscript{51}. See Levinson, supra note 50.

\textsuperscript{52}. Id.

\textsuperscript{53}. Id.

\textsuperscript{54}. See supra note 8 (discussing the most common, least invasive policies).

\textsuperscript{55}. Id.

\textsuperscript{56}. See supra note 8. See also, Ellis v. UPS, infra Parts II, III (discussing the strict no-fraternization policy at issue in Ellis).

\textsuperscript{57}. See Ellis v. UPS, 523 F.3d 823, 824 (2008) (explaining the no-fraternization policy at issue in the case which restricted dating among co-workers, a policy that extended to workers outside of a manager’s supervisory authority).

\textsuperscript{58}. See id.

\textsuperscript{59}. Id. at 829–30.

\textsuperscript{60}. Id. at 830 (explaining the court’s reasoning for upholding Ellis’ termination by UPS due to Ellis’ lack of adequate proof to support his claim of discrimination for an interracial relationship and subsequent marriage with another employee in violation of the company’s no-fraternization policy).
Thus, because many scholars note that no-fraternization policies fall at different places on the spectrum, some are less invasive on employees' rights while others constitute an enormous invasion of privacy, some scholars urge courts to use this spectrum to strike down the most invasive policies as unconstitutional.

I. The Employee's Perspective

Opponents of no-fraternization policies often argue that the policies are in stark opposition to public policy and common practice. Some employees and experts argue that managerial attempts to institute no-fraternization policies are unrealistic and unfair "campaign[s] to sanitize the workplace." Employees often argue that the nature of America's workforce creates situations ripe for romance that employers cannot and should not control. Many argue this is reflected in the large numbers of employees that choose to date co-workers regardless of company policies prohibiting the practice. When the chances of a co-worker relationship negatively affecting the work environment is nominal, employees argue a policy completely banning co-worker dating is unfair and over-inclusive. Additionally, employees note that co-worker relationships often do not interfere with the employees' abilities to perform their jobs, and that employers should be concerned only with job performance.

According to many employees, no-fraternization policies are often inconsistently enforced due to the inherently private nature of intimate relationships. Employees argue that when co-workers date, they often keep the matter a secret; thus, those workers who can best

61. Katharine Mieszkowski, Romance in a Fluorescent-Lit Cube, SALON, http://www.salon.com/mwt/broadsheet/2007/12/07/office_romance/ (last visited March 4, 2009) (discussing that when compared to even a few years ago, there is much less social stigma attached to dating among coworkers, especially among employees with the same rank and pay).

62. See Vicki Shultz, The Sanitized Workplace, 112 YALE L.J. 2061, 2065 (2003). Professor Shultz contends that the anti-sex harassment movement has undergone a campaign to stamp out sexuality from the workplace. Id. at 2063–72. Shultz also contends that managers' sexual harassment policies overly restrict workers' freedom to engage in intimate and sexually-charged behavior within the work setting. Id. at 2186.

63. See supra notes 19, 20 (discussing the large percentages of single American workers clocking in longer hours than ever before).

64. See supra Part I (discussing the widespread nature of co-worker dating).

65. But see, e.g., supra note 13 (noting cases cited by proponents of no-fraternization policies where courts have ignored this work environment argument).


67. See infra Parts III.A and III.B.
keep the relationship secret are less likely to face termination under a no-fraternization policy. In support of this argument, the Seventh Circuit noted in Ellis v. UPS, “Unsurprisingly, [UPS’s] policy does not stop Cupid’s arrow from striking at UPS.” Intra-company dating at UPS was prevalent, although employees often took precautions to keep their relationships secret. As an overall argument encompassing the line of reasoning in Ellis, many employees argue policies that ban dating among co-workers violate their Constitutional rights to engage in off-duty intimate associations. At the very least, employees argue that courts should hold the strictest policies to be invasive of workers’ privacy rights and hold the policies to be unsupported by a compelling interest of the employer. These employees argue that the strictest policies are over-inclusive. The policies restrict more of the employees’ privacy rights than is necessary to accomplish one of the principal alleged employer interests, limiting favoritism, because they prohibit supervisors from dating insubordinates outside of their supervisory authority.

2. **The Employer’s Perspective**

Many employers who institute no-fraternization policies argue that these policies avoid litigation regarding sexual harassment, gender discrimination, and favoritism. These proponents claim that the policies would not have been instituted at all if there was no need to prevent problems arising from co-worker dating. Many companies argue that they would not regulate employees’ social lives

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68. See Ellis, 523 F.3d at 824 (noting that where no-fraternization policies are in place, employees often take precautions to keep their relationship secret).

69. See Ellis v. UPS, 523 F.3d at 824.

70. Id.

71. See infra Part III (discussing the availability of this constitutionally focused argument).


73. Id.

74. See id. This is also the argument made by many labor rights experts in their opposition to Ellis v. UPS.

75. See, e.g., Ellis, 523 F.3d at 824 (discussing the purpose of the no-fraternization policy, as explained by UPS, to be the prevention of favoritism and litigation). See also Roach, supra note 7.

76. See Amaral, supra note 72, at 11–12.
if their social lives did not interfere with their work. Some employers also contend that the policies increase employee productivity by clearly delineating work from pleasure. Some also argue that the policies which require employees reveal or avoid co-worker dating eliminates co-worker tension between co-workers. Proponents further argue the policies increase employee retention and make clear that professionalism is expected of all employees.

III. Analysis of Major Lawsuits Challenging the Constitutionality of Terminations Based on No-Fraternization Instructions or Policies

A. Establishing a Privacy Right

On a federal level, courts have held that the Fourteenth Amendment's Due Process Clause of the Federal Constitution implies a right to privacy. Over the last forty years, the privacy right under the Federal Constitution has grown to encompass not only personal decisions regarding marriage and procreation, but also those concerning sexual conduct and intimate associations. In Lawrence v. Texas, the Supreme Court held criminal sodomy laws to be unconstitutional under the implied privacy right in Fourteenth Amendment's Due Process Clause. Justice Anthony Kennedy, writing the majority opinion, noted that criminal sodomy laws not

77. See Wilson, Filosa, and Fennel, supra note 6, at 483–84.
78. See Amaral, supra note 72, at 1, 11.
79. Id. at 12.
81. See Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (recognizing the right to marry as protected under the fundamental "right of privacy" implicit in the Fourteenth Amendment's Due Process Clause). See also Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding the right to choose one's marriage partner without intervention is a "fundamental freedom" protected by the Fourteenth Amendment's Due Process Clause).
82. See Roe v. Wade, 410 U.S. 113, 154 (1973) (holding "the right of personal privacy includes the abortion decision"); Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (extending the right to unmarried persons); Griswold, 381 U.S. at 485–86 (recognizing the right of married persons to make decisions regarding procreation without governmental inference).
83. See Lawrence v. Texas, 539 U.S. 558, 567 (2003) (noting intimate association is merely a part of the choice to engage in personal relationships protected by the Constitution); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("the most intimate and personal choices a person may make . . . are central to the liberty protected by the Fourteenth Amendment.").
84. 539 U.S. at 558.
only prohibit a particular criminal act but also "seek to control a personal relationship that . . . is within the liberty of persons to choose without being punished as criminals."\(^5\) Hence, the right of privacy provides Americans with protection for decisions and actions that are essential to defining themselves and their place in the world, including the right to engage in intimate associations.\(^6\)

Some states, such as California, have enumerated privacy rights written into their state constitutions.\(^7\) Article I, section 1, of the California Constitution provides citizens with a right to pursue and obtain privacy.\(^8\) In 1972, when California voters approved Proposition 11, the Privacy Initiative, the actual word "privacy" was added to section 1.\(^9\)

There are three significant differences between the right as stipulated in California's Constitution and its counterpart in the Federal Constitution. First, the California right is enumerated explicitly in the state constitution,\(^10\) which critics of the federal right to privacy often cite as a flaw.\(^11\) Second, the federal right may only be enforced against state actors,\(^12\) whereas California's right may provide

\(^{85}\) Id. at 567.

\(^{86}\) See Bowers v. Hardwick, 478 U.S. 186, 205 (Blackmun, J., dissenting) (asserting that "intimate sexual relationships" deserve constitutional protection because individuals use them to define themselves). Subsequently, the court in Lawrence v. Texas overturned Bowers, noting that the dissenting opinion had this issue right. 539 U.S. at 567. The Court in Lawrence also refers to its opinion in Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992), which confirmed that "our laws and tradition afford constitutional protection to personal decisions" relating to marriage, procreation, contraception, family relationships, child rearing, and education. Id. at 574. The Court in Casey explained that these matters involve the most intimate and personal choices a person may make in their lifetime, central to dignity, autonomy, and to the liberties protected by the Fourteenth Amendment. Casey, 505 U.S. at 851. "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." Id.


\(^{88}\) CAL. CONST. art. I, § 1.

\(^{89}\) Hill v. NCAA, 865 P.2d 633, 641 (Cal. 1994).

\(^{90}\) CAL. CONST. art. I, § 1 (listing as inalienable rights of all Californians "pursuing and obtaining safety, happiness, and privacy").

\(^{91}\) Griswold v. Connecticut, 381 U.S. 479, 530 (1965) (Stewart, J., dissenting) ("I can find no such general right of privacy in the Bill of Rights [or] in any other part of the Constitution.").

\(^{92}\) See Planned Parenthood of Se. Pa., 505 U.S. at 849 (holding that the Constitution places limits on a state's right to interfere with a person's "most basic decisions about family and parenthood").
a cause of action against either a governmental entity or a private party. 93 Third, the California right is generally broader in scope than the federal right. 94

However, despite these clear examples of how California’s privacy right is broader in scope, California courts have not explicitly expanded the right regarding marital and sexual decisions beyond the scope allowed by the Federal Constitution. 95 Because the Federal Constitution’s privacy right has been extended to protect intimate associations, many would argue that the California right protects intimate associations at least to the same extent as under the Federal Constitution. 96 Notably, the California court in Ortiz v. L.A. Policy Relief Ass’n, Inc., held that the right of intimate association is a fundamental right under state and federal law. 97

B. The Constitutional Privacy Right as a Limit to Private Employers’ Conduct

California courts recognize the state constitution’s Article I right of privacy as a potential limitation on conduct by private employers in three areas: drug testing, psychological screening, and, importantly, in relation to no-fraternization policies and terminations based on marriage. 98 Although past cases have utilized either a compelling interest or rational relationship test, recent cases reveal a shift in judicial opinion on this matter. Recently, courts have expressed a preference to balance the employee’s right of privacy against the

94. See Planned Parenthood Affiliates of Cal. v. Van De Kamp, 226 Cal. Rptr. 361, 378 (Cal. Ct. App. 1986) (affirming that the California Supreme Court has declared the state constitutional privacy right to be much broader than the privacy rights guaranteed by the Federal Constitution).
95. See, e.g., Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 808 (Cal. 1997) (explaining that California cases establish that the scope and application of the California Constitution’s right of privacy is broader and more protective of privacy, in many contexts, than the Federal Constitution’s privacy right).
96. See John C. Barker, Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions, 19 HASTINGS CONST. L.Q. 1107, 1134–35 (1992) (“Federal guarantees provide a floor below which states may not venture [but] above that floor, California courts are free . . . to define their own levels of protection.”).
97. See Ortiz v. L.A. Police Relief Ass’n, Inc., 120 Cal. Rptr. 2d 670, 678–79 (Cal. Ct. App. 2002) (“the right to marry and the right of intimate association are virtually synonymous” and that the right to marry is a fundamental one in this country, as guaranteed by state and federal law).

The explicit privacy right afforded by the California Constitution is valued and respected, even in the context of private employment.\footnote{100. See supra Part III.A for a discussion of the value and importance placed on the California privacy right, stated explicitly in the California Constitution.} However, where a company policy infringes employees’ privacy rights, if the employer justifies the infringement by showing a high level of impact on the employer or public safety, courts may justify a lesser standard when reviewing the constitutionality of that policy. In \textit{Ortiz}, the court addressed marriage under the state constitutional right of privacy.\footnote{101. \textit{Ortiz} challenged her termination as an employee for a private non-profit that contracted for the Los Angeles Police Department. She refused to end her engagement with a prison inmate despite her employer’s insistence that she would be terminated if she did not end the relationship or resign.\footnote{102. The Second District Court of Appeals recognized the “right to freedom of intimate association” as highly protected by federal and state constitutions.\footnote{103. The court noted that Ortiz’s relationship with the inmate had a substantial impact on Ortiz’s employer and the public. The conflict of interest at issue would likely impact the employer’s ability to adequately perform business, and public safety could be affected in such a manner as to justify a lesser standard of review.}} The employer urged Ortiz that it was a conflict of interest and a safety issue for her to be dating an inmate.\footnote{104. The court ultimately held that in \textit{Ortiz}, the employer’s actions did not implicate the constitutional right to marry because they did not actually prohibit Ortiz from marrying her inmate fiancé.\footnote{105. Although Ortiz’s employer strongly urged her to resign or end her relationship with the inmate, a no-fraternization policy was not in place in this case.\footnote{106. The court noted that Ortiz’s relationship with the inmate had a substantial impact on Ortiz’s employer and the public. The conflict of interest at issue would likely impact the employer’s ability to adequately perform business, and public safety could be affected in such a manner as to justify a lesser standard of review.}}

The court found Ortiz’s employer’s invasion of her privacy right “‘serious’ in every sense of the word,” and it debated at length about which standard to apply.\footnote{107. See \textit{Wilkinson v. Times Mirror Corp.}, 264 Cal. Rptr. 194, 202 (Cal. Ct. App. 1989) (stating that “a court must [engage] in a balancing of interests” in deciding claims alleging an invasion of privacy rights).} However, the court ultimately held that in \textit{Ortiz}, the employer’s actions did not implicate the constitutional right to marry because they did not actually prohibit Ortiz from marrying her inmate fiancé.\footnote{108. Id. at 674.} The court noted that Ortiz’s relationship with the inmate had a substantial impact on Ortiz’s employer and the public. The conflict of interest at issue would likely impact the employer’s ability to adequately perform business, and public safety could be affected in such a manner as to justify a lesser standard of review.\footnote{109. Id. at 675.}
situation. Thus, the court applied a lesser standard of rational basis scrutiny, one that was much more favorable for Ortiz's employer. This standard required a showing of merely a rational relationship between the employer's actions and the right implicated, instead of a compelling interest test. One can infer from the Ortiz decision that courts will more narrowly assess violations on the privacy rights of employees where prohibitions are clearly placed on employees' rights to engage in intimate associations with co-workers. The Ortiz decision may also arguably establish that where an employer's prohibitions of off-duty intimate association between co-workers do not implicate public safety or conflicts of interest, the court will grant a higher standard of review, one more favorable to the employees.

C. Recognizing the Constitutional Right of Privacy as a Basis for Wrongful Discharge in Violation of Public Policy Claims Involving Off-Duty Intimate Association

California and most other states recognize the wrongful discharge cause of action. This type of claim provides a remedy for adverse employment actions in certain circumstances. Since California was the first state to recognize such a tort claim for violation of public policy, the leading California Supreme Court case on the issue, Tameny v. Atlantic Richfield Co., has become the namesake of these so-called "Tameny" claims. The purpose of the wrongful discharge cause of action is to promote a state's public policy by prohibiting employment actions that are contrary to it.

To determine if Tameny claims can be used to challenge wrongful discharge under no-fraternization policies, one must determine whether California's constitutional privacy right is considered a "public policy" supporting this wrongful discharge claim for termination based on off-duty intimate association. California courts use a four-part test to determine this. The policy must be: 1) based on constitutional or statutory provision; 2) for the benefit of the

109. Id. at 686.
110. Id.
111. Id.
112. See ROTHSTEIN, supra note 3 (stating that "courts have upheld the discharge of employees for dating or marrying coworkers.").
113. Id.
114. 610 P.2d 1330 (Cal. 1980).
116. Id.
117. Id.
Intimate association protections under the California Constitution’s privacy right appear to qualify under this four-prong test.\footnote{See Eric Shiners, Keeping the Boss Out of the Bedroom, 37 McGeorge L. Rev. 449, 475 (2006) (explaining the view that protection of intimate association fits the four prong “public policy” test: 1) intimate association is clearly based on a constitutional provision, an enumerated privacy right; 2) upholding the privacy right in an individual case will also benefit the public by limiting employers’ abilities to infringe those rights; 3) protection of intimate association has been part of California law for at least a decade; and 4) California courts have described intimate association protections as a fundamental right).}

Federal and California law clearly recognize a fundamental right of privacy regarding intimate association between consenting adults. The U.S. Supreme Court strongly emphasized its view that personal relationships, including the intimate association they include, are protected by the U.S. Constitution.\footnote{Lawrence v. Texas, 539 U.S. 558, 567 (2003).} As the Court emphasized, this is because of their importance in defining one’s place in the world.\footnote{Id. at 574 (quoting Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992)) (stating that “at the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.”).} California’s enumerated constitutional privacy right must at least protect the guarantees afforded under the federal right.\footnote{See Barker, supra note 96, at 1133.} Therefore, concept of free choice about intimate association expressed in Lawrence is incorporated into California’s constitutional privacy regime.

Additionally, California places a high value on protecting intimate association between consenting adults. California courts have consistently recognized “intimate association” as one of the activities protected under the State’s privacy guarantee, in article I of the California Constitution.\footnote{See Vinson v. Superior Court, 239 Cal. Rptr. 292, 298 (Cal. Ct. 1987).} However, California courts have not, to date, held a no-fraternization policy to be a violation of the right to privacy—through the constitutional protection of intimate associations between consenting adults as a basis for wrongful discharge in violation of public policy.\footnote{See Warfield v. Peninsula Golf & Country Club, 896 P.2d 776, 794 (Cal. 1995).}

\footnote{Silo v. CHW Med. Found., 119 Cal. Rptr. 2d 698, 703 (2002).}
IV. Proposal to Remedy the Problems

Although California courts have not yet recognized the constitutional protection of intimate association as a basis for a wrongful discharge in violation of public policy, there is proof that such a holding could rest on precedent. The California Constitution, at a minimum, incorporates protections of the kind expressed in Lawrence v. Texas. In Lawrence, the Supreme Court expressed strong protections of intimate relations between persons because of their importance in defining one's place in the world. In addition to this implied incorporation, the California courts have continually recognized strong protections to personal relationships and intimate association between consenting adults as an activity protected under the California Constitution's explicit right to privacy.

California courts could use the right to privacy, explicitly enumerated in the state's Constitution, to protect the intimate associations that are infringed upon through strict no-fraternization policies. In many strict policies, employers may prohibit dating between employees altogether, regardless of the employees' pay, rank, or department. In these situations, it is much more difficult for employers to argue that the no-fraternization policy will prevent harm to another person or the public. As the court in Lawrence stated, there is a "general rule" that the state [or private actors, as applied to California state law] cannot "define the meaning of [a personal] relationship . . . or set its boundaries" if there is no harm to another person or the public.

Where the strictest no-fraternization policies are used, the court has held that employers must support such a strict policy with a higher standard of review than rational basis scrutiny. In Ortiz, strict no-fraternization policies were in place to restrict all dating or marriage among co-workers without a finding by the employer that such a policy is strongly supported by interests of public safety and avoidance of conflicts of interest. The court in Ortiz held that it may review this strict policy in a light more favorable to the employee, utilizing a higher standard of review than rational basis scrutiny.

126. See supra notes 83, 86, 120.
127. See supra notes 83, 121.
128. See supra Part III.A.
130. See supra Part III.B (discussing the implications of Ortiz on the standard of review).
131. Id.
The Ortiz court also reiterated the view that restrictions on intimate associations of employees implicate serious privacy rights violations.\textsuperscript{132}

Opponents of policies that prohibit dating among employees may now have more ammunition: the Seventh Circuit’s opinion in Ellis v. UPS. The court in Ellis expressed severe misgivings about supporting the termination of what the court describes as “by all accounts . . . a good employee” under a strict no-fraternization policy.\textsuperscript{133} Although the unconstitutionality of UPS’s “no-fraternization” policy was not raised by Ellis, the court explicitly expressed that their holding for Ellis’s employer “should not be construed as an endorsement of the UPS nonfraternization policy.”\textsuperscript{134} The court notes that when a company like UPS runs “expensive ads that ask ‘What can Brown do for you?’” it might be wise for [UPS] to ask if the policy is worth all the fuss this case has created.\textsuperscript{135} The court powerfully concluded by stating, “Although UPS . . . comes out on top in this case, love and marriage are the losers. Something just doesn’t seem quite right about that.”\textsuperscript{136}

V. Conclusion

Due to the absence of legislative initiative to protect employees’ constitutionally recognized privacy rights, California courts should be driven to recognize a public policy claim by employees for wrongful termination based on lawful off-duty conduct. The courts should look to public policy, the state and federal constitutions, the widespread nature of co-worker dating, and the inherent problems with these policies in striking down the strictest forms of no-fraternization policies. Employees challenging a company’s no-fraternization policy in a California court have available to them a claim for wrongful discharge under public policy, and California courts should recognize this claim. In the arena of no-fraternization policies, the scales have been shifted dramatically to favor employers. Courts should use the California Constitution’s explicit right of privacy provision to overrule strict no-fraternization policies in violation of clear public policy. Courts should recognize that many of the strictest no-fraternization policies strip employees of their rights to engage in legal, off-duty intimate associations with little or no compelling

\textsuperscript{133.} Ellis v. UPS, 523 F.3d 823, 830 (7th Cir. 2008).
\textsuperscript{134.} Id.
\textsuperscript{135.} Id.
\textsuperscript{136.} Id.
employer interests to support them. These actions would help to tip the scales back to a more neutral position between employers' and employees' rights and create a more stable and impartial work environment for all.