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Sex as a Pedagogical Failure

ABSTRACT. In the early 1980s, U.S. universities began regulating sexual relationships between professors and students. Such regulations are routinely justified by a rationale drawn from sexual-harassment law in the employment context: the power differential between professor and student precludes the possibility of genuine consent on the student's part. This rationale is problematic, as feminists in the 1980s first observed, for its protectionist and infantilizing attitude toward (generally) women students. But it is also problematic in that it fails to register what is truly ethically troubling about consensual professor-student sex. A professor's having sex with his student constitutes a *pedagogical* failure: that is, a failure to satisfy the duties that arise from the practice of teaching. What is more, much consensual professor-student sex constitutes a *patriarchal* failure: such relationships often feed on, and reinforce, women's second-class standing in higher education. As such, these relationships can thwart the legal right of women students, under Title IX, to exist in the university on equal terms with their male counterparts. Whether or not we should ultimately favor such an interpretation of Title IX—whether or not, that is, it would render campuses ultimately more equal for women and other marginalized people—it is clear that university professors need to attend more carefully to the sexual ethics of their own practice.

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INTRODUCTION

In 2010, Yale University announced a change in its policy on consensual sexual relationships between faculty members and undergraduate students.¹ Previously, Yale had prohibited faculty members from having relationships with students, undergraduate or graduate, with whom they had or were likely to have a supervisory relationship.² That policy was devised in 1997, after an apparently consensual affair between a seventeen-year-old freshman and her mathematics professor left the student feeling, in her words, “betrayed” and “used.”³ The new 2010 policy forbade faculty members from sexual relations with any current Yale undergraduate whatsoever. (The rules for faculty-graduate student relationships remained unchanged.⁴) Several other universities swiftly followed Yale’s example, including Harvard,⁵ the University of Pennsylvania,⁶ Northwestern,⁷ the

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1. Carole Bass, *University Bans Faculty-Student Sex*, YALE ALUMNI MAG. (Mar.-Apr. 2010), <https://yalealumnimagazine.com/articles/2740-university-bans-faculty-student-sex> [<https://perma.cc/P9YY-EF8T>].
 2. Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 MICH. J. GENDER & L. 79, 91 (1999).
 3. Jeffrey Toobin, *The Trouble with Sex*, NEW YORKER 48, 54 (Feb. 9, 1998), <https://archives.newyorker.com/newyorker/1998-02-09/flipbook/048> [<https://perma.cc/HBE3-CJB6>]. Toobin laments that the mathematics professor, Jay Jorgensen, and others like him, “can expect . . . to have their careers destroyed.” *Id.* at 54. Jorgensen is currently a tenured professor at the City College of New York. *Jay Jorgenson*, CITY COLLEGE N.Y., <https://www.cuny.cuny.edu/profiles/jay-jorgenson> [<https://perma.cc/472D-CTF6>].
 4. Bass, *supra* note 1.
 5. Susan Svrluga, *Harvard Formally Bans Sexual Relationships Between Professors and Undergrads*, WASH. POST (Feb. 5, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/02/05/harvard-formally-bans-sexual-relationships-between-professors-and-undergrads> [<https://perma.cc/62KR-Y2K7>].
 6. Rebecca Tan, *Penn Bans Sexual Relations Between Faculty and Undergraduates in Significant Policy Change*, DAILY PENNSYLVANIAN (Mar. 25, 2018), <https://www.thedp.com/article/2018/03/pritchett-provost-consensual-sex-policy-faculty-undergraduates-ivy-league-shift-upenn-philadelphia> [<https://perma.cc/CE2Q-8MUC>].
 7. *Consensual Romantic or Sexual Relationships Between Faculty, Staff and Students*, NW. U. (Jan. 13, 2014), https://policies.northwestern.edu/docs/Consensual_Relations_011314.pdf [<https://perma.cc/8H7X-NVYL>].

University of Connecticut,⁸ Stanford,⁹ MIT,¹⁰ Columbia,¹¹ and Duke.¹² The architect of Yale's 2010 policy, Deputy Provost Charles Long, had been advocating for the stronger blanket prohibition on faculty-undergraduate relationships since 1983 but had been thwarted by both civil libertarians,¹³ who thought such relationships were a private matter, and feminists, who worried that a prohibition would infantilize women students.¹⁴ Given the decades of resistance that Long's campaign faced, it is interesting that, when the policy did finally change, it prompted little outcry and, indeed, much apparent approval from other universities. Behind this reversal is a story of important shifts: within antidiscrimination law, within campus regulatory structures, and within feminist thinking about the relationship of sex to power.

Part of my task here is to tell that story, so that we may understand how the regulatory treatment of consensual faculty-student sex came to have its current shape. I am particularly interested in the standard rationale that now undergirds prohibitions on faculty-student sex—a rationale borrowed from employment sexual-harassment law—according to which power differentials between professors and students preclude the possibility of genuine consent. Such a rationale is problematic for the reason that feminists in the 1980s first said: it strips (overwhelmingly) women students of their agency, inverting the rapist's logic of “no means yes” into the protectionist logic of “yes means no.” But it is also problematic in that it fails to register what is truly ethically troubling about consensual faculty-student sex. A professor's having sex with his student constitutes a *pedagogical* failure: that is, a failure to satisfy the duties that arise from the teacher-student relationship. Implicit in that relationship is the promise that the teacher will work to equalize the asymmetry in knowledge between him and his student. When the teacher takes the student's longing for epistemic power as an occasion for his own gratification, allowing himself to be—or, worse, making himself—the object of her desire, he has failed her as a teacher.

8. Svrluga, *supra* note 5.

9. *Consensual Sexual or Romantic Relationships in the Workplace and Educational Setting*, STAN. U. (Nov. 21, 2017), <https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-2#anchor-24451> [<https://perma.cc/YN2B-CH9S>].

10. Colleen Flaherty, *Relationship Restrictions*, INSIDE HIGHER ED (May 24, 2018), <https://www.insidehighered.com/news/2018/05/24/academe-sees-new-wave-faculty-student-relationship-restrictions-era-me-too> [<https://perma.cc/4HMQ-4E77>].

11. *Id.*

12. *Id.*

13. Email from Charles Long, Deputy Provost, Yale Univ., to author (Oct. 20, 2019) (on file with author).

14. Bass, *supra* note 1.

Thus, what is fundamentally at issue in consensual professor-student sex is not whether the student's consent is genuine but whether sex with one's student is compatible with being a good teacher. What is more, much professor-student sex, in its dominant mode—that is, between male professor and female student—constitutes not only a *pedagogical* failure but also a *patriarchal* failure.¹⁵ Such relationships often feed on, and reinforce, women's second-class standing in higher education. As such, these relationships plausibly thwart the legal right of women students under Title IX to exist in the university on equal terms with their male counterparts. While genuinely consensual faculty-student relationships do not constitute sexual harassment, they plausibly can and do often constitute sex discrimination. Whether or not we should ultimately favor such an interpretation of Title IX—whether or not, that is, we think that it would render campuses ultimately more equal, not just for women but also for nonwhite, queer, immigrant, working-class, and precariously employed people—it is clear that university teachers need to attend more carefully to the sexual ethics of their own practice. The demand here is not only prudential—a matter of increased legal liability or administrative pressure—but also pedagogical: a question of our ethical duties as teachers.

I. THE “POWER DIFFERENTIAL, NO CONSENT” RATIONALE

The existence of university sexual-harassment policies and procedures is one of the great legacies of feminist activism and jurisprudence of the late 1970s and 1980s. While employment discrimination “on the basis of sex” had been prohibited since the Civil Rights Act of 1964, women in the 1960s and 1970s struggled to invoke the law in their battle against what feminists would eventually come

15. My focus in this Feature is on this dominant form of faculty-student relationship. Some of what I say applies to other forms of the faculty-student relationship (for instance, female professor and male student, male professor and male student, female professor and female student). All such relationships, I think, involve a pedagogical failure. The argument I advance in Part V, *infra*, that consensual professor-student relationships can constitute sex discrimination, might well be extended to certain (for example, working-class, black, or immigrant) men. Consensual professor-student relationships that do not fit the dominant paradigm can also involve other forms of harm, which certainly merit attention: the cases of Jane Gallop (discussed in Part II, *infra*) and of Avital Ronell, an NYU professor of German and Comparative Literature who was recently found by the university to have sexually harassed her graduate student, are interesting examples here (discussed in Part IV, *infra*). See Zoe Greenberg, *What Happens to #MeToo When a Feminist Is the Accused?*, N.Y. TIMES (Aug. 13, 2018), <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html> [<https://perma.cc/P7J9-P5AU>].

to call sexual harassment in the workplace.¹⁶ In the early days of litigating such claims, judges often decided that workplace sexual harassment was a merely “personal” matter,¹⁷ or a natural and inevitable feature of working life.¹⁸ The somewhat more sophisticated among them insisted that sexual harassment did not constitute discrimination “on the basis of sex”: either because it was a harm that could (in principle, if rarely in practice) be equally perpetrated against male

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16. Catharine MacKinnon says that the term “sexual harassment” was first used as “anything approaching a term of art” by the Working Women United Institute (WWUI) in New York in 1975. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 250 n.13 (1979). In testimony to the U.S. Senate Labor and Human Resources Committee in 1981, Karen Sauvigne, program director and cofounder of WWUI, said that “in 1975 at the Institute’s formation we coined the phrase ‘sexual harassment’ and gave a name to a formerly taboo dilemma faced by millions of working women.” *Sex Discrimination in the Workplace: Hearing Before the S. Comm. on Labor & Human Res.*, 97th Cong. 517 (1981) (statement of Karen Sauvigne, Program Director, WWUI). According to Susan Brownmiller, the movement to combat “sexual harassment” was launched in 1975 at a meeting of feminist activists at Cornell, led by Lin Farley and including Sauvigne, who were organizing a speak-out against unwanted advances in the workplace. SUSAN BROWNMILLER, *IN OUR TIME: MEMOIR OF A REVOLUTION* 279 (1999). The speak-out was prompted by discussions in a seminar that Farley was running on women and work, in which students shared their stories of unwanted advances on the job, together with the case of Carmita Wood, a forty-four-year-old administrative assistant who had been relentlessly molested and abused by her boss, a Cornell physicist. *Id.* at 279-82. After her request for a transfer to another department was denied, Wood quit. *Id.* at 280. When she filed her claim for unemployment insurance, she indicated that her reasons for quitting were “personal”; her claim was denied. *Id.* at 280-81. In planning the speak-out, Farley and her fellow activists had to name what had been done to Wood and so many other women, and they decided on “sexual harassment.” *Id.* at 279-82. In 1975, MacKinnon received a newsletter from the women’s center at Cornell (where she had recently played a folk music gig), which described Wood’s case, asking: “Does anyone have any ideas for Carmita?” Toobin, *supra* note 3, at 50. MacKinnon later said that, when reading that, her “mind just went, This is it. It was an epiphany experience. Everything I had heard about what sex inequality is, is not it. This is it.” *Id.*
17. *Corne v. Bausch & Lomb, Inc.*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (“[The supervisor’s] conduct appears to be nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge.”).
18. See *Miller v. Bank of Am.*, 418 F. Supp. 233, 236 (N.D. Cal. 1976) (“The attraction of males to females and females to males is a natural sex phenomenon and it is probable that this attraction plays at least a subtle part in most personnel decisions.”); see also *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976) (citing *Miller* with approval); *Corne*, 390 F. Supp. at 163-64 (“The only sure way an employer could avoid such charges would be to have employees who were asexual.”).

subordinates¹⁹ or because it was a harm that only affected some women in a workplace—those who did not want to concede to their boss’s advances.²⁰

The feminists of this era, many of them working out of Cornell and Yale, fought to make the courts see what is to many of us now obvious: that far from a merely personal matter, or a matter orthogonal to gender, sexual harassment is central to women’s political subordination. In 1974, Paulette Barnes, a black woman who had been recently fired from her job as an administrative assistant at the Environmental Protection Agency, brought suit against her former employer for sex discrimination. Her boss, Douglas Costle, had fired Barnes after she refused his persistent sexual overtures. Barnes’s case was initially dismissed

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19. See *Tomkins*, 422 F. Supp. at 556 (“Title VII was enacted in order to remove those artificial barriers to full employment which are based upon unjust and long-encrusted prejudice It is not intended to provide a federal tort remedy for what amounts to physical attack motivated by sexual desire on the part of a supervisor In this instance the supervisor was male and the employee was female. But no immutable principle of psychology compels this alignment of parties. The gender lines might as easily have been reversed, or even not crossed at all. While sexual desire animated the parties, or at least one of them, the gender of each is incidental to the claim of abuse.”); *Corne*, 390 F. Supp. at 163 (“It would be ludicrous to hold that the sort of activity involved here was contemplated by the Act because to do so would mean that if the conduct complained of was directed equally to males there would be no basis for suit.”). It is interesting that this argument—that sexual harassment is *not* sex discriminatory because it can target both men and women—is at odds with the standard invoked by courts to explain why it was not discriminatory for a woman to be fired for getting pregnant. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 138-39 (1976) (rejecting such claims because there is no comparison class of pregnant men with which to establish differential treatment).
20. *Barnes v. Train*, No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev’d. sub nom. Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (“[S]he was discriminated against, not because she was a woman, but because she refused to engage in a sexual affair with her supervisor Regardless of how inexcusable the conduct of plaintiff’s supervisor might have been, it does not evidence an arbitrary barrier to continued employment based on plaintiff’s sex.”). The federal government mounted this “sex-plus” defense to sexual harassment charges against its employees in the 1970s. See *Barnes*, 561 F.2d at 990 (“[A]ppellee has argued that ‘(a)ppellant was allegedly denied employment enhancement not because she was a woman, but rather because she decided not to furnish the sexual consideration claimed to have been demanded’” (second alteration in original)); *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (“[S]ince the primary variable in the claimed class is willingness *vel non* to furnish sexual consideration, rather than gender, the sex discrimination proscriptions of the Act are not invoked.”), *vacated on other grounds sub nom. Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978); cf. *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1391 (W.D. Mo. 1979) (applying the sex-plus doctrine to uphold the firing of a female employee who violated dress code in part because “plaintiff’s affection for pantsuits is not an ‘immutable characteristic’”). For an early critical discussion of the claim that sex-plus discrimination is not sex discrimination, see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1171-72 (1971).

by the district court,²¹ but proceeded to the D.C. Circuit for review.²² Catharine MacKinnon, then a law student at Yale, slipped a working paper that would eventually become her groundbreaking *Sexual Harassment of Working Women* to one of the law clerks involved with *Barnes v. Costle*.²³ The court ruled that sexual harassment constituted sex discrimination and was thus a violation of Title VII of the Civil Rights Act.²⁴

In *Barnes*, the court identified the act of sex discrimination in the (presumed) heterosexual orientation of the harasser: “retention of [the plaintiff’s] job was conditioned upon submission to sexual relations[,] an exaction which *the supervisor would not have sought from any male*.”²⁵ Costle’s discriminatory act lay in his differential desire: he subjected only women to harassment. As the court itself noted,²⁶ had Costle been bisexual, targeting both women and men for sexual harassment, his actions would not have constituted sex discrimination. This reasoning established Barnes’s sex as a necessary condition of her harassment. But what about the claim, invoked in earlier cases,²⁷ that Barnes’s sex was not sufficient to explain why she had been harassed—that her harassment was a matter of sex *plus* her refusal to concede to her boss’s advances? Here, the court said that

21. *Barnes*, 1974 WL 10628.

22. *Barnes*, 561 F.2d 983.

23. Toobin, *supra* note 3, at 50.

24. One of the three judges on the case was George MacKinnon, Catharine MacKinnon’s father and a conservative Republican. In his concurring opinion, he wrote that “[s]exual advances may not be intrinsically offensive, and no policy can be derived from the equal employment opportunity laws to discourage them. We are not here concerned with racial epithets or confusing union authorization cards, which serve no one’s interest, but with social patterns that to some extent are normal and expectable. It is the abuse of the practice, rather than the practice itself, that arouses alarm.” *Barnes*, 561 F.2d at 1001 (MacKinnon, J., concurring). One can only convince one’s father of so much.

25. *Id.* at 989 (majority opinion) (emphasis added); see also *Williams*, 413 F. Supp. at 659 (using a similar analysis as the basis for finding that sexual harassment discriminates on the basis of sex).

26. *Barnes*, 561 F.2d at 990 n.55 (“It is no answer to say that a similar condition could be imposed on a male subordinate by a heterosexual female superior, or upon a subordinate of either gender by a homosexual superior of the same gender. In each instance, the legal problem would be identical to that confronting us now—the exaction of a condition which, but for his or her sex, the employee would not have faced. These situations . . . are to be distinguished from a bisexual superior who conditions the employment opportunities of a subordinate of either gender upon participation in a sexual affair. In the case of the bisexual superior, the insistence upon sexual favors would not constitute gender discrimination because it would apply to male and female employees alike.”).

27. See *Williams*, 413 F. Supp. 654; *Barnes*, 1974 WL 10628.

“it is enough that gender is a factor contributing to the discrimination in a substantial way,” citing the 1964 defeat on the House floor of a proposed amendment to Title VII that would have restricted its application to cases of discrimination “solely” on the basis of sex.²⁸

This understanding of sex discrimination as sex-differential treatment remains the one conventionally appealed to in the law.²⁹ But, as MacKinnon noted in *Sexual Harassment of Working Women*, this approach has at least two shortcomings. First, it requires showing that “a person of the opposite sex in the same position is not treated the same.”³⁰ This poses a problem when women are discriminated against in the absence of a class of similarly situated men who are treated differently: for example, when an employer’s sickness- and accident-benefits policy expressly excludes pregnancy. In *General Electric Co. v. Gilbert*, the Supreme Court found that such a policy did not discriminate on the basis of sex because it could not be shown that the employer treated pregnant women differently than a comparable group of men: pregnant men.³¹ Similarly, in *Rafford v. Randle Eastern Ambulance Service, Inc.*, a court found that it was not sex discrimination to fire men with moustaches and beards—because there were no mustachioed or bearded women who were being treated differently.³² Second, the differential-treatment approach to sex discrimination gives us a counterintuitive verdict in cases in which men and women alike are sexually harassed by a given superior.³³ That men are *also* being sexually harassed presumably does not make such actions any less discriminatory against women, and vice versa, yet the

28. *Barnes*, 561 F.2d at 990 (“It is clear that the statutory embargo on sex discrimination in employment is not confined to differentials founded wholly upon an employee’s gender.”); see also *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971) (per curiam) (finding that a prohibition discriminating against women with preschool-aged children was sufficient to constitute sex discrimination under Title VII); *Williams*, 413 F. Supp. at 657 (finding that the “retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances” constituted sex discrimination under Title VII); *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959, 961 (N.D. Ill. 1970) (holding that a “no-marriage” policy that applies only to female flight attendants is sex-discriminatory).

29. SUSAN M. OMILIAN & JEAN P. KAMP, 1 SEX-BASED EMPLOYMENT DISCRIMINATION § 11:9 (2019).

30. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 225 (1979).

31. 429 U.S. 125 (1976).

32. 348 F. Supp. 316 (S.D. Fla. 1972).

33. See *Barnes*, 561 F.2d at 990 n.55.

differential-treatment approach suggests that it does. As an early bit of commentary put it: “only the discriminatory application is being attacked, not the evil conduct itself.”³⁴

According to MacKinnon’s alternative inequality approach to sex discrimination, “[a] rule or practice is discriminatory . . . if it participates in the systematic social deprivation of one sex because of sex.”³⁵ What matters is not whether women and men are being treated differently, but rather whether women are being treated in a way that systematically reinforces their social and political subordination. A policy of firing pregnant women does this not only by excluding women from the benefits of work but also by reinforcing the traditional gendered division of reproductive labor.³⁶ A major advantage of the inequality approach is that it makes explicit the substantively normative nature of judgments about what does and does not constitute sex discrimination under the differential-treatment approach. The differential-treatment approach describes sex discrimination in apparently formal terms: it is a matter of whether an action or practice treats women and men, similarly situated, differently. But everything turns, as we see in *Gilbert*, on how “similarly situated” is understood: whether, for example, the situation of pregnant women is sufficiently similar to that of men suffering from temporary disabilities unrelated to pregnancy.³⁷ If these two groups are “similarly situated,” then General Electric’s policy is sex discriminatory; if not, then the policy is not. But judgments of similarity are irreducibly contextual—two distinct things are always similar in some respects and different in others—so anyone hoping to make the relevant similarity judgment in *Gilbert* (or any other sex-discrimination case) will be tacitly relying on a substantive normative judgment about whether it is, in fact, a case of sex discrimination. The problem with the differential-treatment approach is that it tries to characterize sex discrimination at a purely formal level, ignoring the social reality of sexual subordination. As a result, it licenses tacit reliance on (unjustified) normative judgments about which practices are problematic toward women—and men—and which are not, without explicitly acknowledging them. By contrast, MacKinnon’s inequality approach forthrightly assesses whether the practice in

34. Kerri Weisel, *Title VII: Legal Protection Against Sexual Harassment*, 53 WASH. L. REV. 123, 136 n.62 (1977).

35. MACKINNON, *supra* note 30, at 117.

36. While MacKinnon is alert to the need to account for those cases in which both men and women are sexually harassed, or when men alone are sexually harassed by either other men or by women, it is not clear that her inequality approach gives a wholly satisfying treatment of such cases. For a critical discussion, see Janet Halley, *Sexuality Harassment*, in *LEFT LEGALISM/LEFT CRITIQUE* 80 (Wendy Brown & Janet Halley eds., 2002).

37. For the sake of the dialectic only, I am presupposing that only women can get pregnant.

question is conducive to sex oppression, making explicit the irreducibly normative nature of judgments about sex discrimination.

While the courts have not explicitly taken up MacKinnon's inequality approach,³⁸ there are indications of its enduring influence. For example, although *Barnes v. Costle* invoked the differential-treatment account of sex discrimination,³⁹ the court also evoked the inequality account, by comparing, as Reva Siegel has observed, the sexual harassment endured by Barnes to cases in which employees were (uniquely) discriminated against for being in an interracial relationship: "Just as prohibitions on interracial sexual relationships play a role in the perpetuation of racial inequality, *Barnes* suggests, coerced sexual relations in the workplace play a role in the perpetuation of gender inequality."⁴⁰ Likewise, Congress invoked a different conception of sex discrimination when—in direct response to the Supreme Court's decision in *Gilbert* that firing pregnant women was not sex-discriminatory—it amended Title VII to include discrimination on the basis of pregnancy as a form of sex discrimination.⁴¹

In 1977, a few months before *Barnes* was decided, MacKinnon, then working as one of the leaders of the progressive New Haven Law Collective, helped a group of current and former Yale undergraduate women sue the school for both the sexual harassment they had suffered and the university's failure to have any

38. OMIAN & KAMP, *supra* note 29, § 11:9.

39. 561 F.2d 983, 989–90 (D.C. Cir. 1977).

40. Reva B. Siegel, *Introduction: A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 1, 14–15 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004).

41. 42 U.S.C. § 2000e(k) (2018); Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 1 (2009). The central argument marshalled by supporters of the Pregnancy Discrimination Act (PDA)—most notably the consortium of women's groups and feminist lawyers called the Coalition to End Discrimination Against Pregnant Workers—was that pregnancy was no different in kind from other temporary disabilities. See Pedriana, *supra*, at 12. This is an instance of the differential-treatment approach to discrimination. But the PDA's supporters also invoked an inequality approach. Susan Deller Ross, speaking for the Coalition on the House floor, argued, "[S]ince most women workers do bear children at some point in their working lives . . . [*Gilbert*] could thus be used to justify a whole complex of discriminatory employment practices designed to insure that women worker's [sic] role in the market place be confined to low-paying, dead-end jobs. . . . Such policies have a lifetime impact on women's careers." *Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing Before the Subcomm. on Emp't Opportunities of the H. Comm. on Educ. & Labor on H.R. 5055 and H.R. 6075*, 95th Cong. 31 (1977) (statement of Susan Deller Ross).

established mechanism to deal with such complaints.⁴² The resulting case, *Alexander v. Yale University*, was decided both by the district court and on appeal in favor of the university. Nonetheless, it established that sexual harassment, at least in its quid pro quo form,⁴³ constituted sex discrimination under Title IX of the Education Amendments Act of 1972.⁴⁴ Citing *Barnes*, the court noted that

it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII's ban against sex discrimination in employment.⁴⁵

The case prompted universities across the country to create sexual-harassment codes and grievance procedures, a requirement of Title IX that had until then been largely ignored.⁴⁶ These new regulatory structures were meant, among other things, to protect students from sexual harassment by their professors—either in the form of quid pro quo sexual threats and offers or in the form of a hostile learning environment created by unwanted sexual advances.⁴⁷

Soon, however, universities started turning their attention to sexual relationships between faculty and students that were, at least on their face, noncoercive.

42. For discussion of the context and legacy of *Alexander v. Yale University*, see Anne E. Simon, *Alexander v. Yale University: An Informal History*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 40, at 51-59.

43. 459 F. Supp. 1, 3 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980). The hostile-environment form of sexual harassment would not be recognized as sex discrimination under Title IX until 1993 in *Patricia H. v. Berkeley Unified School District*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993). The plaintiffs in the case were represented by Pamela Price, one of the original plaintiffs in *Alexander*.

44. 20 U.S.C. §§ 1681-1688 (2018).

45. *Alexander*, 459 F. Supp. at 4.

46. Simon, *supra* note 42, at 56.

47. In 1980, 30 percent of female seniors at the University of California, Berkeley reported harassment by at least one male professor. Elisabeth A. Keller, *Consensual Amorous Relationships Between Faculty and Students: The Constitutional Right to Privacy*, 15 J.C. & U.L. 21, 21 (1988) (citing Margaret D. Smith, *Must Higher Education Be a Hands-On Experience? Sexual Harassment by Professors*, 28 EDUC. L. REP. 693, 696 (1986)). Similarly, a 1981 survey of graduate and undergraduate women students at Iowa State University found that 43.2 percent reported receiving unwanted sexual attention from a professor. *Id.* (citing Jean W. Adams, Janet L. Kottke & Janet S. Padgitt, *Sexual Harassment of University Students*, 24 J.C. STUDENT PERSONNEL 484, 488 (1983)); see also BILLIE WRIGHT DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS 11 (2d ed. 1990) (“A familiar jest is ‘[w]here there has been a student body, there has always been a faculty for love.’”).

In a 1983 letter to faculty and students in Harvard's Faculty of Arts and Sciences, Dean Henry Rosovsky announced the Harvard Faculty Council's stance on faculty-student relationships, saying that such relationships are "always wrong" in the instructional context due to their "fundamentally asymmetric . . . nature."⁴⁸ Rosovsky warned that faculty-student relationships outside the instructional context "may also lead to difficulties."⁴⁹ That same year, the University of California's Assembly of the Academic Senate adopted a proposal to ban faculty-student sex in the supervisory context.⁵⁰ These highly publicized policy changes led many other universities to follow suit and create their own consensual relationship policies,⁵¹ including the University of Minnesota (1984),⁵² Temple University (1985),⁵³ MIT (1985),⁵⁴ the University of Michigan (1986),⁵⁵ the University of Iowa (1986),⁵⁶ the College of William & Mary (1991),⁵⁷ Tufts University (1992),⁵⁸ Indiana University (1992),⁵⁹ the University of Virginia (1993),⁶⁰ Amherst College (1993),⁶¹ Oberlin College (1993),⁶² Stanford University (1993),⁶³ Ohio Northern University (1995),⁶⁴ Rutgers University (1997),⁶⁵ Buffalo State

48. Frances L. Hoffmann, *Sexual Harassment in Academia: Feminist Theory and Institutional Practice*, 56 HARV. EDUC. REV. 105, 111-12 (1986).

49. *Id.* at 112.

50. *Id.* at 111.

51. *Id.* at 105.

52. Keller, *supra* note 47, at 22.

53. Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 844 n.255 (1988).

54. *Id.*

55. *Id.*

56. Keller, *supra* note 47, at 22.

57. Jack Hitt & William Kerrigan, *New Rules About Sex on Campus*, HARPER'S MAG. 33, 36 (Sept. 1993), <https://harpers.org/archive/1993/09/new-rules-about-sex-on-campus-2> [<https://perma.cc/PJY4-RDF8>].

58. Jim Morrison, *U-Va. Faculty Bans Sex with Students*, WASH. POST (Apr. 23, 1993), <https://www.washingtonpost.com/archive/local/1993/04/23/u-va-faculty-bans-sex-with-students/006e1c8a-ea15-4d71-b8a7-c1779a4dda09> [<https://perma.cc/SW8U-7RN5>].

59. Hitt & Kerrigan, *supra* note 57.

60. Morrison, *supra* note 58.

61. Hitt & Kerrigan, *supra* note 57.

62. *Id.*

63. *Id.*

64. Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 J. GENDER & L. 269, 271 (1996).

65. Mack, *supra* note 2, at 82 n.6.

College (1997),⁶⁶ and Yale University (1998).⁶⁷ In 1993, *Harper's Magazine* reported that "at least two dozen universities" had proscribed student-professor romances in "the last few years."⁶⁸ In the early 1990s, important professional organizations, including the American Council on Education, the National Education Association, the Association of American Law Schools, and the American Association of University Professors, began urging universities to formulate policies on consensual faculty-student relationships.⁶⁹ The resulting policies ranged from merely discouraging faculty-student relationships to forbidding them in actual or potential instructional and supervisory contexts to prohibiting them as a blanket rule.⁷⁰

This expansion of campus sexual-harassment policies in the 1980s and 1990s to include consensual relationships was driven by at least three forces. First was the radical social theory that underlay feminist efforts to transform antidiscrimination law, according to which, in the words of Kathryn Abrams, paraphrasing MacKinnon, "coercion is paradigmatic of heterosexual relations and constitutive of the social meaning of gender under gender inequality."⁷¹ Common heterosexual practices that were conventionally seen as benign and natural – the boss making a pass at his secretary, the professor trading grades for sex – were revealed as moves within a structure of domination and subordination, moves that both expressed and reinforced the social inequality of men and women. As with the inequality approach, this feminist account of sex discrimination was only ever partially internalized by antidiscrimination law. However, it did focus new suspicion on seemingly consensual heterosexual relationships, especially those marked by a formal asymmetry in power – as in the paradigm case of a teacher-student relationship.

A second factor in the expansion of consensual-relationship policies was the Supreme Court's 1986 decision in *Meritor Savings Bank, FSB v. Vinson*, which

66. Peta Cox, *Epistemophilia: Rethinking Feminist Pedagogy*, 25 AUSTL. FEMINIST STUD. 79, 89 n.8 (2010).

67. Mack, *supra* note 2, at 91.

68. Hitt & Kerrigan, *supra* note 57, at 33.

69. See Jennifer L. Gossett & Maria L. Bellas, *You Can't Put a Rule Around People's Hearts . . . Can You?: Consensual Relationships Policies in Academia*, 35 SOC. FOCUS 267, 270 (2002); Young, *supra* note 64, at 272 & nn.14-16.

70. For a taxonomy of different policy types, see Young, *supra* note 64, at 273-76.

71. Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761, 763 (1989); see also Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 635, 635-37 (1983). For pioneering feminist theorizing of sexual harassment, see generally LIN FARLEY, *SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB* (1978); and MACKINNON, *supra* note 30.

held that an employee's consensual sexual involvement with a supervisor was not necessarily a bar to a finding of sexual harassment under Title VII.⁷² Mechelle Vinson was a twenty-two-year-old woman who, while working as a bank teller, was persistently coerced into having sex with her supervisor and branch manager Sidney Taylor over the course of four years, until he fired her.⁷³ Like Paulette Barnes before her, and the women in other key sexual-harassment cases,⁷⁴ Vinson was black. It is black women in the United States who have disproportionately borne the costs of both sexual harassment and the legal battle against it. The Court pointed out that even if Vinson had consented to Taylor's sexual demands in order to avoid being fired, this did not make his sexual advances wanted. A female subordinate, the Court suggested, might consent to a sexual relationship because of an implied quid pro quo threat, in which case the consent does not suffice to make the advances wanted. "The fact that sex-related conduct was 'voluntary,' in the sense that the complainant was not forced to participate against her will," the Court wrote, "is not a defense," for the "gravamen of any sexual harassment claim is that the alleged sexual advances were 'unwelcome.'"⁷⁵ Extending the logic of *Meritor* to the university context, it suddenly became possible that professors were sexually harassing the women students with whom they were having consensual sex. Women students' consent to such relationships might, like Vinson's consent to having sex with her boss, be an expression not of genuine want, but fear. Substantial differences in power—supervisor and worker, professor and student—cast doubt on the possibility of genuine consent.

A third factor was the Equal Employment Opportunity Commission's (EEOC) 1990 amendment to its guidance on Title VII,⁷⁶ which provided that

72. 477 U.S. 57, 68 (1986). For a discussion of the implications of *Meritor* for universities, see Keller, *supra* note 47, at 24-26.

73. DeNeen L. Brown, *She Said Her Boss Raped Her in a Bank Vault. Her Sexual Harassment Case Would Make Legal History*, WASH. POST (Oct. 13, 2017, 11:17 AM EDT), <https://www.washingtonpost.com/news/retropolis/wp/2017/10/13/she-said-her-boss-raped-her-in-a-bank-vault-her-sexual-harassment-case-would-make-legal-history> [https://perma.cc/5BVX-6KGP].

74. See, e.g., *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 460 (E.D. Mich. 1977) (involving a black female assistant manager suing a white male employer); *Miller v. Bank of Am.*, 418 F. Supp. 233, 234 (N.D. Cal. 1976) (involving a black female clerk suing a white male supervisor). The central plaintiff in *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1979), *aff'd*, 631 F.2d 178 (2d Cir. 1980), Pamela Price, was also black. Statement by Pamela Price, *Alexander*, 459 F. Supp. 1 (No. N-77-277).

75. *Meritor*, 477 U.S. at 68.

76. U.S. Equal Emp't Opportunity Comm'n, No. N-915.048, Policy Guidance on Employer Liability for Sexual Favoritism Under Title VII (Jan. 12, 1990), <https://www.eeoc.gov/policy/docs/sexualfavor.html> [https://perma.cc/9HK5-RFX2].

employers may be held liable for unlawful sex discrimination against third parties who were negatively affected by the favoritism shown by a superior to a subordinate with whom he is in a relationship.⁷⁷ Extending the logic of *Meritor* and the EEOC guidelines from Title VII to Title IX, it was plausible that universities could be liable for sexual harassment that arose from apparently consensual relationships between faculty members and students, not only because such relationships failed to pass the “wantedness” test established by *Meritor* but also because they could generate third-party claims of hostile work environment due to favoritism.⁷⁸

While some feminists welcomed the creation of campus policies for consensual student-teacher relations,⁷⁹ others warned that they represented a betrayal of feminist principles.⁸⁰ The latter group took particular aim at the common rationale for these policies: that the large differential in power between teacher and student precluded or cast doubt on the possibility of genuine, noncoerced consent on the student’s part. Does not this rationale, feminist critics asked, strip (overwhelmingly) women students of their sexual agency, inverting the rapist’s logic of “no means yes” into the moralizing and protectionist logic of “yes means no”?⁸¹ Some feminists also argued that prohibitions on consensual student-

77. See Ann Pellegrini, *Interested Third Parties: A Response to Tania Modleski*, 26 CRITICAL INQUIRY 619, 623, 625 (2000).

78. Carol Sanger, *Consensual Sex and the Limits of Harassment Law*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 40, at 77, 87; Michael K. Wyatt, *Avoiding Sexual Abuse Claims After Meritor*, NAT’L L.J., Oct. 27, 1986, at 47, col. 2.

79. See, e.g., DZIECH & WEINER, *supra* note 47, at 170-81; ADRIENNE RICH, *Taking Women Students Seriously*, in ON LIES, SECRETS, AND SILENCE 237, 242-43 (1979); Chamallas, *supra* note 53, at 861-62; Phyllis Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantage of the ‘Fair’ Sex*, 53 ALB. L. REV. 95, 119-23 (1988); 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, 145-56 (1988); Caroline Forell, *What’s Wrong with Faculty-Student Sex? The Law School Context*, 47 J. LEGAL EDUC. 47, 70-72 (1997); Mack, *supra* note 2, at 82-85; Tania Modleski, *Fight the Power: A Response to Jane Gallop, James Kincaid, and Ann Pellegrini*, 26 CRITICAL INQUIRY 591, 599-600 (2000); Carol Sanger, *The Erotics of Torts*, 96 MICH. L. REV. 1852, 1879-81 (1998) (reviewing JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997)).

80. See, e.g., JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997); Carrie N. Baker, *Proposed Title IX Guidelines on Sex-Based Harassment of Students*, 43 EMORY L.J. 271, 296 n.121 (1996); Hoffmann, *supra* note 48, at 118; Ann Pellegrini, *Pedagogy’s Turn: Observations on Students, Teachers, and Transference-Love*, 25 CRITICAL INQUIRY 617, 617-25 (1999); Margaret Talbot, *A Most Dangerous Method*, LINGUA FRANCA (1997), <https://linguafranca.mirror.theinfo.org/Archive/method.html> [<https://perma.cc/SMT4-7B45>]; Young, *supra* note 64, at 269-302.

81. See GALLOP, *supra* note 80, at 38; Pellegrini, *supra* note 80, at 620; Young, *supra* note 64, at 270. For a more recent expression of this critique, see LAURA KIPNIS, *UNWANTED ADVANCES:*

teacher sex disproportionately harmed queer and other precariously-positioned faculty members;⁸² reinforced a hierarchical, antifeminist, and inhumane understanding of pedagogy;⁸³ and ignored the inherently personal, and indeed erotic, nature of the pedagogical enterprise.⁸⁴ (Male opponents of such bans, meanwhile, typically expressed their opposition in terms of the right to privacy and free association,⁸⁵ their distaste for prudery,⁸⁶ and, in one notorious case, the benefits to young women of losing their virginity to their male professors.⁸⁷) On the view of many feminists in the 1980s and 1990s, to extend sexual-harassment policies to cover consensual teacher-student relationships was to pervert the original motivation of those policies: to make campuses safer and freer for women.

Fraught debates about the regulation of teacher-student sex reflected broader debates within feminism of that period. Starting in the 1980s, some feminists rejected a MacKinnonite feminism that, as they saw it, made all women

SEXUAL PARANOIA COMES TO CAMPUS (2017) [hereinafter KIPNIS, UNWANTED ADVANCES]; and Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC. (Feb. 27, 2015), <https://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351> [<https://perma.cc/JR4T-CGEC>] [hereinafter Kipnis, *Sexual Paranoia*].

82. GALLOP, *supra* note 80, at 84-95; Hoffmann, *supra* note 48, at 115; Pellegrini, *supra* note 80, at 621-22; *see also* Kal Alston, *So Give Me Love, Love, Love, Love, Crazy Love: Teachers, Sex, and Transference?*, 1998 PHIL. EDUC. 366, 366 (cautioning against “invoking the power of the state, which does not have a good record of protecting those most vulnerable to its powers”). In *Naragon v. Wharton*, 572 F. Supp. 1117, 1123-24 (M.D. La. 1983), *aff’d*, 737 F.2d 1403 (5th Cir. 1984), the court upheld the sanctioning of a graduate student for having a consensual lesbian relationship with an undergraduate who was in her department but whom she did not teach, after the student’s parents complained. At the time, Louisiana State University did not have a prohibition on faculty-student relationships. The dean who sanctioned the graduate student also knew of an ongoing affair between a male faculty member and a female student over whom he had grading responsibility; the dean had declined to sanction the male faculty member. *See* Forell, *supra* note 79, at 68. For similar worries about “governance feminism” and the regulation of sex more broadly, *see* JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006); Halley, *supra* note 36, at 80-104; and Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015) [hereinafter Halley, *Trading the Megaphone*].
83. *See* GALLOP, *supra* note 80, at 69-71; Talbot, *supra* note 80.
84. *See* GALLOP, *supra* note 80, at 42-49; Talbot, *supra* note 80.
85. *See* Gary E. Elliot, *Consensual Relationships and the Constitution: A Case of Liberty Denied*, 6 MICH. J. GENDER & L. 47, 48-49 (1999); Hitt & Kerrigan, *supra* note 57, at 36; *see also* Keller, *supra* note 47, at 28-34 (cataloguing privacy-based rationales from courts regarding such policies).
86. *See* Hitt & Kerrigan, *supra* note 57, at 34; James R. Kincaid, *Pouvoir, Félicité, Jane, et Moi (Power, Bliss, Jane, and Me)*, 25 CRITICAL INQUIRY 610, 610-11 (1999).
87. *See* Hitt & Kerrigan, *supra* note 57, at 35-36.

victims and all heterosexual desire suspect, declaring themselves instead “pro-sex” or “sex-positive.”⁸⁸ These “Third Wave” feminists strongly criticized radical feminists for playing into the hands of politically ascendant conservatives by (as they saw it) reinforcing a Victorian paternalism that would ultimately be used to oppress and control women.⁸⁹ As Ann Snitow, Christine Stansell, and Sharon Thompson wrote in a gently critical letter to Adrienne Rich in 1981, “In the Reagan era, we can hardly afford to romanticize any old norm of a virtuous and moral sexuality.”⁹⁰ But in the last decade, and particularly in the wake of #MeToo, feminists have moved back toward a Second-Wave skepticism about sex across large power differentials. As an index of this shift, just compare how contemporary feminists would respond to a present-day Clinton-Lewinsky-type scandal to how feminists responded—or failed to respond—in the late 1990s, when it became clear that the world’s most powerful man had been receiving fellatio from a twenty-two-year-old intern.⁹¹

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88. For the *locus classicus*, see ELLEN WILLIS, *Lust Horizons: Is the Women’s Movement Pro-Sex?*, in *NO MORE NICE GIRLS: COUNTERCULTURAL ESSAYS* 3 (1992).
89. See, e.g., RENE DENFELD, *THE NEW VICTORIANS: A YOUNG WOMAN’S CHALLENGE TO THE OLD FEMINIST ORDER* 11 (1995); KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS* 146–50 (1993); NADINE STROSSEN, *DEFENDING PORNOGRAPHY: FREE SPEECH, SEX, AND THE FIGHT FOR WOMEN’S RIGHTS* 161–78 (1995); Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 22 (Carole S. Vance ed., 1984); Cathy Young, *The New Madonna/Whore Syndrome: Feminism, Sexuality, and Sexual Harassment*, 38 *N.Y.L. SCH. L. REV.* 257, 258 (1993).
90. Adrienne Cecile Rich, *Compulsory Heterosexuality and Lesbian Existence* (1980), 15 *J. WOMEN’S HIST.* 11, 38 (2003).
91. For women’s contemporary reactions to the Clinton-Lewinsky affair, see Francine Prose, *New York Supergals Love That Naughty Prez*, *OBSERVER* (Feb. 9, 1998), <https://observer.com/1998/02/new-york-supergals-love-that-naughty-prez> [<https://perma.cc/3HU3-KHPD>]; Marjorie Williams, *Clinton and Women*, *VANITY FAIR* (May 1998), <https://www.vanityfair.com/magazine/1998/05/williams199805> [<https://perma.cc/ZS8C-UUFA>]. For an excellent discussion of contemporary feminist reaction to the Clinton-Lewinsky affair, see *Slow Burn: Bedfellows*, *SLATE* (Sept. 26, 2018), <https://slate.com/podcasts/slow-burn/s2/clinton/e7/bedfellows> [<https://perma.cc/X4P7-6NVB>]. For more on the shift in women’s perspectives on the affair in the wake of #MeToo, see, for example, Monica Lewinsky, *Emerging from “The House of Gas Light” in the Age of #MeToo*, *VANITY FAIR* (Feb. 25, 2018), <https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo> [<https://perma.cc/UN5W-FAD7>]; Alyssa Mastromonaco, *What My Friendship With Monica Lewinsky Taught Me About #MeToo*, *POLITICO* (Mar. 8, 2019), <https://www.politico.com/magazine/story/2019/03/08/alyssa-mastromonaco-monica-lewinsky-metoo-225695> [<https://perma.cc/AD8H-AMR3>]; and Ashley Velez, *#MeToo Founder Tarana Burke Breaks Down Why Bill Clinton’s Affair with Monica Lewinsky Was an Abuse of Power*, *ROOT* (Oct. 16, 2018), <https://www.theroot.com/metoo-founder-tarana-burke-breaks-down-why-bill-clinton-1829795624> [<https://perma.cc/7UUS-N9S9>].

Correspondingly, regulation of teacher-student relationships has become increasingly common, and has faced, as in the case of Yale's 2010 policy change, little resistance from feminists.⁹² In 1989, only an estimated 17 percent of American universities had consensual relationship policies; by 2004, the estimate was 57 percent.⁹³ Since Yale's 2010 decision to prohibit all faculty-undergraduate relationships, many other universities have followed suit, crafting similarly strict policies; a 2014 survey of universities found that the number had risen to 84 percent.⁹⁴ Justifications for these policies almost invariably appeal to the differences in power between faculty and students; the previously mentioned study found that 98 percent of schools justified these restrictions on power-differential grounds.⁹⁵

Whatever we think of the policies it undergirds, the "power differential, no consent" rationale is problematic.⁹⁶ In *Meritor*, the observation that consent is no bar to a finding of sexual harassment is motivated by situations where a subordinate feels compelled to relent to a supervisor's advances because she fears the consequences of not doing so, even if there is no explicit threat made.⁹⁷ In such cases, a form of consent may be given, but of the sort that is compatible with unwantedness. The "power differential, no consent" rationale assimilates all professor-student relationships to the *Meritor* paradigm: that is, a paradigm in which apparent consent is, in fact, coerced. Or, more carefully put, the "power differential, no consent" rationale either assimilates all professor-student sex to the *Meritor* paradigm, or to what we might call an "incapacity" paradigm, according to which women students are incapable of consenting per se to sex with professors. The latter paradigm is suspect for the reasons many feminists have long said: most university students are legally adults, and to think of them as incapable of consent is both paternalistic and inconsistent with broader patterns of judgment about consent. The "power differential, no consent" rationale should only apply to those instances in which students, despite appearances, feel subtly coerced into consenting to sexual relationships with their professors.

92. A notable exception here is Laura Kipnis. See KIPNIS, UNWANTED ADVANCES, *supra* note 81; Kipnis, *Sexual Paranoia*, *supra* note 81.

93. Eileen Sullivan, *Perceptions of Consensual Amorous Relationship Policies (CARPs)*, 5 J.C. & CHARACTER (2004). (Note that the title of Sullivan's piece should have "Policies" for "Polices.")

94. Tara N. Richards et al., *An Exploration of Policies Governing Faculty-to-Student Consensual Sexual Relationships on University Campuses: Current Strategies and Future Directions*, 55 J.C. STUDENT DEV. 337, 342 (2014).

95. *Id.* at 344.

96. For appeals to this rationale in defense of regulations on professor-student relationships, see, for example, DZIECH & WEINER, *supra* note 47, at 25, 75; Coleman, *supra* note 79, at 95-96; and DeChiara, *supra* note 79, at 142.

97. 477 U.S. 57, 68 (1986).

What of those cases – we all know of them – in which women students enthusiastically and willfully enter into such relationships and indeed initiate those relationships themselves?

Of course, that there are some teacher-student relationships to which the *Meritor* paradigm does not apply – cases, that is, that cannot be plausibly described as coercive – does not show us that the “power differential, no consent” rationale should be thrown out. The problem is that such relationships are not, in fact, an exception, but one important paradigm of professor-student relationships. I do not mean to suggest that it is the only paradigm. There is also (the well-instantiated) paradigm of the lecherous professor who subtly and not-so-subtly imposes himself on his women students, sometimes coercing them into acquiescence. But there is also the paradigm of the “hot” professor, with whom the student sleeps not because she is afraid of what he might otherwise do but because she finds him sexy and desirable, and whose advances are very much, at the time at least, welcome. The “power differential, no consent” rationale cannot plausibly account for what is troubling about such cases. But there *is* something troubling – something troubling, say, about the male professor who happily accepts the infatuated attentions of his freshman student, has sex with her, dates her. The problem, I suggest, is that he was supposed to be *teaching* her.

The power differential between teacher and student is not itself undifferentiated: it is not simply that the teacher has more influence on how the student’s life will go than the student has on the fate of her teacher. Indeed, thinking of the power relationship between teacher and student this way is what invites the *Oleanna*-style insistence that, really, women students have all the power, because they can get their male professors fired.⁹⁸ Teachers and students are divided by a profound *epistemic* asymmetry. Teachers know and understand certain things; students want to know and understand those same things. Implicit in the student-teacher relationship is the promise of at least a partial equalization of that asymmetry: that the teacher will confer on the student some of his power and help her become, along a certain dimension, more like him. In the best cases, students find this asymmetry intoxicating, frustrating, and an occasion for desire – that is, a spur to learning. When the teacher takes the student’s longing for epistemic power and transposes it into a sexual key, allowing himself to be – or worse, *making* himself – the object of her desire, he has failed her as a teacher. And this is so even if the student has fully and enthusiastically consented.

98. *Oleanna* is a play by David Mamet that premiered in 1992. DAVID MAMET, *OLEANNA* (1992). It depicts an escalating conflict between a male professor and his female student, which leads the student, egged on by her feminist group, to accuse her professor of sexual harassment and then attempted rape. *Id.* He is denied tenure and suspended from his job. *Id.*

II. TEACHING AND TRANSFERENCE

In 1992, Jane Gallop, Distinguished Professor of English and Comparative Literature at the University of Wisconsin at Milwaukee, was accused of sexual harassment by two of her graduate students. After a long investigation, the university found Gallop guilty of violating, with respect to one of the students, a prohibition on “consensual amorous relations” between faculty and students. Five years later, Gallop published a book, *Feminist Accused of Sexual Harassment*, defending herself against the accusations.⁹⁹ She did not deny the basic facts: that she had performatively and passionately kissed one of the students at a bar in front of other students; that she had announced at a conference that graduate students were her “sexual preference”; that she purposely made her pedagogical relationships intense, flirtatious, and sexually charged; that she had multiple consensual sexual affairs with students, both undergraduate and graduate, before 1982, when she met her long-term partner.¹⁰⁰ Instead, Gallop denied that there was anything wrong with any of this:

At its most intense – and, I would argue, its most productive – the pedagogical relation between teacher and student is, in fact, a “consensual amorous relation.” And if schools decide to prohibit not only sex but “amorous relations” between teacher and student, the “consensual amorous relation” that will be banned from our campuses might just be teaching itself.¹⁰¹

The pedagogical relationship, in its ideal form, is already an amorous, erotic relation, so what harm could there be in allowing that relation to physically manifest in sex? To rule out student-faculty sex is to rule out erotically charged pedagogy – the best sort of pedagogy, Gallop thinks.

In her formal response to the students’ complaints, Gallop appealed to Freud’s notion of transference, the patient’s tendency to unconsciously project feelings, both positive and negative, associated with important childhood figures (usually parents) onto the analyst.¹⁰² In many cases, the result is what Freud

99. GALLOP, *supra* note 80, at 1.

100. GALLOP, *supra* note 80, 90–91 (describing passionately kissing one of her students at a bar); *id.* at 86 (noting that she had announced at a conference that graduate students were her sexual preference); *id.* at 11–12, 20, 33, 44–49, 52–53 (describing how she purposely made her pedagogical relationships intense, flirtatious, and sexually charged); *id.* at 44–48, 52–53 (saying she had multiple consensual sexual affairs with students, both undergraduate and graduate, before 1982, when she met the man who became her long-term partner).

101. *Id.* at 57.

102. *Id.* at 56.

called “transference-love,” a projection of a child’s devotion, infatuation, and eagerness to please from parent to analyst. Transference, Gallop said, “is also an inevitable part of any relationship we have to a teacher who really makes a difference.”¹⁰³ Falling in love with our teachers, in other words, is a sign that pedagogy has gone well.

Perhaps. Certainly, those of us who ended up as professors almost invariably did so because some teacher aroused in us intense feelings of infatuation, desire, and want. And those of us who teach will likely recognize something akin to transference in not only those students in whom we arouse similar desires but also in those students for whom the exercise of our pedagogical authority is like a mortal attack on their independence, prompting outsized hostility rather than (outsized) adoration.¹⁰⁴ Even so, Gallop failed to notice that central to Freud’s theory of transference – and to the contemporary practice of psychotherapy¹⁰⁵ – is his insistence that the analyst “is absolutely debarred”¹⁰⁶ from engaging romantically or sexually with his patients.¹⁰⁷ For Freud, “the analyst responds but

103. *Id.*

104. That said, as Corey Robin points out in an eviscerating essay in the *Chronicle of Higher Education*, those who wax lyrical about the erotics of pedagogy are, like me, almost always professors at elite universities – that is, the sort of people (professors) who are invested in a romanticized self-understanding of the sort of institutions (elite universities) that provide the space and time for intense dyadic pedagogic relationships. See Corey Robin, *The Erotic Professor*, CHRON. HIGHER EDUC. (May 13, 2018), <https://www.chronicle.com/article/The-Erotic-Professor/243401> [<https://perma.cc/Q94G-LQN5>]. Thus, Robin writes, “the real shadow talk of the erotic professor is not sex but class.” *Id.* I certainly feel the sting of Robin’s critique, and indeed the publication of his essay stopped me, for a while, from wanting to write this Feature. I do not deny that the picture of pedagogy I presuppose here is an elitist one: it is a picture that assumes that professors are not entirely consumed with bureaucratic hoop-jumping or huge teaching loads and that students are not consumed by financial or immigration worries and, moreover, arrive at university with the sort of cultural capital that allows them to make use of opportunities for close mentorship. Like Robin, my political commitments mean that I think that such an education need not be elitist, that the “aim should not be to tear down Harvard but to lift up Brooklyn College.” *Id.* But he is right to point out that this is an all-too-easy thing to say and that the “the material conditions and teacher-student ratios that are necessary for a democratized intensity” would require a drastic redistribution of social resources at all levels of education. *Id.* For what it is worth, I wholeheartedly support such a redistribution.

105. See generally GLEN O. GABBARD & EVA P. LESTER, *BOUNDARIES AND BOUNDARY VIOLATIONS IN PSYCHOANALYSIS* (1995) (explaining how the contemporary field of psychology establishes boundaries).

106. Sigmund Freud, *Further Recommendations in the Technique of Psycho-Analysis: Observations on Transference-Love* (1915), reprinted in *FREUD’S TECHNIQUE PAPERS* 65, 79 (Steven J. Ellman ed., Joan Riviere trans., 2002).

107. Pellegrini, *supra* note 80, at 624, correctly notes Freud’s prohibition on countertransference but strangely takes this to speak *against* prohibitions on faculty-student relationships. For

does not respond *in kind*.”¹⁰⁸ The analyst must not, that is, respond with either love or hostility to his patient, and a fortiori must not use the transference as a means toward his own emotional or physical satisfaction. Freud cautioned the analyst that the “patient’s falling in love is induced by the analytic situation and is not to be ascribed to the charms of his person.”¹⁰⁹ Instead, the analyst must use the transference-relation as a tool in the therapeutic process. According to Freud, the skilled analyst does this by drawing the patient’s attention to the transference at work, and convinces—note the ambiguity in that word, to which I will return—her that her transference-attitude is a mere projection of repressed emotion. “In this way,” Freud wrote, “the transference is changed from the strongest weapon of the resistance into the best instrument of the analytic treatment . . . [I]ts handling remains the most difficult as well as the most important part of the technique of analysis.”¹¹⁰

What might it be for the professor to respond to the student’s transference-love but not respond *in kind*—instead harnessing it as a tool in the pedagogic process? It would not be enough for the professor simply to refrain from using the transference as a means toward sleeping with the student. Nor would it be enough for the professor to use the student’s desire to please him as a way of motivating the student to learn.¹¹¹ It would involve, presumably, the professor “convincing” the student that her desire for him is a form of projection: that what she really desires is not the professor at all but what he represents. In that way, the student’s transference-feelings could be repurposed for the end of education itself: that is, the student’s learning.

At the start of “Notes on Transference-Love,” Freud tells us that he can “go behind moral prescriptions” to their source, “namely, to utility.”¹¹² By this, Freud meant he could explain why analysts should not sleep with their patients, not by appealing to general moral principle—say, a prohibition on nonconsensual sex or sex across power differences—but by appealing to the specific “requirements of analytic technique.” Simply put, romantic and sexual relations between ana-

more straightforward applications of Freud’s views of transference-love to the pedagogical context, see Chris Higgins, *Transference Love from the Couch to the Classroom: A Psychoanalytic Perspective on the Ethics of Teacher-Student Romance*, 1998 PHIL. EDUC. 357, 357; Lisa Ruddick, *Professional Harassment*, 26 CRITICAL INQUIRY 601, 603-04 (2000); and Sanger, *supra* note 79.

108. Higgins, *supra* note 107, at 363.

109. Freud, *supra* note 106, at 67.

110. SIGMUND FREUD, AN AUTOBIOGRAPHICAL STUDY 47 (James Strachey trans., 1963).

111. For Freud, this is what partly distinguishes psychoanalysis from other forms of psychotherapy. *See id.*

112. Freud, *supra* note 106, at 71.

lyst and patient severely disrupt, and are incompatible with, the goal of the therapeutic process: the patient's liberation from neurosis. Insofar as the analyst responds to his patient's transference-love in kind, rather than using it as a means toward the therapeutic goal, he has failed as an analyst.¹¹³ The same can be said of teaching.¹¹⁴ To explain why professors should not sleep with their students, we do not need to appeal to general moral principles about consent or coercion. We can, instead, appeal to the specific requirements and aims of the pedagogical practice. We can, that is, appeal to the point of education: the intellectual transformation of the student.

The value of this comparison between the therapist-patient and professor-student relationship lies not only in the shared phenomenon of transference but also in the similar consequences that result from its mismanagement. Students and patients who have had consensual relationships with, respectively, their professors and therapists, tend to report similar emotional consequences, particularly the feeling of having been betrayed.¹¹⁵ The betrayal in question is not a lover's betrayal: the therapist or professor need not have cheated on or lied to the patient or student. Rather, it is the betrayal of the trusted authority figure who fails to live up to the implicit terms set by the therapeutic or pedagogical relationship. The student is betrayed – to adapt a phrase from Judith Herman in

113. This Freudian thought is enshrined in both professional norms and regulations across the therapeutic profession, as well as in the law. *See* *Simmons v. United States*, 805 F.2d 1363, 1365-66 (9th Cir. 1986) (determining that a counselor's sexual relationship with a patient under transference constituted wrongful behavior in the scope of his employment); *Corgan v. Muehling*, 574 N.E.2d 602, 606-07 (Ill. 1991) (holding that the patient's claim is actionable upon proof of the defendant's negligence in handling the transference phenomenon and having sexual relations with the patient during the course of treatment); Linda Jorgenson, Rebecca Randles & Larry Strasburger, *The Furor over Psychotherapist-Patient Sexual Contact: New Solutions to an Old Problem*, 32 WM. & MARY L. REV. 645 (1991); Timothy E. Allen, Note, *The Foreseeability of Transference: Extending Employer Liability Under Washington Law for Therapist Sexual Exploitation of Patients*, 78 WASH. L. REV. 525, 533 n.65 (2003) (listing state statutes that criminalize such conduct by therapists); S. Wesley Gorman, Comment, *Sex Outside of the Therapy Hour: Practical and Constitutional Limits on Therapist Sexual Misconduct Regulations*, 56 UCLA L. REV. 983 (2009).

114. For an argument that professors, like therapists, should be legally classified and regulated as fiduciaries, see Forell, *supra* note 79. *See also* Mack, *supra* note 2, at 80 (discussing the violation of trust that occurs when a faculty member transforms his relationship with a student into a sexual one). On two Canadian cases in which professors were found guilty of "breach of trust" for having had consensual relations with students, see Shirley Katz, *Consensual Sexual Relations Between Students and Faculty*, CAASHHE NEWSL. (Can. Ass'n Against Sexual Harassment in Higher Educ., Victoria, B.C.), Mar. 2000, at 1, 4.

115. On the common psychological effects of the sexualization of pedagogical and therapeutic relationships, see MARILYN R. PETERSON, AT PERSONAL RISK: BOUNDARY VIOLATIONS IN PROFESSIONAL-CLIENT RELATIONSHIPS 105-40 (1992).

the context of parent-child incest – not by the sex itself, but by the “corruption of [teacherly] love” it represents.¹¹⁶ Likewise, there is a striking similarity between the rationalizations produced by therapists and professors who engage in such relationships: “the sexualization of our relationship will do you good and is really for your benefit”; “we’re basically equals here”; “in transgressing my role of professional detachment I’m treating you like a human being.”¹¹⁷

Caroline Forell notes that “[m]any [consensual faculty-student relationships] are not good for at least one of the parties – almost always, the student.”¹¹⁸ The empirics bear out this concern. One study of 356 graduate women across various disciplines found that 13 percent had engaged in consensual relationships with their professors; thirty-one women in the study reported being pressured to date or have sex with a male faculty member and that these men used “[v]arious types of threats or persuasion,” including threats of academic and financial penalties and physical harm, “such as grabbing, slapping, and restraint.”¹¹⁹ The women in the study reported feeling embarrassed, “fearful of jeopardizing their academic futures,” and “physically afraid.”¹²⁰ Another study of 464 women members of the clinical psychology division of the American Psychological Association found that 31 percent had received advances from, and 17 percent had had sex with, their professors during graduate school.¹²¹ Ninety-five percent of respondents in the study said that such relationships were ethically inappropriate, coercive, exploitative, or harmful to students’ educations.¹²² The authors found that the attitudes of the participants toward consensual faculty-student relationships in which they had been involved were significantly more negative

116. JUDITH HERMAN, *FATHER-DAUGHTER INCEST* 4 (2000). It is interesting to note that undergraduate students appear to overwhelmingly see consensual faculty-undergraduate relationships as unethical or inappropriate. A 1995 study indicated that undergraduates found consensual relationships between faculty and undergraduates unethical; in a 2002 survey of almost 500 undergraduates, the students gave a mean score of 4.48 to faculty-student consensual relationships, on a scale from 1 (always appropriate) to 5 (always inappropriate). Richards et al., *supra* note 94, at 339.

117. Ruddick, *supra* note 107, at 602 (noting that all of these rationalizations are present in GALLOP); see also RICHARD S. EPSTEIN, *KEEPING BOUNDARIES: MAINTAINING SAFETY AND INTEGRITY IN THE PSYCHOTHERAPEUTIC PROCESS* 241-43 (1994).

118. Forell, *supra* note 79, at 52.

119. Beth E. Schneider, *Graduate Women, Sexual Harassment, and University Policy*, 58 J. HIGHER EDUC. 46, 47, 54, 57-58 (1987).

120. *Id.* at 57.

121. Robert D. Glaser & Joseph S. Thorpe, *Unethical Intimacy: A Survey of Sexual Contact and Advances Between Psychology Educators and Female Graduate Students*, 41 AM. PSYCHOLOGIST 43, 43 (1986).

122. *Id.* at 47.

in retrospect, with students coming to see past encounters as “extremely exploitative and harmful.”¹²³ They commented that “these changes in part reflect a consenting involvement by many students at the time as well as *an increased current sensitivity to the problems involved in such relationships*, a sensitivity that was not present at the time of contact.”¹²⁴ They also acknowledged “the reality of a population of women of unknown numbers who, after gaining keenly competitive admission to doctoral studies in psychology, take leave of that effort and goal not through lack of ability and diligence but through disgust, dissuasion and misuse.”¹²⁵

Some consequences to the mismanagement of transference are particular to the pedagogical context. When a therapist abuses the therapeutic relationship by having a sexual relationship with his patient, the patient is likely to find it difficult to trust another therapist, and the psychic issues that brought her to therapy might well go unresolved, if not exacerbated. But a woman student who has an analogous experience with her professor also faces a possible harm due to the public nature of the pedagogical relationship. Here is one account of how such a harm might manifest, from a former student-girlfriend:

For a long time, I went around feeling naive, humiliated, and ashamed. Many of his colleagues knew the extent of the errands I ran for him Many of his colleagues were also my professors, and the humiliation I felt in their presence was great. I was ridiculed by students who were aware of what was going on. My emotional attachment to him earned me the title “Professor X’s pitbull,” as though I could not think for myself, only defend my master on command.¹²⁶

The student is not only, in the eyes of her professor-boyfriend, transformed from a student, whose needs he is meant to serve, into someone who is meant to serve his needs (his errands, his ego). She is also transformed in the eyes of her academic community as a whole. She is unable to relate any longer to her other professors as her teachers; they are now her boyfriend’s (judgmental) colleagues. She may stay enrolled, but is she any longer a student? If she leaves, are we surprised?

123. *Id.* at 43.

124. *Id.* at 49 (emphasis added).

125. *Id.* at 50.

126. Leslie Irvine, *A “Consensual” Relationship*, in *SEXUAL HARASSMENT ON CAMPUS: A GUIDE FOR ADMINISTRATORS, FACULTY, AND STUDENTS* 234, 242 (Bernice R. Sandler & Robert J. Shoop eds., 1997).

Above, I drew attention to Freud's saying that the good analyst "convinces" his patient that her transference emotions are not real love but mere projection. The ambiguity in that word "convinces" is telling. For projection, as Freud notes, "is the essential character of every love."¹²⁷ Transference-love "has perhaps a degree less of freedom than the love which appears in ordinary life . . . it displays its dependence on the infantile pattern more clearly, is less adaptable and capable of modification; but that is all and that is nothing essential."¹²⁸ In other words, the good analyst must partially mislead the patient about what she is feeling; in convincing her that she does not really love him, but merely what he represents, he convinces her of "the truth, but not the whole truth."¹²⁹

So, too, with the student's love for her professor.¹³⁰ We can say that she is "really" in love with what he represents, rather than the man himself. But who falls in love any other way? (As Proust writes, "We fall in love with a smile, the look in someone's eyes, a shoulder. That is enough; then during the long hours of hope or sadness, we create a person, we compose a character."¹³¹) The differences between the infatuation a student has for her professor and the infatuation anyone has for anyone else are a matter of degree, not kind. The problem with professor-student sexual relationships is not that they can involve no genuine love.¹³² It is that they involve the wrong sort of love. Speaking as a teacher to other teachers, bell hooks commands us to "[t]hink: how can I love these strangers, these others that I see in the classroom?"¹³³ The love hooks is speaking

127. Freud, *supra* note 106, at 76.

128. *Id.* at 76-77.

129. *Id.* at 76.

130. One might worry that this opens my account to the same objection raised by feminists against the "power differential, no consent" rationale: that it infantilizes women by denying their desires. To be clear, I do think that professors—and here the analogy with the therapist ends—should not actually *tell* their infatuated students that they are not "really in love." Indeed, I doubt that, except in very rare cases, it is wise for the professor to acknowledge the student's amorous feelings; much better, instead, to simply treat the student as if her erotic energies were already directed at learning—thereby, one hopes, making them so.

131. 5 MARCEL PROUST, *The Fugitive*, in *IN SEARCH OF LOST TIME* 496 (Christopher Prendergast ed., Peter Collier trans., 2002) (1925).

132. I hope this suffices to answer an objection frequently voiced against prohibitions on faculty-student relationships: that such relationships sometimes end in marriage. I take this objection to be motivated by the thought that the only reason to prohibit faculty-student relationships is that they involve a mere simulacrum of love. But my argument—like Freud's—does not depend on any distinction between real and false love. (In a sense all love is a simulacrum.) But I also confess that I find the "it sometimes ends in marriage" line an odd one, since the same is true of so many evidently problematic relationships.

133. bell hooks, *Embracing Freedom: Spirituality and Liberation*, in *THE HEART OF LEARNING: SPIRITUALITY IN EDUCATION* 113, 125 (Steven Glazer ed., 1999).

of is not the exclusive, jealous, dyadic love of lovers but something more distanced, more controlled, more open to others and the world—though no less love for that.

III. SOCRATES AND THE DUTIES OF PEDAGOGY

Many have found in the figure of Socrates a different, more erotically intimate model of pedagogy, one that speaks against modern regulations on teacher-student love. After all, Socratic pedagogy is an intensely erotic affair, especially given its association with the ancient Greek institution of *paidēasteia*, whereby young aristocratic boys in the bloom of adolescence (*eromenoi*) are introduced to the moral and intellectual virtues by older male lovers (*erastai*).¹³⁴ But Socrates, at least in Plato's telling, does not sleep with his students, subverting the traditional dynamics of *paidēasteia*. In the *Republic*, Socrates tells us that "sexual pleasure mustn't come into" relationships between the guardians and the young boys they are educating, "if they are to love and be loved in the right way."¹³⁵ Indeed, *Kallipolis*, the ideal city, will have a law that mandates that adult guardians love their young students only "as a father would a son."¹³⁶ For Socrates, to love a boy properly involves awakening his desire for wisdom—to make him, that is, a *philosopher*, a "lover of wisdom."¹³⁷ This is a task accomplished not through sex but through the rigors of *elenchus*, philosophical refutation. Thus, in *Lysis*, Hippothales (rather foolishly) asks Socrates for his advice on seducing his beloved, only to receive a demonstration in how to philosophically interrogate him.¹³⁸ It is for this reason—this identification of loving with questioning, of *erôs* with *erôtan*¹³⁹—that Socrates can say that the only thing he understands is *ta erôtika*, the art of love.¹⁴⁰

134. For a discussion of *paidēasteia*, see K.J. DOVER, *GREEK HOMOSEXUALITY* 50-52 (1978); and C.D.C. Reeve, *Introduction to PLATO ON LOVE*, at xi (C.D.C. Reeve ed., 2006).

135. PLATO, *REPUBLIC* 403b (G.M.A. Grube, trans., C.D.C. Reeve ed., 1991).

136. *Id.* at 403a.

137. Reeve, *supra* note 134, at xix.

138. Plato, *Lysis*, in *PLATO ON LOVE*, *supra* note 134, at 1-25 (Stanley Lombardo trans.).

139. Reeve, *supra* note 134, at xix-xx (noting Socrates's "nontrivial play on words facilitated by the fact that the noun *erôs* ('love') and the verb *erôtan* ('to ask questions') seem to be etymologically connected").

140. Plato, *Symposium*, in *PLATO ON LOVE*, *supra* note 134, at 172a, 177d & n.28 (Alexander Nehamas & Paul Woodruff trans.).

In the *Symposium*, Socrates tells us (as the prophetess Diotima told the young Socrates in turn) that the student's erotic energies are first aroused by a particular beautiful body. Then, they must be redirected: first to physical beauty in general, then to the beauty of souls, then to the beauty of institutions, morality, and the sciences, and finally to the form of the Beautiful itself, in the presence of which it is possible to give birth to true virtue.¹⁴¹ What, presumably, must not happen is for the student to become fixated on the particular body or soul of the teacher. To return to the Freudian view, the teacher must make himself a transitional object, to be left behind as a mere rung in the student's ascent to wisdom.¹⁴² It is thus apt that the dialogue ends with Socrates's student Alcibiades stumbling into the party drunk and delivering a speech on his sexual longing for his teacher—a longing that Socrates has consistently refused to satisfy.

That Socrates does not sleep with Alcibiades tends to earn Socrates admiration for his restraint.¹⁴³ Socrates is the dutiful teacher, resisting the temptations of his beautiful young student. It is Alcibiades, whose superficiality prevents him from taking the erotic ascent on which Socrates would lead him, who is the pedagogical failure. But another reading presents itself.¹⁴⁴ How superficial is Alcibiades? He has, after all, fallen in love with Socrates, who is notoriously ugly, presumably because of the latter's intellectual virtues. And how otherworldly is Socrates? When Alcibiades first enters the scene, he staggers over to sit next to Agathon, the most beautiful man in the room, only to discover that Socrates is already there. "Why did you choose this particular couch?," he accuses his teacher.¹⁴⁵ Socrates responds by asking Agathon to protect him from Alcibiades's jealous rage, of which he says he has grown weary and frightened.¹⁴⁶ When Alcibiades is persuaded to give a speech on love, he explains that it will have to be a speech on Socrates, lest his teacher get jealous.¹⁴⁷ Are we really to believe that Socrates is not enjoying all this? Is Alcibiades not right when he says that Socrates is "crazy about beautiful boys . . . follow[ing] them around in a perpetual

141. *Id.* at 210a-211e.

142. On the teacher as transitional object, see Higgins, *supra* note 107, at 364.

143. See, e.g., William Deresiewicz, Essay, *Love on Campus*, AM. SCHOLAR (June 1, 2007), <https://theamericanscholar.org/love-on-campus> [<https://perma.cc/443U-BP6M>]; Sanger, *supra* note 78, at 1882.

144. For a related reading, see Michael Gagarin, *Socrates' Hybris and Alcibiades' Failure*, 31 PHOENIX 22 (1977). Much of my reading of the *Symposium* is influenced by my undergraduate professor Karsten Harries.

145. Plato, *supra* note 140, at 213b-c.

146. *Id.* at 213c-d.

147. *Id.* at 214b-d.

daze”?¹⁴⁸ Why, in the *Charmides*, does Socrates return from war and immediately go to the palaestra to inquire whether, during his time away, any young men have become known, not just for their virtue, but for their beauty? Is Alcibiades a failed student, or is Socrates a failed teacher—the sort of teacher who would prefer to absorb rather than redirect his student’s erotic energies?¹⁴⁹

As Gagarin notes, perhaps the most striking accusation that Alcibiades makes against Socrates is that he pretends to be a lover but is in fact a *beloved*—a deception he has perpetrated, Alcibiades says, against various young men.¹⁵⁰ What is the significance of this? The more obvious possibility is the one I suggested above: that Socrates is clever at getting his students to fall in love with him, serving his own narcissistic pleasure. A second possibility hones in on the first part of the accusation: that Socrates is not really a *lover*. Within *paidēasteia*, it is the older lover who is figured as the teacher, and the younger beloved as the student. To say, as Alcibiades does, that Socrates is not really a lover is thus to say that Socrates is not really a teacher. And indeed, the account of pedagogy that Socrates recounts from Diotima involves an inversion of the pedagogical logic of *paidēasteia*. At the beginning of Socrates’s account, Diotima says that when an older lover meets a beautiful boy, he “instantly teem[s] with speeches about virtue” and “tries to educate him.”¹⁵¹ But then we learn that it is the lover, and not his beloved, who ascends to virtue, using the beautiful boy as a rung on a ladder, as a transitional object.¹⁵² The education of the young boy drops out of view. Indeed, the boy was never promised an education: the lover, Diotima says, merely “tries to teach him.”¹⁵³

Here is an impious thought. Perhaps all of Socrates’s apparent attempts at teaching—his relentless subjection of beautiful young men to the rigors of *elen-*

148. *Id.* at 216d.

149. In a misogynistic bit of prose, Freud discusses a “type of woman” whose transference-love cannot be harnessed for therapeutic ends: “These are women of an elemental passionateness; they tolerate no surrogates; they are children of nature who refuse to accept the spiritual instead of the material; to use the poet’s words, they are amenable only to the ‘logic of gruel and the argument of dumplings.’ With such people . . . one must acknowledge failure and withdraw . . .” Freud, *supra* note 106, at 74–75. Perhaps there are such people, and perhaps Alcibiades is one of them. Or perhaps Freud has come up against his limits.

150. Gagarin, *supra* note 144, at 29; Plato, *supra* note 140, at 222a–b.

151. *Id.* at 209b.

152. *Id.* at 210a–211c.

153. *Id.* at 209b.

chus—are not pedagogical efforts at all. Perhaps they are merely a means of Socrates’s own self-directed ascent to knowledge.¹⁵⁴ This would give us a neat but dark solution to what Gregory Vlastos has called the “[p]aradox of Socrates”: the fact that a man who is convinced of the supreme value of wisdom is so poor at passing it onto others.¹⁵⁵ Alcibiades concludes his speech by warning Agathon that Socrates’s flirtations will lead nowhere.¹⁵⁶ And indeed that is true, in two senses. Socrates will not lead his student to bed—he will exercise restraint—but he equally will not lead his student to wisdom. Vlastos’s own solution to the paradox involves seeing Socrates as a dogmatist who wants to save the souls of others but only by the rationalist method to which he is ideologically wedded. Behind this pedagogical failure, Vlastos says, lies “a failure of love.”¹⁵⁷ For Vlastos detects “a last zone of frigidity in the soul of the great erotic; had he loved his fellows more, he could hardly have laid on them the burdens of his ‘despotic logic’ impossible to be borne.”¹⁵⁸ But we might think that Socrates does not merely fail to love *enough*. Could it be that he fails to love at all—love anyone, that is, but himself? If so, we have in Socrates not just a failed teacher, but a false teacher.

Several times in the *Symposium*, Alcibiades accuses Socrates of *hybris*: a vice of excess, the desire to rise above one’s proper place.¹⁵⁹ In this connection, Socrates is compared to Marsyas, who was flayed by the gods for playing too well.¹⁶⁰ Alcibiades recalls how the other soldiers felt scorned by Socrates when he, impervious to the cold, marched barefoot through the snow¹⁶¹—a scorn that Alcibiades himself feels when Socrates, impervious to his seductions, refuses to sleep with him, which Alcibiades calls an act of *hybris*.¹⁶² Socrates drinks but does not

154. The figure of Diotima, who is explicitly positioned as a successful teacher of Socrates, *id.* at 207c, keen to have him take the ascent, *id.* at 210a, might be meant to form an implicit contrast with Socrates. Diotima, a woman, is then the true teacher, because she is a true lover. If so, then there is also the paradox of Diotima, who leads Socrates to the truth via a sort of gentle *elenchus*, but whose (reported) account leaves no room for this possibility. Has Socrates misunderstood?

155. Gregory Vlastos, *Introduction: The Paradox of Socrates*, in *THE PHILOSOPHY OF SOCRATES* 1, 1-21 (Gregory Vlastos ed., 1971).

156. Plato, *supra* note 140, at 222b.

157. Vlastos, *supra* note 155, at 16.

158. *Id.* at 17.

159. PLATO, *Symposium*, in *LYSIS. SYMPOSIUM. GORGIAS*, at 172a, 215b, 219c, 222a (W.R.M. Lamb trans., 1925); *see also* Gagarin, *supra* note 144, at 31-33.

160. PLATO, *supra* note 159, at 215b-d.

161. *Id.* at 220b.

162. *Id.* at 219c (ὄβρισην).

get drunk¹⁶³ and goes about his day while other members of the party, exhausted and hungover, sleep.¹⁶⁴ Socrates, godlike, is beyond human affect, beyond love. In its primary meaning, the Greek *hybris* “indicates some sort of insolent violence” and could “refer specifically to sexual assault against a woman or young boy.”¹⁶⁵ This seems a good distance from *hybris* as acting superior and godlike, until we remember that the Greek gods were unbound by human norms of sexual decency. Thus, Alcibiades’s accusation against Socrates carries with it the implication of sexual inappropriateness. So does Alcibiades’s accusation that Socrates is not really a lover but a beloved: an Athenian man who continued, after his adolescence, to inhabit the passive sexual role of the “beloved” (*erômenos*) could be stripped of citizenship – a fate that, in a sense, Socrates met. Taken literally, this is a draconian punishment for a nonwrong. But taken figuratively – where the failure to be a lover is a failure to be a teacher – the stripping of citizenship might seem a more appropriate retribution. Socrates’s disinterest in teaching the young men who long for him imperils not just their souls but the fate of Athens itself.¹⁶⁶

To be a teacher, Alcibiades tells us, is to know how to love properly. Socrates, he suggests, does not know how to love anyone except himself. This – and not noble restraint – is what stops Socrates from giving into his students’ seductions. A true teacher, who really loved his students, would turn his students’ love away from himself, teaching them how to love in turn.

IV. SEX AS A PATRIARCHAL FAILURE

In a discussion in *Critical Inquiry* on the publication of *Feminist Accused of Sexual Harassment*, James Kincaid, an English professor at the University of Southern California, defended Gallop from charges of sexual harassment – charges that he saw as lacking in a sense of “fun.”¹⁶⁷ Kincaid opened his case by transcribing a letter he received from a student the previous semester:

163. *Id.* at 214a, 200a.

164. *Id.* at 223d.

165. Gagarin, *supra* note 144, at 25.

166. The dramatic date of the *Symposium* is 416 BCE. Reeve, *supra* note 134, at xxii n.3. This is a year before Alcibiades was appointed joint leader of the disastrous Sicilian expedition, for which he advocated. When recalled to Athens to answer charges that he mutilated religious statues and drunkenly profaned the Eleusinian Mysteries, Alcibiades betrayed the Athenians and joined the Spartans. THUCYDIDES, *THE LANDMARK THUCYDIDES: A COMPREHENSIVE GUIDE TO THE PELOPONNESIAN WAR* 6.15-6.61, 6.88-6.92 (Robert B. Strassler ed. 1998). Charmides, whom Alcibiades identifies as another of Socrates’s victims, Plato, *supra* note 140, at 222b, was a supporter of the Thirty Tyrants. Reeve, *supra* note 134, at 85 n.26.

167. Kincaid, *supra* note 86, at 613.

Dear Professor Kinkade [sic]:

I never do this kind of thing, but my roommate keeps telling me I should, she says, go ahead and tell him if you feel like it, so I am. I really like your class and the way you have of explaining things. I mean I read these poems and they don't mean a thing to me until you start talking and then they do. It's the way you talk that is different from the other teachers I have had in the English Department, who may know more than you but can't get it across if you know what I mean. But when you were saying that the Romantic poets wrote about feelings, unlike the 17th-century poets like Pope, who didn't, I knew right away what you meant. I have a lot of feelings myself, though I am not exactly a poet ha ha. But anyhow, I just wanted to say thanks and hope you keep it up because I really like it.¹⁶⁸

Kincaid reads this note as an act of flirtation, an initiation, a come-on:

That note, unsigned and heartfelt, expresses true desire My admirer hopes that I will keep it up because he or she likes it, and he or she writes me this note hoping that I will like it. I will like it and he or she will like it and we will, together, keep it up because it is fun for both of us to like and be liked and to keep being liked without end. Nobody reaches the finish line; nobody is empowered, and nobody is victimized, either. If my perceptive student and I go beyond writing notes and make all this material, it will not be because I have something to give and he or she to take, or vice versa, but because we like it and want to keep it up. A physical relationship will not be progress, just difference.¹⁶⁹

Kincaid, whose profession it is to interpret and teach others to interpret, is here engaged in what would be a satire of a certain kind of “perverse” psychoanalytic interpretation, if the occasion for it were not the “heartfelt” letter of a young woman. Kincaid keeps the student's gender deliberately ambiguous — “he or she” — but we know that this is a young woman, if not from the letter's tone, then from the gender of the letter-writer's roommate. What investment does Kincaid have in acting as if this letter and his response have nothing to do with gender? I offer an answer shortly.

As it is, Kincaid's reading of the letter — and Kincaid no doubt would say I am being decidedly unfun here — is a kind of abuse, a pornification of a sweet and earnest declaration of a feeling. The student, for the first time, gets the meaning of poetry, and she is awestruck and admiring of this professor who has,

¹⁶⁸. *Id.* at 610-11.

¹⁶⁹. *Id.* at 611.

alone among all her professors, been able to show her what poetry means. Kincaid ignores all this, and seizes on the last line – “I hope you keep it up because I really like it” – turning it into a crude sexual pun. He is hard for his student, and she is enjoying it, and wants it to continue, *ad infinitum*, just because it is fun.

But that is not what the student said. She wants him to “keep it up” – that is, keep on *teaching* – not only because it is enjoyable, but because it helps her understand what poetry means: “I mean I read these poems and they don’t mean a thing to me until you start talking and then they do.” It is the professor’s capacity to understand and to disclose that she wants from him, not just the pleasure of watching him exercise that capacity. It is Kincaid’s insistence on the masturbatory nature of his student’s desire that allows him to say of the imagined future where he and his student “go beyond writing notes and make all this material,” that “nobody is empowered, and nobody is victimized, either.”

Is there no difference in power between Kincaid, author of *Child-Loving: The Erotic Child and Victorian Culture*, and his student? I want to leave aside the (unfun) questions of institutional power: who grades whom, who writes recommendations for whom, and so on. There are other power differences here. First, as I have suggested, there are differences in epistemic power. Kincaid knows how to read in a way that renders the opaque meaningful; the student lacks, but desires, this power. This is a premise of the teacher-student relationship: that we will begin our relationship with an asymmetry of epistemic power and end it with that power something closer to equalized. Part of what is particularly disturbing about Kincaid’s reading of the letter is that the student is not particularly intellectually sophisticated; Kincaid’s praise of her as “perceptive” feels manipulative and cruel, giving her a simulacrum of what she actually wants – the teacher’s own cognitive mastery. Indeed, Kincaid only reproduces the letter, presumably without the author’s permission, because he is confident that she is not the type to read *Critical Inquiry*. But what if she did read it? How should she feel, seeing her youthful earnestness exhibited as a sexual trophy?

Second, there is Kincaid’s power to interpret, not only poetry but the student herself. This is a sort of metaphysical power – that is, a power not only to uncover truth, but to make truth. He tells us that her letter is latently sexual, that its natural fulfilment would be sex – that sex would merely “make all this material.” What would happen if Kincaid (as we might easily imagine he did) offered this reading to the student herself, who trusts him to tell her the truth about texts? Could Kincaid not simply make it true that her letter was, in a sense, sexual all along?

Kincaid would, no doubt, protest that her letter *is*, objectively if latently, sexual. It is not as if there are no expressions of desire to be found in it. It opens like a confession of love: “I never do this kind of thing . . .” The student declares that she has “a lot of feelings,” and then immediately makes fun of herself for

doing so (“ha ha”). She picks Kincaid out as special and “different from the other teachers.” Kincaid may not be wrong to imply that he could sleep with this student if he wanted to – without quid pro quo offers, threats, or violence. Presumably, all he would have to do is read her some Wordsworth, call her “perceptive,” and lead her to bed. But what does this really tell us? Are we to believe that Kincaid is not engaged in an act of deliberate sexualization, that he is merely passive and obedient in the face of his student’s will?

Here are five possible readings of the student’s psychological state: (1) the student admires and wants to be like her professor, but does not (yet) want to sleep with him; (2) the student’s desire is intense but inchoate: she does not know, or there is no fact of the matter about, whether she wants to be like the professor or to have him; (3) the student wants both to be like the teacher and to have him and sees having him as a means to – or a sign of – being like him; (4) the student thinks it is impossible to be like the professor and therefore longs, as a second-best, to have him; (5) the student wants merely to sleep with the professor, and the talk of poetry and understanding is just a form of flirtatious flattery. I find (5) a wildly implausible reading, and strongly suspect that something like (1), (2), (3), or (4) is right. But whichever reading is correct, it is surely possible for Kincaid to get his student to consensually sleep with him. When a student’s desire is inchoate – *do I want to be like him, or to have him?* – it is easy for the teacher to settle it in the latter direction. And it is similarly easy when the student (wrongly) thinks that sleeping with the teacher is a means to becoming, or a sign of already being, like the teacher (“he wants me so I must be brilliant”) or when the student (wrongly) thinks that sleeping with the teacher is the best she can have. Even when a student’s desire is a more fixed desire to be like the teacher, it is easy for the teacher to convince the student that her desire is really for him or that sleeping with the teacher is a way to become like the teacher. (What better way to understand the “feelings” of the Romantic poets than experiencing those feelings yourself?)

Whether (1), (2), (3), (4), or (5) is correct, Kincaid can – and, importantly, *ought to*, as a teacher – direct his student’s desire away from himself and toward its proper pedagogic object: in this case, poetry. If, as per (1), this is what the student’s desire is already directed at, then all Kincaid has to do is exercise some restraint and not sexualize an earnest expression of the desire to learn. If, as per (2), the student’s desire is ambivalent, or as per (3) and (4), confused, Kincaid must do more than merely exercise restraint. He must draw boundaries, positively redirect the student’s desires in the proper direction, and show her just what is required for her to become like him. If, as per (5), the student really and solely wants to bed him – a case I think rare in the pedagogic context – Kincaid needs to see whether he can make something useful of that desire, whether he can convince the student that it is not him she really wants, but what he has.

Failing to try to do this, Kincaid fails at what his student is praising him for: being a good teacher.

In all five cases, Kincaid must resist the temptation to allow himself to be, or make himself, the narcissistic receptacle of his student's desires. I am not saying that teaching can or should be entirely free of narcissistic satisfactions. But there is a subtle and important difference between enjoying the desires one ignites in one's students before, or at the same time as, turning them away from oneself—and making oneself their wholly consuming object. This latter sort of narcissism is the enemy of good teaching. It does not instantiate itself only in the sexualization of the pedagogical relationship, although that is a particularly clear instance. Part of what is striking, for example, about the case of Avital Ronell, the NYU professor of German and Comparative Literature who was recently found by her university to have sexually harassed her graduate student,¹⁷⁰ is how little of the abuse she allegedly perpetrated was sexual: the demand that her student spend countless hours seeing Ronell or talking on the phone with her, that he “schedule his life around her wants and needs,” that he “distance himself from friends and family,” that he not travel out of New York.¹⁷¹ Had Ronell not also touched her graduate student and sent him sexually explicit messages, she would presumably not have been found by the university to have violated Title IX. But she would have obviously still failed in her duties as a teacher, insofar as she used her student's emotional and professional dependency to gratify her own narcissistic ends. Of what regulation or law is this a violation?

Above, I queried Kincaid's investment in discussing his student as if she could be a man or a woman, “he or she.” What is it that Kincaid tacitly recognizes and wants to hide from view? Most obviously, that the pattern he is in fact describing—older, male professor; younger, female student—is, overwhelmingly, the most common form of professor-student sexual relationship. Kincaid does not want us to see him as a cliché. He also presumably does not want us to see—or perhaps himself does not know?—the underlying gender dynamics that produce this cliché. By this I do not only mean that boys and men are socialized to find being in positions of dominance sexy, and girls and women are socialized to find being in positions of subordination sexy. I also do not only mean the way that some male professors blend male sexual entitlement with intellectual narcissism, seeing women students as the sexual rewards unfairly kept from them in their adolescence, when brawn or cool was rewarded over brains. I mean, most

170. See *supra* note 15.

171. Complaint at 4, *Reitman v. Ronell*, No. 157658/2018 (N.Y. Sup. Ct. Aug. 16, 2018), <https://blog.simplejustice.us/wp-content/uploads/2018/08/FINAL-Complaint-Reitman-v.-Ronell-and-NYU.pdf> [<https://perma.cc/48GG-L56C>].

importantly, the way that women are socialized to interpret their feelings about men they admire.

Adrienne Rich famously described the institution of “compulsory heterosexuality” as a political structure that compels all women, regardless of their sexual orientation, to regulate their relations to women in a way that is congenial to patriarchy.¹⁷² One mechanism of that institution is the tacit instruction in how women should feel, or interpret their feelings, about those women they admire. The appropriate affective response in such a case is envy—never desire. (You must want to be *like* that woman; it could never be that you simply *want* her.) But another mechanism of compulsory heterosexuality is the instruction women receive in how to feel, or interpret their feelings, about the men they find compelling. Here, women are taught that it is not envy they feel, but desire: you must *want* him, it cannot be that you want to be *like* him.

Regina Barreca, speaking of and to women who ended up as professors, asks: “At what point . . . did the moment come for each of us when we realized that we wanted to be the teacher, and not sleep with the teacher?”¹⁷³ Barreca’s question suggests that the default interpretation for most women is that the desire sparked by the male teacher is a desire *for* the teacher, an interpretation that must be overcome if the woman is ever going to become the teacher. If Barreca is right, then the importance for women, straight and gay alike, in having women professors goes well beyond the value of role models. The question is not whether women have authorities with whom they can identify, but what social processes structure the possibilities and limits of such identification, for women and for men. Male students, meanwhile, encounter their male professors as *they* are socialized to do: wanting to be like them.¹⁷⁴ As Robin West writes:

Smart male students view themselves as all sorts of things, including young intellectuals. A good male student will often attach himself to a brilliant professor, and will aspire to *be like* him. A smart female student . . . *might* attach herself in this way to a brilliant professor and aspire to be like him. But it’s not very likely. Unlike the male student, she is far more likely to be attracted to the brilliant professor, and aspire not to be *like* him, but to give herself *to* him.¹⁷⁵

172. See Rich, *supra* note 90.

173. Regina Barreca, *Contraband Appetites: Wit, Rage, and Romance in the Classroom*, in *THE EROTICS OF INSTRUCTION* 1, 2 (Regina Barreca & Deborah Denenholz Morse eds., 1997).

174. And, at the limit, desiring to destroy and replace them: its own source of psychic drama.

175. Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 15 *WIS. WOMEN’S L.J.* 149, 178 (2000).

The central point is that this difference in likelihoods is not a playing out of some natural, primordial pedagogical drama, but the product of gendered socialization.¹⁷⁶ There might well be something inherently erotic about the pedagogical enterprise. But the particular form those erotic energies typically take—male professors sleeping with their female students—has much to do with how men and women are taught to relate to power, in its various forms.¹⁷⁷

I am not saying, as the Avital Ronell case makes clear, that it is any less a pedagogical failure for a female professor to sleep with her male student, or her female student, or for a male professor to sleep with his male student.¹⁷⁸ Indeed, I think these all constitute failures of the pedagogical duty to harness a student's desire for epistemic ends. But I am saying that an appreciation of the ethics of consensual teacher-student sex misses something crucial if it does not notice that it is overwhelmingly male professors who sleep with their overwhelmingly female students. The professor's failure in such cases—that is, most actual cases of consensual professor-student sex—is not simply his failure to redirect the student's erotic energies toward its apt object. It is a failure that involves taking advantage of the fact that women are socialized in a particular way under patriarchy—that is, socialized in a way that conduces *to* patriarchy—for the satisfaction of his narcissistic gratification. In turn, this gendered practice reproduces the very dynamics on which it feeds, by making sure that the benefits of education will not accrue equally to men and women. In such cases, sleeping with one's student is not simply a pedagogical failure, but also a patriarchal one. Behind teacher-student sex lies, as it so often does, gender.

176. Freud's account of transference-love focuses entirely, without justification or explanation, on the relationship between a female patient and male analyst. This is in spite of the fact that Freud thinks that transference is a near-inevitable outcome of therapeutic process. See generally Freud, *supra* note 106.

177. Indeed, even those who have criticized the invocation of Freudian transference, see Sanger, *supra* note 79, at 1875, and Platonic ascent, see Deresiewicz, *supra* note 143, in defense of teacher-student sex do not note the way in which these appeals always cover up the gendered dynamics of these psychodramas. Likewise, Corey Robin's materialist critique of the discourse of erotic pedagogy—according to which “the real shadow talk of the erotic professor is not sex but class”—ignores the role of gender. Robin, *supra* note 104.

178. See *supra* note 15. On the particular challenges of managing transference between gay teachers and their students, see Michèle Aina Barale, *The Romance of Class and Queers: Academic Erotic Zones*, in *TILTING THE TOWER* 16 (Linda Garber ed., 1994). See also bell hooks, *Eros, Eroticism and the Pedagogical Process*, 7 *CULTURAL STUD.* 58 (1993) (on the role of *eros* in teaching).

V. CONSENSUAL SEX AS SEX DISCRIMINATION

I would like to return to where I began: the relationship between university regulation, feminism, and the law. Critics of university consensual-relationship regulations often take particular offense at their typical inclusion within sexual-harassment policies. How could a *consensual* relationship amount to sexual harassment given that the gravamen of sexual harassment is that it is *unwanted*? Sherry Young claims that “[c]onsensual relationships, by definition, fall outside Title IX’s prohibition of sexual conduct that is ‘unwelcome’” and asks why then the university could have any legal interest in regulating them.¹⁷⁹ Young’s question does not pay due heed to the distinction, drawn by the Supreme Court in *Meritor*, between *wanted* and *consensual* sexual relations. *Meritor* rightly cautions that sometimes a woman acquiesces to a man’s sexual advances because she feels she has little other choice, given the power that the man has over her.¹⁸⁰ In cases of serious power imbalance—between supervisor and employee, professor and student—consent might be subtly coerced, even without the more powerful party’s knowing. But once the distinction between wanted and consensual sexual relations is drawn, the question—how could a *wanted* consensual relationship amount to sexual harassment?—is a good one.

On the one hand, it simply seems impossible: a sexual relationship that is fully and consistently wanted by a competent adult throughout its duration could not amount to, or involve, unwanted sexual advance. On the other hand, imagine the undergraduate who, infatuated with her professor, pursues him and, thrilled to find her attentions returned, has sex with him, dates him, only to eventually realize that she was just one in a string of students and that their affair was less a sign of her intellectual specialness than of his vanity. Feeling betrayed, she can no longer take his classes, or spend time in his department (her department). She worries (rightly) about which of his colleagues (her teachers) know about the relationship, and how they might hold it against her; she suspects (rightly) that her academic successes will be chalked up to him, although whatever successes she has will be in spite of him. Now recall that this is an experience

179. Young, *supra* note 64, at 279; see also Elliot, *supra* note 85, at 53 (“Clearly something is remiss when someone is punished for violating a ban on ‘consensual amorous relations’ absent a sexual relationship or suspended for having a consensual relationship absent a complaint of wrongdoing.”); Jane Gallop, *Resisting Reasonableness*, 25 CRITICAL INQUIRY 599, 600 (1999) (arguing that the continued policy of treating consensual relations as sexual harassment is misguided).

180. 477 U.S. 57, 68 (1986) (“The gravamen of any sexual harassment claim is that the alleged sexual advances were ‘unwelcome.’ . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”).

that happens to many women and almost no men. Recall further that this is not because of some natural division of sexual labor but because of the psychosexual order into which men and women are inducted and from which men disproportionately benefit and by which women are disproportionately harmed. Now recall Title IX: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁸¹ I think it is clear that our fictional young woman was not sexually harassed by her professor. But was she not denied the benefits of education “on the basis of sex”?

While genuinely consensual (or “wanted”) professor-student relationships do not constitute sexual harassment, they might, I want to suggest, still count as sex discrimination under Title IX. Such relationships often, predictably, and seriously harm women’s educations.¹⁸² What is more, they do so *on the basis of sex*. This is obviously true on the conventional differential-treatment interpretation of sex discrimination. At least in the case of the woman student who has sex with a straight male professor – or a male student with a straight female professor, or a male student with a gay male professor, or a female student with a lesbian professor – the student’s sex is a major contributing factor in the professor’s interest in sexually engaging with her, and such sexual engagement marks a difference between how she and her male counterparts are treated.

More interestingly, consensual professor-student sex is plausibly sex discriminatory on MacKinnon’s inequality approach, on which the gravamen of sex discrimination is its expression and reinforcement of the social inequality of women and men. Perhaps there are some male professors who are entirely unaroused by the fact that the women with whom they are sleeping are students. Perhaps. Even so, are we really to believe that the more common pattern is not one in which the professor-student dynamic – superior and subordinate, powerful and ingénue – erotically underscores the standard heterosexual dynamic? I

181. 20 U.S.C. § 1681(a) (2018).

182. For a discussion of such harms, see Forell, *supra* note 79; Mack, *supra* note 2, at 92-100; and Sanger, *supra* note 79. Sanger comes close to something like my suggestion here:

[A]lthough consensual relationship may not be harassment, they may still constitute a category of behavior about which academic institutions are properly concerned [T]here is also the general matter of women and the atmosphere of education. It would be nice to think that girls could just attend school [T]here is something heartening in an institution where students would not have to consider themselves sexually available to everyone – especially those whose duty is to teach, even if they teach in classrooms where the pedagogical voltage is high.

Sanger, *supra* note 79, at 1878-79.

know of a woman who, as an undergraduate, began a relationship with her professor that lasted many years beyond college—all set to be one of those “happy marriages” that are commonly raised to refute arguments like mine. When she finally broke up with him, she explained that “there’s just something about an adult man who wants to date his freshman.” The “something,” I take it, is an erotic investment in gendered domination.

Leaving aside questions of what such relationships express, it is easy enough to say what they produce. They often, if not universally, harm women in ways that systematically derail their educations. This is obviously true in the case of women who stop going to class, who become convinced they are not cut out for academic life, who drop out of college or grad school. But it is also true in the case of women who stay in college or grad school, but with a diminished sense of their intellectual capacities, a reasonable suspicion of the male professors who show an interest in their work, and anxieties (again, all too reasonable) that, should they succeed, their successes will be attributed to someone or something else. A friend of mine, an exceptionally brilliant woman academic, once explained to a male colleague that, had any of her male mentors, in college or in grad school, ever so much as put a hand on her knee, it would have “destroyed” her. The colleague was taken aback. He recognized that such an action would have been creepy, wrong, an instance of sexual harassment—but how could it destroy someone? My friend’s colleague did not know, she explained to him, what it is like to have one’s sense of intellectual worth rest precariously on the approbation of men.

On a feminist understanding of workplace sexual harassment, its harmful effects are not merely contingent—not merely a matter of women having certain consistent psychological responses to certain patterns of male behavior. Instead, as Lin Farley argued early on, it is the *function* of sexual harassment to harm women in these ways: to police and enforce their subordinate roles both as women and as workers.¹⁸³ Similarly, Vicki Schultz has argued that many prevalent forms of workplace sexual harassment are “designed to maintain work—particularly the more highly rewarded lines of work—as bastions of masculine competence and authority.”¹⁸⁴ Is it such a stretch to think that the function of the widespread practice of male professors making sexual advances on their female students is to impress on women their proper place in the university? That, insofar as women are allowed into the university, it is to play the role not of student or would-be professor, but of sexual conquest, fawning girlfriend, emotional caretaker, wife, and/or secretary? And, even if no individual men intend

183. FARLEY, *supra* note 71, at 15; see also Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998) (encouraging a broader conceptualization of sexual harassment).

184. Schultz, *supra* note 183, at 1687.

these consequences, what should we say if women, as a class – and especially women who are not white and rich – experience these consequences? Should we say that this just confirms that this is their natural place in the university?

One might worry that I am moralizing. There is admittedly something salacious about professor-student sex; if not quite worthy of the tabloids, it is worthy of countless books, movies, and anonymous blog posts.¹⁸⁵ But that professor-student sex is salacious, or titillating, or transgressive, is hardly reason to regulate it. The reason for the law to regulate it, if there is one, is that it is often discriminatory: that it does and can have the function of excluding women from equal access to education. Insofar as this is true, the fact that some see such relationships as scandalous, and the fact that others see them as perfectly normal, are equally irrelevant. What matters is the role such relationships play in the lives of the particular women who participate in them, and in the life and fortunes of women as a class.

Here I want to freely concede that my claim – that consensual professor-student relationships can, and often do, constitute sex discrimination under Title IX – rests on a certain descriptive picture of the relationship between pedagogy, sex, and gender. On the view I have been suggesting, such relationships are discriminatory in that they harm women as students, and do so on the basis of sex in two senses: (a) they are usually animated by a discriminatory heterosexual desire for women alone; and (b) they express and reinforce women's unequal status in the university and beyond. Crucial here is the empirical claim that such relationships harm women in their capacity as students, both individually and as a class. I have offered an account of the relationship between pedagogy and sex – on which the two are, in effect, antithetical – that is poised to explain just why it might be that professor-student sex harms individual students: by failing to properly direct a student's energies, the professor disrupts the student's epistemic pursuits, betraying the goal of the practice in which student and professor are alike engaged. While this is a form of harm to which both female and male students are susceptible, in the case of female students, this failure is also both expressive and productive of women's unequal standing in the university.¹⁸⁶ And insofar as faculty-student relationships are, indeed, productive of women's inequality in the university and beyond, women as a class are harmed by such relationships.

185. For a survey of recent cultural representations of professor-student relationships, see Dere-siewicz, *supra* note 143.

186. It might well be that certain groups of men – for example, black men – who are socially coded as “nonacademic” are also liable to this second sort of status harm.

In resting on partly empirical claims about the magnitude and forms of harm resulting from consensual faculty-student relationships, my argument is like that of the feminists who first argued that sexual harassment constitutes sex discrimination under Title VII. Their work was based on the collective testimony by women of their experiences in the workplace. By comparison, there has been little work done on how consensual relationships with faculty affect women in the university, though what I say here draws on the work that has been done.¹⁸⁷ The inquiry is not merely statistical: not just a question of which women stay and which women go and how they objectively perform. What also, and really, matters is the extent to which women see themselves as students in their own right, on equal terms with men, and are thought of and treated on such equal terms by men and other women—and the role that faculty-student sex has in this economy of asymmetrical esteem. It is right that my argument is in this sense hostage to reality, and I find in this little to fear.

What I do fear is what it might mean, in practice, for the law or universities to recognize consensual faculty-student relationships as a potential violation of Title IX. The deep truth is this: patriarchy, as a system, means that women are “subjected to discrimination” “on the basis of sex” wherever they go, including the university, just as racism ensures that people of color are discriminated against “on the basis of race” wherever they go. How could it not be? Women do not enter the classroom on equal terms with men.¹⁸⁸ They are assumed to be less intellectually capable, encouraged to be less risk-taking and ambitious, given less mentoring, socialized to be less confident and to take themselves less seriously, told that their minds are sexual liabilities and their self-worth is a matter of male sexual attention, and groomed to be caretakers and mothers and doting wives rather than scholars or intellectuals. These truths are further underscored and inflected when women are nonwhite or poor or low-caste, and thus seen as multiply unfit for the university.

The question, then, is which forms of inequality we will use the law to try to eradicate, and which forms we will have to leave (we hope) to the forces of social change. One factor, but just one, is seriousness: which forms of discrimination most significantly harm students’ access to education. Another factor, one that often cuts against considerations of the first, is tractability: which behaviors are sufficiently uncommon that regulating them has an air of plausibility to the cultural mainstream. A third factor is consequences: what regulation will achieve not in the ideal case, but in the actual case.

¹⁸⁷. See *supra* note 182.

¹⁸⁸. On this theme, and the myth of “coeducation,” see RICH, *supra* note 79.

It is this final factor that gives me, and should give us all, most serious pause. Would the further expansion of Title IX regulations make campuses safer for women, for queers, for immigrants, for those precariously employed, for people of color?¹⁸⁹ At Colgate University, only 4.2% of the student body was black during the 2013-14 academic year, and yet a full 50% of sexual violation accusations that year were against black male students, with black male students making up 40% of those who went through the university's formal disciplinary process.¹⁹⁰ In 1984, the year after the first consensual relationship policies appeared on U.S. campuses, a court for the first time was asked to decide whether a university was justified in sanctioning one of its teachers for a sexual affair with a student.¹⁹¹ The case, *Naragon v. Wharton*, involved a graduate student at Louisiana State University (LSU), Kristine Naragon, who was having a romantic relationship with a female freshman student whom she did not teach. (At the time, LSU did not officially prohibit such relationships.) The LSU administrators sanctioned Naragon after persistent complaints from the student's parents (but not the student) about the lesbian relationship; the same administrators did not sanction a male professor who was in an ongoing affair with a female student over whom he had grading responsibility.¹⁹² The court upheld the university's sanctioning of Naragon.

When considering the argument for expanding the remit of Title IX, we can and must ask: would it lead to (further) failures of due process,¹⁹³ unfair in

189. On the failures of Title IX in this respect, see Jacob Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, CHRON. HIGHER EDUC. (Jan. 6, 2019), <https://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805> [<https://perma.cc/6N45-QQLF>]; Halley, *Trading the Megaphone*, *supra* note 82; and Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases*, ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361> [<https://perma.cc/NFW8-ZTYC>].

190. Yoffe, *supra* note 189.

191. *Naragon v. Wharton*, 737 F.2d 1403 (5th Cir. 1984).

192. *Id.* at 1407 (Goldberg, J., dissenting).

193. See Halley, *Trading the Megaphone*, *supra* note 82, at 117; Yoffe, *supra* note 189; see also Elizabeth Bartholet et al., FAIRNESS FOR ALL STUDENTS UNDER TITLE IX 10 (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf> [<https://perma.cc/53UC-96R8>] (noting that the processes Harvard adopted “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation”); Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <https://www.prospect.org/article/sex-lies-and-justice> [<https://perma.cc/5EGY-WRT2>] (addressing how campus regulations are often in conflict with due process); Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974> [<https://perma.cc/KST5-5S3C>].

themselves but also doubly unfair in that they often disproportionately target those who are already marginalized? Would such an expansion inadvertently strengthen the hand of cultural conservatives, who are all too keen to control women under the guise of protecting them? Would it supply grounds for the suppression of academic freedom? Would it be seen, however falsely, as the ultimate *reductio* of Title IX, a clear sign if one was ever needed that the feminists had lost their minds?

While I think there is, at the level of principle, a serious Title IX-based case to be made for prohibitions on consensual faculty-student sex, questions such as these make me worry about putting such prohibitions into practice. The Title IX regime is necessary but imperfect, and its imperfections must be addressed.¹⁹⁴ With Department of Education Secretary Betsy DeVos's new and controversial proposed rules¹⁹⁵ and a wave of litigation challenging some of the Obama Administration regulations on due-process grounds,¹⁹⁶ the Title IX regime is facing a slew of changes, though it is debatable whether they will lead to actual improvement. Even with potential reforms, it is also worth remembering that regulation is one way, and not always the best way, to create institutional change. This is perhaps true, above all, when it comes to the institution of sex.

CONCLUSION

In *Eros, Eroticism and the Pedagogical Process*, bell hooks writes of her experience as a new professor: “No one talked about the body in relation to teaching.

(“On too many campuses, a new attitude about due process – and the right to be presumed innocent until proved guilty – has taken hold.”).

194. I am sympathetic, for example, to Halley's suggestion that the university bodies that adjudicate Title IX cases should (unlike current Title IX offices) have a mandate to protect students from all forms of unjust discrimination, including race-based discrimination. See Halley, *Trading the Megaphone*, *supra* note 82, at 107-08. I am also interested in making available to students the choice of reparative justice processes in at least some cases of sexual harassment, discrimination, and assault.
195. Andrew Kreighbaum, *College Groups Blast DeVos Title IX Proposal*, INSIDE HIGHER ED. (Jan. 31, 2019), <https://www.insidehighered.com/news/2019/01/31/higher-ed-groups-call-major-changes-devos-title-ix-rule> [<https://perma.cc/9GZ2-RHUL>]; Laura Meckler, *Betsy DeVos Poised to Issue Sweeping Rules Governing Campus Sexual Assault*, WASH. POST (Nov. 25, 2019), https://www.washingtonpost.com/local/education/betsy-devos-poised-to-issue-sweeping-rules-governing-campus-sexual-assault/2019/11/25/f9c21656-of90-11ea-bofc-62cc38411ebb_story.html [<https://perma.cc/F2BJ-RLBH>].
196. Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED. (Oct. 3, 2019), <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings> [<https://perma.cc/P9DR-XNMD>].

What did one do with the body in the classroom?”¹⁹⁷ What one is supposed to do or not do with one’s body, and with one’s students’ bodies, is something university teachers do not, as a profession, discuss. Or, when we do have such discussions, they are almost always externally imposed by anxious administrators, in the form of mandatory sexual-harassment training. Even then, such training has little to do with what is special or particular about the pedagogical relationship. Lessons from the workplace are transferred to the classroom, with no mention of why the act of teaching itself might carry with it peculiar risks and peculiar responsibilities.

Sometimes, such conversations happen informally. A friend of mine, a young male law professor, recently described to me the awkwardness of sharing a gym with many of his undergraduates. They are free to look at his body, he said, while he “of course, pretends they don’t have bodies at all.” I admired his “of course” — he meant that it is self-evident to him that he cannot be a good teacher while also treating his students as even remotely potential sexual partners.¹⁹⁸ Except that this is not self-evident to many, sometimes with poignant consequences. Another friend, when he was a graduate student, was horrified to learn that some of his female students complained that he stared at them when they wore skirts or shorts to class. No one had told this then-graduate student what it might mean for him, as a man, to teach under patriarchy: that if he just let his gaze go where it “naturally” went, let his conversations and interactions with his students proceed as they “naturally” might, he would likely fail to treat his female students on equal terms with his male students. No one told him that, without an intervention into what came “naturally” to him, he would likely end up treating his women students as something less than fully students: as bodies to be consumed, prizes to be won, reservoirs from which to draw. What is more, no one had told him that, raised as they had been on unequal terms from the start, his women students might well go along with it. As a result, the young women he taught were failed. But so, too, was this graduate student, whose own teachers had failed to teach him how to teach.

The contrast between the profession of university teaching and the profession of psychotherapy on this score is striking. Learning to expect and how to negotiate the dynamics of transference is central to the training of therapists, as is learning just why it is that transference must not be responded to in kind. Nothing similar is true of university professors. Indeed, in the U.S. academic context, graduate students and junior professors are given little pedagogical

197. bell hooks, *supra* note 178, at 58.

198. I should say that neither I nor my professor-friend think that we should ignore the fact that students have bodies that are differently abled, differently racialized, that have different roles in the reproductive cycle, and so on. His point (and mine) is about treating our students as having bodies that might be sexually available to us.

training of any sort. But this difference in training does not, I suggest, track a more fundamental difference in kind between therapy and teaching. In both cases, there is a relation of asymmetric need and trust; in both cases, intense emotions predictably arise; in both cases, sex undermines the constitutive goal of the practice. Rather than simply assuming that there must be something distinctive about university teaching that makes teacher-student sex, but not therapist-patient sex, permissible, we should ask ourselves whether the difference instead lies in the contingencies of history. Freud wrote thoughtfully but unequivocally about the sexual ethics of psychoanalysis at the start of the twentieth century, laying down a common normative groundwork for nearly all schools of psychotherapy thereafter. Pedagogy has not, in this respect, had its Freud. Plato, who perhaps came closest, is all too easily misread.

But it is not too late. Indeed, the trend toward increased campus regulation of sex offers an opportunity for university teachers, as a group, to think about the goals of the pedagogical practice and the norms of conduct appropriate to those goals. One might also think that the trend toward increased regulation gives professors a strong prudential reason to engage in such a project. If professors do not regulate themselves, they will – as has already been happening – be regulated from the top down, with all the attendant consequences. External regulation is unlikely to reflect, and indeed currently does not reflect, the ethical and psychic complexities of pedagogy. Instead, top-down regulation reflects administrators' desires to cover their backs and the law's tendency to see the classroom on the model of the workplace. It is striking, in this regard, that when the law does regulate therapist-patient relationships, it almost always does so in the terms accepted by therapists themselves: in the terms, that is, of what therapists as therapists owe to their patients as patients. What might it be, I want to ask, for professors to lead administrators and the law in thinking not merely in the familiar terms of consent, coercion, and conflict of interest – but in terms of what university teachers as teachers owe their students as students? What might it be for us to articulate a sexual ethics of pedagogy?