

Sex as a Pedagogical Failure*

Amia Srinivasan
St John's College, Oxford

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 employment sexual harassment law: the differential in power 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 infantilising attitude towards (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 are often parasitic on, and productive of, 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. Whether or not we should ultimately favour such an interpretation of Title IX – whether or not, that is, it would render campuses ultimately more equal for women and other marginalised people – it is clear that university professors need to attend more carefully to the sexual ethics of their own practice.

Being so caught up,
So mastered by the brute blood of the air,
Did she put on his knowledge with his power

W.B. Yeats, 'Leda and the Swan'

1. A Change in Policy

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

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¹ <https://yalealumnimagazine.com/articles/2740-university-bans-faculty-student-sex>

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 or amorous relations with any current Yale undergraduate whatsoever (the rules for faculty-graduate student relationships remain as before). Yale’s example was swiftly followed by several other universities, including Harvard,⁴ the University of Pennsylvania⁵, the University of Connecticut,⁶ Northwestern⁷, Stanford⁸, MIT,⁹ Columbia¹⁰ and Duke.¹¹ 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 libertarians¹² and feminists.¹³ 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 anti-discrimination 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 rationale that now standardly undergirds prohibitions on faculty-student sex – a rationale, we will see, borrowed from employment sexual harassment law – according to which differentials in power between professor and student 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 towards at least the partial equalisation of the epistemic asymmetry that constitutively characterises the teacher-student relationship. When the teacher makes the student’s longing for epistemic power an occasion for his own gratification, allowing himself to be – or making himself – the object of her desire, he has failed her as a teacher.

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.

² Margaret H. Mack, Regulating Sexual Relationships Between Faculty and Students, 6 Mich. J. Gender & L. 79 (1999), at 91.

³ Jeffrey Toobin, ‘The Trouble with Sex’, *The New Yorker*, February 9 1998, pp 48-55, at 53-54. Toobin laments that the mathematics professor, Jay Jorgensen, and others like him, ‘can expect...to have their careers destroyed’ (ibid 54). Jorgensen is currently a tenured professor at City College New York.

⁴https://www.washingtonpost.com/news/grade-point/wp/2015/02/05/harvard-formally-bans-sexual-relationships-between-professors-and-undergrads/?utm_term=.715f89aad0cc

⁵<https://www.thedp.com/article/2018/03/pritchett-provost-consensual-sex-policy-faculty-undergraduates-ivy-league-shift-upenn-philadelphia>

⁶https://www.washingtonpost.com/news/grade-point/wp/2015/02/05/harvard-formally-bans-sexual-relationships-between-professors-and-undergrads/?utm_term=.715f89aad0cc

⁷ https://policies.northwestern.edu/docs/Consensual_Relations_011314.pdf

⁸ <https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-2#anchor-24451>

⁹<https://www.insidehighered.com/news/2018/05/24/academe-sees-new-wave-faculty-student-relationship-restrictions-era-me-too>

¹⁰<https://www.insidehighered.com/news/2018/05/24/academe-sees-new-wave-faculty-student-relationship-restrictions-era-me-too>

¹¹<https://www.insidehighered.com/news/2018/05/24/academe-sees-new-wave-faculty-student-relationship-restrictions-era-me-too>

¹² Private email from Charles Young.

¹³ Yale Alumni Magazine article, ibid

But not only that. Much professor-student sex, in its dominant mode – i.e. male professor and female student – constitutes not only a pedagogical failure, but moreover a patriarchal failure.¹⁴ For such relationships are often parasitic on, and productive of, 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. Whether or not we should ultimately favour 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 non-white, queer, immigrant, working class and precariously employed people – it is clear that university professors need to attend more carefully to the sexual ethics of their own practice. The demand here is not fundamentally prudential – a matter of increased legal liability or administrative pressure – but pedagogical: a question of our ethical duties, as teachers.

2. 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 1964 U.S. Civil Rights Acts, women in the 1960s and 1970s struggled to invoke the law in their battle against (what feminists would eventually come to call)¹⁵ sexual harassment in the workplace. Judges often decided that workplace sexual harassment was a merely ‘personal’ matter,¹⁶ or a natural and inevitable feature of working life.¹⁷ 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

¹⁴ My focus in this article is on this dominant form of faculty-student relationship. Some of what I say applies to other forms of faculty-student relationship (e.g. female professor and male student, male professor and male student, female professor and female student). In particular, all such relationships, I think, involve a pedagogical failure. What is more, the argument I advance in §6, to the effect that consensual professor-student relationships might constitute sex discrimination, might well be extended to certain (e.g. 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 case of Jane Gallop (discussed in §3) and of Avital Ronnell, a 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. (cite: <https://www.nytimes.com/2018/08/13/nyregion/sexual-harassment-nyu-female-professor.html>).

¹⁵ The term ‘sexual harassment’ was invented in 1975, at a meeting of feminist activists at Cornell, led by Lin Farley, who were organising a speak-out against unwanted advances in the workplace. 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 advance on the job, together with the case of Carmita Wood, a 44-year-old administrative assistant who had been relentlessly molested and abused by her boss, a Cornell physicist. After her request for a transfer to another department was denied, Wood quit her job. When she filed her claim for unemployment insurance, she indicated that her reasons for quitting were ‘personal’; her claim was denied. In planning the speak-out, Farley and her fellow activists had to give a name to what had been done to Wood and so many other women; they decided on the term ‘sexual harassment’. (Susan Brownmiller, *In Our Time: Memoir of a Revolution* (New York: Dial Press, 1990), 280ff.) In 1975, Catherine 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?’ ‘When I read that,’ MacKinnon would later say, ‘my 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’ (Toobin *ibid* 50).

¹⁶ *Corne v. Bausch and Lomb*, 390 F. Supp. 161, 163 (D. Ariz. 1975) (supervisor’s conduct was “nothing more than a personal proclivity, peculiarity or mannerism. By his alleged sexual advances, Mr. Price was satisfying a personal urge”).

¹⁷ See *Miller v. Bank of America*, 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”); *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 557 (D.N.J. 1976) (citing *Miller* with approval); *Corne v. Bausch and Lomb*, 390 F. Supp. 161, 163-64 (D. Ariz. 1975) (“The only sure way an employer could avoid such charges would be to hire employees who were asexual”).

subordinates;¹⁸ or because it was a harm that did not affect all women in a workplace, but only some of them – i.e. those who did not want to concede to the boss’ advances¹⁹.

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 a practice that 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 a suit against her former employer for sex discrimination. Her boss, Douglas Costle, had fired Barnes after she refused his persistent sexual overtures. Barnes’ case was initially dismissed by the district court, but then proceeded to the District of Columbia Court of Appeals for review. Catharine MacKinnon, then a law student at Yale, slipped a working paper that would eventually become her seminal *The Sexual Harassment of Working Women* to one of the law clerks involved with *Barnes v. Costle*.²⁰ The court ruled that sexual harassment constituted sex discrimination, and was thus a violation of Title VII of the Civil Rights Act.²¹

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*.”²² Costle’s discriminatory act lies in his differential desire, because of which only women were subject to harassment. The implication of this – one explicitly drawn by the court in *Barnes*²³ – is that, had Costle been bisexual, targeting both

¹⁸ *Tomkins v. Public Service Electric & Gas Co.*, 422 F. Supp. 553, 556 (D.N.J. 1976) (“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 v. Bausch and Lomb*, 390 F. Supp. r61, 163 (D. Ariz. 1975) (“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 to note that this argument – that sexual harassment is not sex discriminatory because it can target both men and women – presupposes an account of sex discriminatory action (as something that in principle can only happen to women) that is at odds with that standardly invoked by courts to explain why it was not discriminatory for a woman to be fired for e.g. getting pregnant (i.e. it is not sex discriminatory because there is no comparison class of pregnant men with which to establish differential treatment.) See for example *General Electric v. Gilbert* (policy of firing pregnant women not sex discrimination because only women can get pregnant, so no comparison class of men against which women are differentially treated).

¹⁹ *Barnes v. Train, Civ. No. 1828-73 (D.D.C. 1974)* (“she 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 *Williams v. Saxbe*, 413 F. Supp. 654, 657 (D.D.C. 1976) (“since 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”); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977) (“appellee 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’”; c.f. *Lanigan v. Bartlett & Co. Grain*, 466 F. Supp. 1388, 1391 (W.D. Mo. 1979) (applying the sex-plus doctrine to uphold firing of female employee who violated dress code) (“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 Note, Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv.L.Rev. 1109, 1171-72 (1971).

²⁰ Toobin *ibid*, at 50.

²¹ 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 ‘Sexual 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’. One can only convince one’s father of so much.

²² *Barnes v. Costle*, emphasis added. See also *Williams v. Saxbe*, 413 F. Supp. 654,659 (D.D.C. 1976) (similar analysis as basis for finding that sexual harassment discriminates on the basis of sex).

²³ *Barnes v. Costle*, fn. 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

women and men for sexual harassment, his actions would not constitute sex discrimination. This reasoning established Barnes' sex as a necessary condition of her harassment. But what about the claim, invoked in earlier cases,²⁴ that Barnes' 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' advances? Here the court said that 'it is enough that gender is a factor contributing to the discrimination in a substantial way', citing the defeat, on the floor of the House in 1964, of a proposed amendment to Title VII that would have restricted its application to cases of discrimination 'solely' on the basis of sex.²⁵

This understanding of sex discrimination as sex-differential treatment remains the one conventionally appealed to in the law.²⁶ But, as MacKinnon noted in her 1979 *Sexual Harassment of Working Women*, this 'differential treatment' approach to sex discrimination has at least two shortcomings. First, it requires that 'it can be shown that a person of the opposite sex in the same position is not treated the same'.²⁷ This poses a problem where women are discriminated against but there exists no 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 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, i.e. pregnant men. Similarly, in *Rafford v. Randle Eastern Ambulance Service, Inc.*, the court found that it was not sex discrimination to fire men with 'excessive' beards – because there were no excessively bearded women who were being treated differently. 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;²⁸ that men are *also* being sexually harassed presumably does not make such actions any less discriminatory against women, and vice versa. As an early bit of commentary put it: 'only the discriminatory application is being attacked, not the evil itself'.²⁹

According to MacKinnon's alternative 'equality' approach to sex discrimination, '[a] rule or practice is discriminatory...if it participates in the systematic social deprivation of one sex because of sex.'³⁰ 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 labour.³¹ A major advantage of the

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".

²⁴ See fn. 19.

²⁵ *Barnes v. Costle*. ("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 *Williams v. Saxbe* (plaintiff discriminated against on the basis of sex plus attractiveness, constituting sex discrimination under Title VII); *Phillips v. Martin Marietta Corp* (sex-plus discrimination is sex discrimination under Title VII); *Sprogis v. United Airlines* ('no-marriage' policy that applies only to female flight attendants is sex discriminatory).

²⁶ Susan M. Omilian and Jean P. Kamp, 'Sex-Based Employment Description', June 2019 Update, Part III, §11:9. See also *ibid* for a discussion of the alternative 'disparate impact' understanding of sex discrimination.

²⁷ MacKinnon, *Sexual Harassment of Working Women*, 1979, at 225.

²⁸ See fn. 23

²⁹ Note: Title VII: Legal Protection Against Sexual Harassment, 52 Wash. L. Rev. 123, 136 n 62 (1977)

³⁰ MacKinnon *ibid* 117

³¹ 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 equality approach gives a wholly

equality 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*, in how ‘similarly situated’ is to be understood: whether, for example, the situation of pregnant women is sufficiently similar to that of men suffering from temporary disabilities unrelated to pregnancy.³² If these two groups are ‘similarly situated’, then General Electric’s policy is sex discriminatory; if not, 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’ view is that it tries to characterize sex discrimination at a purely formal level, prescinding from the social reality of sexual subordination, thereby licensing tacit reliance on (unjustified) normative judgments about which practices are problematic, and which are not. By contrast, MacKinnon’s equality approach makes explicit the irreducibly normative nature of judgments about sex discrimination, by making such judgments a matter of the substantive social effects of actions and practices: whether, that is, they conduce to sex oppression.

While MacKinnon’s equality approach has not been explicitly taken up by the courts,³³ there are indications of its enduring influence. In *Barnes v. Costle*, for example, the court explicitly invoked the ‘differential treatment’ account of sex discrimination, explaining that Barnes was discriminated against because her supervisor would not have treated his male subordinates similarly.³⁴ But the court also, as Reva Siegel observes,³⁵ subtly invoked a different conception of sex discrimination, by comparing 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’³⁶. Likewise, Congress invoked a different conception of sex discrimination when – in direct response to the Supreme Court’s decision in *Gilbert* that the practice of firing pregnant women was not sex discriminatory – it amended Title VII to explicitly include discrimination on the basis of pregnancy as a form of sex discrimination.³⁷

In 1997, a few months before *Barnes* would be decided, MacKinnon, now working as one of the leaders of the progressive New Haven Law Collective, helped a group of current and former Yale

satisfying treatment of such cases. For a critical discussion, see Janet Halley, ‘Sexuality Harassment’, in *Left Legalism/Left Critique*, Edited by Wendy Brown and Janet Halley, 80-104. Durham, NC: Duke University Press.

³² For the sake of the dialectic only, I am granting the premise that only women can get pregnant.

³³ Susan M. Omilian and Jean P. Kamp, ‘Sex-Based Employment Description’, June 2019 Update, Part III, §11:9.

³⁴ See fn 22.

³⁵ Reva Siegel, ‘Introduction: A Short History of Sexual Harassment’, in MacKinnon, C. A., & Siegel, R. B. (Eds.). (2003). *Directions in sexual harassment law*, at 14–15.

³⁶ Siegel *ibid*, at 15.

³⁷ Nicholas Pedriana, *Discrimination by Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 Yale J.L. & Feminism (2009). The central argument marshalled by supporters of the 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 (Pedriana *ibid* 12). This is an instance of the ‘differential treatment’ approach to discrimination. But an equality approach was also invoked by the PDA’s supporters. Susan 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, this one decision [*Gilbert*] could thus be used to justify a whole complex of discriminatory employment practices designed to insure that women workers’ role in the market place be confined to low-paying, dead-end jobs...Such policies have a lifetime impact on women’s careers’ (Pedriana *ibid* 12).

undergraduate women sue the school for the sexual harassment they had suffered, and the failure of the university to have any established mechanism to deal with such complaints.³⁸ The resulting case, *Alexander v. Yale*, was decided both by the district court and on appeal in favour of the university. Nonetheless, it established that sexual harassment, at least in its *quid pro quo* form,³⁹ constituted sex discrimination under Title IX of the Education Amendments Act of 1972, explicitly drawing on the finding in *Barnes* (by then decided) that sexual harassment constitutes discrimination under Title VII. What is more, the case prompted universities across the country to create sexual harassment codes and grievance procedures, a requirement of Title IX that had been previously largely ignored.⁴⁰ These new regulatory structures were meant to prevent, inter alia, students being subjected to 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.⁴¹

Soon, however, universities started turning their attention to sexual relationships between faculty and students that were, at least on their face, non-coercive. 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'. Rosovsky also warned that faculty-student relationships outside the instructional context 'may also lead to difficulties'.⁴² In the same year, the University of California's Assembly of the Academic Senate adopted a proposal to ban faculty-student sex in the supervisory context.⁴³ These highly publicized policy changes led many other universities to follow suit and create their own consensual relationship policies,⁴⁴ including the University of Minnesota (in 1984)⁴⁵, Temple University (1985)⁴⁶, MIT (1985)⁴⁷, the University of Michigan (1986)⁴⁸,

³⁸ For discussion of the context and legacy of *Alexander v. Yale*, see Anne E. Simon, 'Alexander v Yale University: An Informal History', in MacKinnon ed, *Directions in Sexual Harassment Law*.

³⁹³⁹ The district court dismissed the claims of two plaintiffs, who had complained, respectively, of feeling intense emotional distress while supporting a friend who was sexually harassed without recourse, and of being threatened by a Yale administrator with a defamation suit for investigating persistent reports of sexual harassment. The court commented that 'No judicial enforcement of Title IX could properly extend to such imponderables as *atmosphere*...and the claims just mentioned are untenable on their face' (*Alexander v. Yale University*, 459 F.Supp. 1 (1977), at 3, emphasis added). The hostile environment form of sexual harassment would not be recognised as sex discrimination under Title IX until 1993, in *Patricia H. v. Berkeley Unified School Dist.*, 830 F. Supp. 1288 (N.D. Cal. 1993). The plaintiffs in the case were represented by Pamela Price, one of the original plaintiffs in *Alexander*.

⁴⁰ Simon *ibid*, at p 56.

⁴¹ In 1980, thirty percent of female seniors at the University of California at Berkeley reported harassment by at least one male professor. A 1983 survey of graduate and undergraduate women students at Iowa State University found that 43.2% of the students reported receiving unwanted sexual attention from a professor, including verbal sexual advances, fondling, kissing, pinching, hugging, and sexual bribery. (Elisabeth A. Keller. 'Consensual Amorous Relationships Between Faculty And Students: The Constitutional Right to Privacy.' *Journal of College and University Law* 15, (1988): 21-42, at 21, referring to Middleton, Sexual Harassment by Professors: An Increasingly Visible Problem, *Chron. of Higher Educ.*, Sept 15, 1980. At 1, 4. And Adams, Kotke & Padgett, Sexual Harassment of University Students, 24 *J.C. Student Personnel* 484, 488 (1983). See also Dziech & Weiner, *The Lecherous Professor* (2nd ed), p 11ff.

⁴² Frances L. Hoffman, *Sexual Harassment in Academia: Feminist Theory and Institutional Practice*, 56, *Harv. Edu. Rev.* 105, at 111-2.

⁴³ Hoffman *ibid*, p 110.

⁴⁴ Hoffman *ibid*, p 105.

⁴⁵ Elisabeth A. Keller. 'Consensual Amorous Relationships Between Faculty And Students: The Constitutional Right to Privacy.' *Journal of College and University Law* 15, (1988): 21-42, at 22.

⁴⁶ Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 *S. CAL. L. REV.* 777, 862 (1988). At p 844, fn. 255

⁴⁷ Chamallas *ibid* at p 844, fn. 255

⁴⁸ Chamallas *ibid* at p 844, fn. 255

the University of Iowa (1986)⁴⁹, The College of William & Mary (1991)⁵⁰, Tufts (1992)⁵¹, Indiana (1992)⁵², University of Virginia (1993)⁵³, Amherst College (1993)⁵⁴, Oberlin (1993)⁵⁵, Stanford (1993)⁵⁶, Ohio Northern University (1995),⁵⁷ Rutgers (1997),⁵⁸ Buffalo State College (1997)⁵⁹ and Yale (1997).⁶⁰ In 1993, *Harper's* reported 'at least two dozen universities' that had proscribed student-professor romances in 'the last few years'.⁶¹ In the early 1990s, important professional organisations, including the American Council on Education, the National Education Association, the Association of American Law Schools, and the American Association of University Professors, also began urging universities to formulate policies on consensual faculty-student relationships.⁶² The resulting policies ranged from merely discouraging faculty-student relationships to forbidding them in actual or potential instructional/supervisory contexts, to blanket prohibitions.⁶³

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 MacKinnon, 'coercion is paradigmatic of heterosexual relations and constitutive of the social meaning of gender under gender inequality'.⁶⁴ 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. While, as I have shown, this feminist account of sex discrimination was only ever partially internalised by anti-discrimination law, it did bring new suspicion on seemingly consensual heterosexual relationships, especially those marked by a formal asymmetry in power – as in the paradigm case of teacher-student relationship: male professor and the female student.

A second factor in the expansion of consensual relationship policies was the Supreme Court's 1986 decision, in *Meritor Savings Bank, FSB v. Vinson*, that an employee's consensual sexual involvement with

⁴⁹ Keller *ibid* 22

⁵⁰ Jack Hitt (editor), 'New rules about sex on campus', *Harper's Magazine*, September 1993, pp 33-42, at p 36

⁵¹ Jim Morrison, *U-Va. Faculty Bans Sex With Students: Proposed Rule Awaits President's Approval*, Wash. Post, Apr. 23, 1993, at B1.

https://www.washingtonpost.com/archive/local/1993/04/23/u-va-faculty-bans-sex-with-students/006e1c8a-ea15-4d71-b8a7-c1779a4dda09/?utm_term=.48a815d10263

⁵² Hitt *ibid* p 36

⁵³ Morrison, *ibid*.

⁵⁴ Hitt *ibid* p 36

⁵⁵ Hitt *ibid* p 36

⁵⁶ <https://adminguide.stanford.edu/chapter-1/subchapter-7/policy-1-7-2>

⁵⁷ Sherry Young, 'Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education', *Journal of Gender & The Law*, Vol 4:269, at 271, fn 11, citing Ohio Northern Faculty Handbook 1995-96, 2.3(3), at 14-15: "Faculty and staff members should not have sexual relations with students to whom they are not married".

⁵⁸ Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 Mich. J. Gender & L. 79 (1999), at 83, fn. 6.

⁵⁹ Peta Cox, 'Epistemophilia: Rethinking Feminist Pedagogy', *Australian Feminist Studies*, Vol. 25, No. 63, March 2010, at 89, fn 8.

⁶⁰ Mack *ibid*, 91.

⁶¹ Hitt *ibid*, at 33.

⁶² Young *ibid*, at 272 and Jennifer L. Gossett & Maria L. Bellas, 'You Can't Put a Rule around People's Hearts ... Can You?: Consensual Relationships Policies in Academia' (2002), *Sociological Focus* 35(3): 267-283, at 270.

⁶³ See Young *ibid*, at 273-6, for a taxonomy of different policy types.

⁶⁴ Catharine MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 65 (1983). For the pioneering feminist theorising of sexual harassment, see Farley, L. (1978). *Sexual shakedown: The sexual harassment of women on the job*. New York: McGraw-Hill; Catharine MacKinnon (1979). *Sexual harassment of working women*. New Haven: Yale University Press; and Working Women United Institute. (1975). *Sexual harassment on the job: Questions and answers*. Unpublished manuscript, Ithaca, NY.

a supervisor was not necessarily a bar to a finding of sexual harassment under Title VII.⁶⁵ Mechelle Vinson was a 22-year-old woman who, while working as a bank teller, was persistently coerced into having sex with her supervisor, vice president Sidney Taylor, over the course of three years, until he fired her for taking inordinate amounts of sick leave. (Like Paulette Barnes before her, and the women in other key sexual harassment cases,⁶⁶ Mechelle Vinson was black; it is black women in the U.S. who have both 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 her Taylor's sexual demands in order to avoid being fired, this did not make his sexual advances wanted. For 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.'"⁶⁷ 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. For women students' consent to such relationships might, like Mechelle 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 1990 amendment to its guidance on Title VII,⁶⁸ which provided that employers may be held liable for unlawful sex discrimination against third parties who were negatively affected by the favouritism shown by a superior to a subordinate with whom he is in a relationship.⁶⁹ 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, either because such relationships failed to pass a 'wantedness' test, or because they could generate third-party claims of hostile work environment due to favouritism.⁷⁰

While some feminists welcomed the creation of campus consensual relationship policies,⁷¹ others warned that they represented a betrayal of feminist principles.⁷² The latter group took particular aim at

⁶⁵ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986). For discussion of the implications of *Meritor* for universities, see Elisabeth A. Keller, "Consensual Amorous Relationships Between Faculty And Students: The Constitutional Right to Privacy," *Journal of College and University Law* 15, (1988): 21-42. At 24ff.

⁶⁶ See e.g. *Miller v. Bank of America*, 418 F. Supp. 233 (N.D. Cal 1977) (black female clerk suing white male supervisor); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459 (E.D. Mich. 1977) (black female assistant manager suing white male employer). The central plaintiff in *Alexander v. Yale*, 459 F.Supp. 1 (D.Conn. 1979), 631 F.2d 178 (2nd Cir. 1980), Pamela Price, was also black.

⁶⁷ *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

⁶⁸ <https://www.eeoc.gov/policy/docs/sexualfavor.html>

⁶⁹ Ann Pellegrini, Interested Third Parties: A response to Tania Modleski, *Critical Inquiry* 26, 2000, at p 625.

⁷⁰ Carol Sanger, 'Consensual Sex and the Limits of Harassment Law', in MacKinnon and Siegel (eds), *Directions in Sexual Harassment Law*, at p 80; Wyatt, *Avoiding Sexual Abuse Claims After Meritor*, Nat'l L.J., Oct. 7, 1986, at 19, col. 1.

⁷¹ See e.g. Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. CAL. L. REV. 777, 862 (1988); Phyllis Coleman, *Sex in Power Dependency Relationships: Taking Unfair Advantages of the "Fair" Sex*, 53 Albany L. Rev. 95, 119 (1988); Dziech & Weiner *ibid*; Margaret H. Mack, Regulating Sexual Relationships Between Faculty and Students, 6 Mich. J. Gender & L. 79 (1999); Carol Sanger, 'The Erotics of Torts', *Michigan Law Review*, 1998, Vol. 96: 1852-1883; Tania Modleski, 'Fight the Power: A response to Jane Gallop, James Kincaid, and Ann Pellegrini', *Critical Inquiry* 26, 2000; Caroline Forell, What's Wrong with Faculty-Student Sex-The Law School Context, 47 J. LEGALEDUC. 47, 72 (1997). See also Adrienne Rich, *Taking Women Students Seriously*, in ON LIES, SECRETS, AND SILENCE (1979), at 242-43; and 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).

⁷² See e.g. Jane Gallop, *Feminist Accused of Sexual Harassment*. 1997. Durham: Duke University Press; Ann Pellegrini, 'Pedagogy's Turn: Observations on students, teachers, and transference-love' *Critical Inquiry* 25, 1999, pp 617-625; Sherry Young (1996), 'Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education', 4 American University Journal of

the common, rationale for these policies, according to which the large differential in power between teacher and student precludes or casts doubt on the possibility of genuine, non-coerced 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 moralising and protectionist logic of 'yes means no'?⁷³ Some feminists also argued that prohibitions on consensual student-teacher sex disproportionately harm queer and other precarious faculty members;⁷⁴ reinforce a hierarchical and inhumane understanding of pedagogy that is anti-feminist;⁷⁵ and ignore the inherently personal, and indeed erotic, nature of the pedagogical enterprise.⁷⁶ (Male opponents of such bans, meanwhile, typically expressed their opposition in terms of the right to privacy and free association⁷⁷, their distaste for prudery⁷⁸, and, in one notorious case, the benefits to young women of losing their virginity to their male professors⁷⁹.) 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 the college campus 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 victims and all heterosexual desire suspect, declaring themselves instead 'pro-sex' or 'sex-positive'.⁸⁰ These feminists of the 'third wave' strongly criticised 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.⁸¹ (As Ann Snitow, Christine Stansell, and Sharon Thompson wrote in a gently critical letter to Adrienne Rich in 1981: 'In the Reagan

Gender & Law: 269-302; Carrie N. Baker, *Proposed Title IX Guidelines on Sex-based Harassment of Students*, 43 Emory LJ.271, 271 n.121 (1994); Margaret Talbot, 'A Most Dangerous Method', *Lingua Franca* 1997; Frances L. Hoffman, *Sexual Harassment in Academia: Feminist Theory and Institutional Practice*, 56, Harv. Edu. Rev.

⁷³ Gallop *ibid*, Pellegrini *ibid*, Young *ibid*. For a more recent expression of this critique, see Laura Kipnis, 'Sexual Paranoia Strikes Academe', *The Chronicle of Higher Education*, February 27, 2015 and Laura Kipnis, *Unwanted Advances*, Verso 2018.

⁷⁴ Gallop *ibid*, Pellegrini *ibid*, Hoffman *ibid*. See also: Kal Alston, 'So Give Me Love, Love, Love, Love, Crazy Love: Teachers, Sex, and Transference?', *Philosophy of Education* 1998, at 366. In *Naragon v. Wharton*, 572 F. Supp. 1117 (M.D. La. 1983), *aff'd* 737 F.2d 1402 (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 parents of the student 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. (Caroline Forell, What's Wrong with Faculty-Student Sex-The Law School Context, 47 J. LEGAL EDUC. 47, 72 (1997), at 67-68.) For similar worries about 'governance feminism' and the regulation of sex more broadly, see Janet Halley 2002, 'Sexuality Harassment.' In *Left Legalism/Left Critique*, Edited by Wendy Brown and Janet Halley, 80-104. Durham, NC: Duke University Press; Janet Halley, 2006. *Split Decisions: How and Why to Take a Break from Feminism*. Princeton: Princeton University Press; and Janet Halley, 2015. 'Trading the Megaphone for the Gavel'. Harvard Law Review Forum, Vol 128:103.

⁷⁵ Gallop *ibid*, Talbot *ibid*.

⁷⁶ Gallop *ibid*, Talbot *ibid*.

⁷⁷ See Hitt *ibid*, p 36ff; and Gary E. Elliott, *Consensual Relationships and the Constitution: A Case of Liberty Denied*, 6 Mich. J. Gender & L. 47 (1999). See also Elisabeth A. Keller. "Consensual Amorous Relationships Between Faculty And Students: The Constitutional Right to Privacy." *Journal of College and University Law* 15, (1988): 21-42.

⁷⁸ See Hitt *ibid* p 34; and James Kincaid, 'Pouvoir, Felicite, Jane, et Moi (Power, Bliss, Jane, and Me)', *Critical Inquiry* 25(3), 1999: 610-616.

⁷⁹ See Hitt *ibid*, at 35-36.

⁸⁰ For the *locus classicus*, see Ellen Willis, 'Lust Horizons: Is the Women's Movement Pro-Sex?' (1981) in *No More Nice Girls* (1992), pp. 3-14.

⁸¹ See e.g. Carol S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in *PLEASURE AND DANGER EXPLORING FEMALE SEXUALITY* 22 (Carol Vance ed., 1989); Katie Roiphe, *The Morning After. Sex, Fear, and Feminism on Campus* (Boston, 1993); Cathy Young, *The New Madonna/Whore Syndrome: Feminism, Sexuality, and Sexual Harassment*, 38 N.Y.L. SCH. L. REV. 257, 258 (1993); Rene Denfeld, *The New Victorians: A Young Woman's Challenge to the Old Feminist Order* 11 (New York, 1995); and Nadine Strossen, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (New York, 1995).

era, we can hardly afford to romanticize any old norm of a virtuous and moral sexuality.⁸²) But in the last decade, and particularly in the wake of #MeToo, feminists have moved back towards a second-wave scepticism about sex across large power differentials. As an index of this shift, just consider how contemporary feminists would respond to a present-day Monica Lewinsky-type scandal, and compare this 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-one year old intern.⁸³

Correspondingly, regulation of teacher-student relationships have become increasingly common, and have faced (as in the case of Yale’s 2010 policy change) little resistance from feminists.⁸⁴ In 1989, only an estimated 17% of American universities had consensual relationship policies; by 2004, the estimate was 57%.⁸⁵ A 2014 survey of universities found that that number had risen to 84%.⁸⁶ Since Yale’s decision in 2010 to prohibit all faculty-undergraduate relationships, many other universities have followed suit, crafting similarly strict policies. The justification for these policies almost invariably appeal to the differences in power between faculty and student.⁸⁷

Whatever we think of the policies it undergirds, the ‘power differential, no consent’ rationale is problematic.⁸⁸ In *Meritor*, the observation that consent is no bar to a finding of sexual harassment is motivated by those cases 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. In such cases, a form of consent may be given, but not the sort of consent that is incompatible with unwantedness. The ‘power differential, no consent’ rationale thus assimilates all cases of professor-student relationship 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 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. But the former unpacking of the ‘power differential, no consent’ rationale only applies to those cases in which students, despite appearances, feel subtly coerced into consenting to sexual relationships with their professors. What of those cases – we all know of them – in which women students enthusiastically and wilfully enter into such relationships, and indeed initiate those relationships themselves?

Of course, there will be cases for which even the best rules are a clumsy fit. 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 rationale should be thrown out. The problem

⁸² Adrienne Rich, ‘Compulsory Heterosexuality and Lesbian Existence’ (1980), *Journal of Women's History*, Volume 15, Number 3, Autumn 2003, pp. 11-48, p. 38

⁸³ For contemporary reactions from women to the Clinton-Lewinsky affair, see <https://observer.com/1998/02/new-york-supergals-love-that-naughty-prez/> and <https://www.vanityfair.com/magazine/1998/05/williams199805>

⁸⁴ A notable exception here is Laura Kipnis. See citations in fn. 73.

⁸⁵ Eileen Sullivan (2004) Perceptions of Consensual Amorous Relationship Policies (CARPs), *Journal of College and Character*, 5:8.

⁸⁶ Tara N. Richards, Courtney Crittenden, Tammy S. Garland, Karen McGuffee (2014), ‘An Exploration of Policies Governing Faculty-to-Student Consensual Sexual Relationships on University Campuses: Current Strategies and Future Directions’. *Journal of College Student Development*, Vol. 55 (4): 337-352, at p 342.

⁸⁷ Richards et al (ibid), at 344, found that 98% of universities with a consensual relationship policy justified that policy in terms of the power differential between faculty and student.

⁸⁸ For appeals to this rationale in defence of regulations on professor-student relationships, see e.g. – Peter DeChiara ibid, at 142; Phyllis Coleman ibid, at 95-96; and Dziech & Weiner ibid, at 25, 75.

is that such relationships are not in fact 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: 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 about such cases – 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 want to 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 *Oleana*-style insistence that, really, women students have all the power, because they can get their male professors fired. Instead, teacher and student are constitutively characterised by a profound *epistemic* asymmetry. Teachers, *qua* teachers, know, understand and know how to do certain things; students, *qua* students, want to know, understand and know how to do those same things. Implicit in the student-teacher relationship is the promise of at least a partial equalisation of that asymmetry: that the teacher will confer on the student some of his power, will 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 to this transposition.

3. 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, and reprimanded her. Five years later, Gallop published a book, *Feminist Accused of Sexual Harassment*, defending herself against the accusations.⁸⁹ 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 purposively made her pedagogical relationships intense, flirtatious and sexually charged; that she had many consensual sexual affairs with students, both undergraduate and graduate, before 1982, when she met the man she would go on to marry. 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

⁸⁹ Jane Gallop, *Feminist Accused of Sexual Harassment*. 1997. Durham: Duke University Press

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.⁹⁰

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 a parent) onto the analyst.⁹¹ In many cases the result is what Freud called ‘transference-love’, a projection of a child’s devotion, infatuation and eagerness to please from parent to analyst. Transference, Gallop says, ‘is also an inevitable part of any relationship we have to a teacher who really makes a difference’.⁹² 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, want. And those of us who teach will likely recognise 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.⁹³ Even so, Gallop fails to notice that, central to Freud’s theory of transference – and central to the contemporary practice of psychotherapy⁹⁴ – is his insistence that the analyst ‘is absolutely debarred’⁹⁵ from engaging romantically or sexually with his patients.⁹⁶ For Freud, ‘the analyst responds but does not respond *in kind*’.⁹⁷ 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 towards his own emotional or physical satisfaction. (Freud cautions the analyst that the ‘patient’s falling in love is induced by the analytic situation and is not to be ascribed to

⁹⁰ Gallop *ibid*, 57.

⁹¹ Gallop *ibid*, 56

⁹² Gallop *ibid*, 56

⁹³ 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 romanticised self-understanding, in the sort of institutions (elite universities) that provide the space and time for intense dyadic pedagogic relationships. Thus, Robin writes, ‘the real shadow talk of the erotic professor is not sex but class’ (Corey Robin, ‘The Erotic Professor’, *The Chronicle of Higher Education*, May 13, 2018). 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 the present article. 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’. But he is right to point out that this is an all too easy thing to say, and 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. For what it is worth, I wholeheartedly support such a redistribution.

⁹⁴ Gleason O. Gabbard and Eva P Lester, *Boundaries and Boundary Violations in Psychoanalysis*, New York 1995.

⁹⁵ Sigmund Freud (1915), ‘Further Recommendations in the Technique of Psycho-Analysis: Observations on Transference-Love’. Transl. Joan Riviere. In Stephen Ellman, *Freud’s Technique Papers*, 2002, p 79.

⁹⁶ Pellegrini (*ibid*) correctly notes Freud’s prohibition on counter-transference, but strangely takes this to speak *against* prohibitions on faculty-student relationships. For more straightforward applications of Freud’s views of transference-love to the pedagogical context, see Carol Sanger (1998), ‘The Erotics of Torts’ *Michigan Law Review*, Vol. 96: 1852–1883; Chris Higgins 1998, ‘Transference Love from the Couch to the Classroom: A Psychoanalytic Perspective on the Ethics of Teacher-Student Romance’, *Philosophy of Education*; and Lisa Ruddick, ‘Professional Harassment’, *Critical Inquiry* 26, 2000, pp 601–609.

⁹⁷ Chris Higgins *ibid*, p 363.

the charms of his person'.⁹⁸) Instead, the analyst must use the transference-relation as an tool in the therapeutic process. The skilled analyst does this by drawing the patient's attention to the transference at work, and, Freud says, '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 says, '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.'⁹⁹

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 towards 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.¹⁰⁰ 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'.¹⁰¹ By this Freud means he can explain why analysts should not sleep with their patients, not by appealing to general moral principles (say, a prohibition on non-consensual sex or sex across power differences), but by appealing to the specific 'requirements of analytic technique'.^{102,103} Simply put, romantic and sexual relations between analyst and patient severely disrupt, and are incompatible with, the constitutive 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 towards the therapeutic goal, he has failed *qua* analyst.¹⁰⁴ The same can be said of teaching.¹⁰⁵ 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 appeal, that is, to the point of education: the intellectual transformation of the student.

⁹⁸ Freud in Ellman *ibid*, 67

⁹⁹ Freud, *An Autobiographical Study*, p 77. Translated by James Strachey. London 1925/1950: Hogarth Press and The Institute of Psycho-Analysis.

¹⁰⁰ For Freud, this is what partly distinguishes psychoanalysis from other forms of psychotherapy (see Freud *An Autobiographical Study*, p 77).

¹⁰¹ Freud in Ellman *ibid*, 71

¹⁰² Freud in Ellman *ibid*, 71

¹⁰³ Young *ibid*, at 282ff, objects to a prohibition on therapist-patient relationships on the grounds that such a probation presumes that, because of the transference-relations, patients are unable to consent. But this is crucially not Freud's rationale.

¹⁰⁴ This Freudian thought is enshrined in both professional norms and regulations across the therapeutic profession, as well as in the law. See 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); *Simmons v. United States*, 805 F.2d 1363 (9th Cir. 1986) (patient's consent to sexual conduct with psychiatrist might have resulted from transference); *Corgan v. Muehling*, 143 Ill.2d 296, 574 N.E.2d 602 (1991) (one holding himself out as a registered psychologist allegedly caused harmful emotional reactions in patient as a result of sexual activities together; the claim is actionable if plaintiff proves negligent handling of transference phenomenon); 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 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).

¹⁰⁵ For an argument that professors, like therapists, should be legally classified and regulated as fiduciaries, see Forell *ibid*. See also Mack *ibid*, 80 (on the violation of trust because faculty member and student). 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 Newsletter, Volume 11, no 2., March 2000, at 4.

The value of this comparison, between the therapist-patient and professor-student relationship, lies not only in the phenomenon, common to both, 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.¹⁰⁶ 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 to make her feel betrayed. Rather, it is the betrayal of the trusted authority 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 the context of parent-child incest, not by the sex itself, but by the corruption of teacherly love it represents.^{107,108} Likewise, there is a striking similarity between the rationalisations 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'.¹⁰⁹

'Many [consensual faculty-student relationships] are not good for at least one of the parties—almost always, the student'.¹¹⁰ A study of graduate student women who had had consensual sexual relationships with faculty found that 51% of them came to believe that there was 'some degree of coercion' involved in the relationship.¹¹¹ A different study, of 356 graduate women across various disciplines, found that 13% had engaged in consensual relationships with their professors; the researchers noted 'serious consequences of such relationships, including threats or harassment from a spurned faculty lover, resignation of students from their programs, and strong feelings of isolation and embarrassment'.¹¹² A survey of 464 women members of the clinical psychology division of the American Psychological Association found that 31% had received advances from, and 17% had had sex with, their professors during graduate school.¹¹³ 95% of respondents said that such relationships were ethically inappropriate, coercive, exploitative or harmful to students' educations. The researchers found that women's attitudes towards consensual relationships were significantly more negative in retrospective, with students coming to see past encounters as 'extremely exploitative and harmful'.¹¹⁴ The researchers 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.'¹¹⁵ They acknowledged 'the reality of a population of women of unknown numbers who, after

¹⁰⁶ On the common psychological effects of the sexualisation of pedagogical and therapeutic relationships, see Marilyn R. Peterson, *At Personal Risk: Boundary Violations in Professional-Client Relationships* (New York, 1992).

¹⁰⁷ Judith Herman, *Father-Daughter Incest*, 2000, Cambridge: HUP, p 4.

¹⁰⁸ 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 undergraduate students find 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 *ibid*, at 339).

¹⁰⁹ Ruddick *ibid*, at 602. See also Richard S. Epstein, *Keeping Boundaries: Maintaining Safety and Integrity in the Psychotherapeutic Process* (Washington, 1994). Ruddick notes that all these rationalisations are present in Gallop's *Feminist Accused* (*ibid*).

¹¹⁰ Forrell *ibid* 52.

¹¹¹ Forrell *ibid* 86.

¹¹² Schneider BE: Graduate women, sexual harassment, and university policy. *J Higher Educ* 58:46-65, 1987.

¹¹³ Glaser R D and Thorpe J S : Unethical intimacy: A survey of sexual contact and advances between psychology educators and female graduate students. *Amer Psychol* 41, 1986.

¹¹⁴ *Ibid* 43.

¹¹⁵ *Ibid* 49, emphasis added.

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'.¹¹⁶

There are consequences to the mismanagement of transference that 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, by a former student-girlfriend:

For a long time, I went around feeling naïve, 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.¹¹⁷

The student is not only, in the eyes of her professor-boyfriend, transformed from a student, whose needs he is meant to serve, to someone who is meant to serve his needs (his errands, his ego). She is also – or so she imagines, but do we think she is wrong? – likewise 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?

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, *convices*, is telling. For projection, as Freud notes, 'is the essential character of every love'¹¹⁸. 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'.¹¹⁹ 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 of her 'the truth, but not the whole truth'¹²⁰. So too with the student's love for her professor. 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 for a smile, a look, a shoulder. That is enough; then, in the long hours of hope or sorrow, we fabricate a person, we compose a character'.¹²¹) The differences here, 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.¹²² It is that they involve the wrong sort of love. Speaking as

¹¹⁶ Ibid 50.

¹¹⁷ Leslie Irvine, A "Consensual" Relationship, in *Sexual Harassment on Campus* 234, 242 (Bernice Sandler & Robert Shoop eds., 1997). Quoted in Sanger *ibid* 1875.

¹¹⁸ Freud in Ellman *ibid*, 76

¹¹⁹ Freud in Ellman *ibid*, 76-66.

¹²⁰ Freud in Ellman *ibid*, 76

¹²¹ Marcel Proust, *The Captive and the Fugitive*.

¹²² 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

a teacher to other teachers, bell hooks commands us to ‘Think: How can I love these strangers, these others that I see in the classroom?’¹²³ The love hooks is speaking 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.

4. Plato and the duties of pedagogy

Many have found in the figure of Socrates a different, more erotically intimate model of pedagogy, one that they speaks against modern regulations on the form teacher-student love must take. After all, Socratic pedagogy is an intensely erotic affair: young aristocratic boys in the bloom of adolescence (*eromenoi*) are introduced into the moral and intellectual virtues by older male lovers (*erastai*).¹²⁴ Except that Socrates, at least in Plato’s telling, does not sleep with his students. In the *Republic*, Socrates tells us that ‘sexual pleasure musn’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’.¹²⁵ Indeed, *Kallipolis* will have a law that mandates that adult guardians love their young students only ‘as a father would a son’.¹²⁶ For Socrates, to love a boy properly is seemingly to awaken his desire for wisdom – to make him, that is, a *philosopher*, a ‘lover of wisdom’. This is a task accomplished not through sex but through the rigours of *elenchus*. Thus in the *Lysis*, Hippothales (rather foolishly) asks Socrates for his advice on seducing his beloved, and receives a demonstration in philosophical refutation. It is for this reason – this identification of loving with questioning, of *erôs* with *erôtan*¹²⁷ – that Socrates can say of himself that the only thing he understands is *ta erôtika*: the art of love.¹²⁸

In the *Symposium*, Socrates tells us (as Diotima, we are told, told him in turn) that the student’s erotic energies are first aroused by a particular beautiful body, and then 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.¹²⁹ What presumably must not happen is for the student to become fixated on the particular body or soul of the teacher. To return to Freudian terms, the teacher must make himself a transitional object, to be left behind as a mere rung in the student’s ascent to wisdom.¹³⁰ It is thus apt that the dialogue ends with Socrates’ 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.

Even those who remember that Socrates does not sleep with Alcibiades tend to admire the former’s restraint.¹³¹ Socrates is the dutiful teacher, resisting the temptations of his beautiful young

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.

¹²³ bell hooks, ‘Embracing Freedom: Spirituality and Liberation,’ in *The Heart of Learning: Spirituality in Education*, ed. Steven Glazer (New York, 1999), p. 125.

¹²⁴ For a discussion of the ancient Greek institution of *paidēraisteia*, see Kenneth Dover, *Greek Homosexuality*, Cambridge: HUP, 1978.

¹²⁵ Plato, *Republic*. G.M.A. Grube, transl. and C.D.C. Reeve, ed. 1991. Indianapolis: Hackett. 403a.

¹²⁶ Plato, *ibid*, 403a.

¹²⁷ C.D.C. Reeve, ‘Plato on Love’, Indianapolis: Hackett, 2006, at xix.

¹²⁸ Plato, *Symposium*. Transl. Alexander Nehamas and Paul Woodruff. In C.D.C. Reeve (ed), *Plato On Love*. Indianapolis: Hackett, 2006. 177d.

¹²⁹ Plato, *Symposium*, 210a – 211c.

¹³⁰ On the teacher as transitional object, see Higgins *ibid*, p 364.

¹³¹ See e.g. William Deresiewicz (2007), ‘Love on Campus’, *The American Scholar*, 1 June 2007; Carol Sanger, ‘The Erotics of Torts’ *ibid*, at 1882.

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.¹³² 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.¹³³ Socrates responds by asking Agathon to protect him from Alcibiades' jealous rage, of which he says he has grown weary and frightened.¹³⁴ 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.¹³⁵ 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 daze'¹³⁶? Why, in the *Charmides*, does Socrates return from war and immediately go to the palaestra to enquire 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 his student's erotic energies rather than redirect them towards the Beautiful itself?¹³⁷

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.¹³⁸ 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 homes in on the first part of the accusation: that Socrates is not really *a lover*. In the ancient Greek institution of *paiderasteia*, 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 *paiderasteia*. At the beginning of Socrates' 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.¹³⁹ 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.¹⁴⁰ 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.

Here is an impious thought. Perhaps all of Socrates' apparent attempts at teaching – his relentless subjection of beautiful young men to the rigours of *elenchus* – are not pedagogical efforts at all. Perhaps they are merely a means of Socrates' own self-directed ascent to knowledge.¹⁴¹ This would give us a neat

¹³² For a related reading, see Michael Gagarin, 'Socrates' "Hybris" and Alcibiades' Failure', *Phoenix* 31(1), 1977: 22-37. Much of my own reading of the *Symposium* is influenced by one of my undergraduate professors, Karsten Harries.

¹³³ Plato, *Symposium*, 213b.

¹³⁴ Plato, *Symposium*, 213c-d.

¹³⁵ 214d.

¹³⁶ 216d.

¹³⁷ 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 in Ellman 74-75). Perhaps there are such people, and perhaps Alcibiades is one of them. Or perhaps Freud has come up against his limits.

¹³⁸ 222a-b.

¹³⁹ 209b.

¹⁴⁰ 210a – 211c.

¹⁴¹ The figure of Diotima, who is explicitly positioned as a successful teacher of Socrates (207c), keen to have him take the ascent (210a), might be meant to form an implicit contrast with Socrates. Diotima, a woman, is then the true teacher, because she is a

but dark solution to what Gregory Vlastos has called the ‘paradox of Socrates’: the fact that a man who is convinced of the supreme value of wisdom is so poor at passing it onto others.¹⁴² Alcibiades concludes his speech by warning Agathon that Socrates’ flirtations will lead nowhere.¹⁴³ 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’ 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’.¹⁴⁴ 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’.¹⁴⁵ 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.¹⁴⁶ In this connection, Socrates is compared to Marsyas, who was flayed by the gods for playing too well.¹⁴⁷ Alcibiades recalls how the other soldiers felt scorned by Socrates when he, impervious to the cold, marched barefoot through the snow¹⁴⁸ – a scorn that Alcibiades himself feels when Socrates, impervious to his seductions, ‘hybristically’ refuses to sleep with him.¹⁴⁹ Socrates drinks but does not get drunk¹⁵⁰ and goes about his day while other members of the party, exhausted and hungover, sleep.¹⁵¹ Socrates, godlike, is beyond human affect, beyond love. In its primary meaning, the Greek *hybris* indicates a sort of ‘insolent violence’, and could refer specifically to sexual assault against a woman or young boy.¹⁵² 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’ accusation against Socrates carries with it the implication of sexual inappropriateness. So does Alcibiades’ 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 non-wrong. 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’ disinterest in teaching the young men who long for him puts not in peril just their souls, but the fate of Athens itself.¹⁵³

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

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?

¹⁴² Gregory Vlastos, ‘Introduction: The Paradox of Socrates’, in *The Philosophy of Socrates* (Gregory Vlastos ed.). Anchor Books: 1971: 1-21.

¹⁴³ 222b.

¹⁴⁴ Vlastos 16.

¹⁴⁵ Vlastos 17.

¹⁴⁶ At 215b, 219c and 222a. See Michael Gagarin, ‘Socrates’ “Hybris” and Alcibiades’ Failure’, *Phoenix* 31(1), 1977: 22-37 for discussion.

¹⁴⁷ 215b-d.

¹⁴⁸ 220b.

¹⁴⁹ 219c.

¹⁵⁰ 214a and 200a.

¹⁵¹ 223d.

¹⁵² Gagarin 25.

¹⁵³ The dramatic date of the *Symposium* is 416, a year before Alcibiades is 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 Eleusynian Mysteries, Alcibiades betrayed the Athenians and joined the Spartans. Charmides, whom Alcibiades identifies as another of Socrates’ victims (222b), was a supporter of the Thirty Tyrants.

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.

5. Sex as a Patriarchal Failure

In a discussion in *Critical Inquiry* on the publication of *Feminist Accused of Sexual Harassment*, James Kincaid, a professor of English at the University of Southern California, defends Jane Gallop from charges of sexual harassment – charges that he sees as lacking in a sense of 'fun'.¹⁵⁴ Kincaid opens his case by transcribing a letter he received from a student the previous semester:

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 it¹⁵⁵

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.¹⁵⁶

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 weren't, as Kincaid says, 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 tone of the letter, 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'm being decidedly un-fun here – is a kind of abuse, a pornification of a sweet and earnest declaration of a feeling. The student,

¹⁵⁴ James Kincaid, 'Pouvoir, Felicite, Jane, et Moi (Power, Bliss, Jane, and Me)', *Critical Inquiry* 25(3), 1999: 610-616, at 613.

¹⁵⁵ Kincaid *ibid* 610-11.

¹⁵⁶ Kincaid *ibid* 611.

for the first time, gets the meaning of poetry, and she is awestruck and admiring of this professor who has, alone amongst all the professors she has had, been able to show her what and how 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’s enjoying it, and wants it to continue, *ad infinitum*, just because it’s fun. But that is not what the student said. She wants him to ‘keep it up’ – that is, keep on *teaching* – not just because it’s enjoyable, though it is that too, 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 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 (un-fun) questions of institutional power: who grades whom, who writes recommendations for whom, and so on. There are other differences in power here. First, as I have already 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 equalised. 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 her permission, because he is confident that she isn’t the type to read *Critical Inquiry*. But what if she did read it? How might she be expected to 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 perhaps 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 as if 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 so doing (‘ha ha’). She picks Kincaid out as special and ‘different from the other teachers’. Kincaid is not 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’d 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 sexualisation, 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 doesn’t (yet) want to sleep with him. (2) The student’s desire is intense but inchoate: she doesn’t know, or there is no fact of the matter about, whether she wants to be like the professor, or to have the professor. (3) The student wants both to be the teacher and to have him, and takes the having of him as a means to – or a sign of – her being like him. (4) The student thinks it is

impossible for her to be like the professor, and so 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. Where 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. Similarly for when the student (wrongly) thinks that sleeping with the teacher is a means to becoming, or a sign of already being ('he wants me so I must be brilliant'), like the teacher; or when the student (wrongly) thinks that sleeping with the teacher is the best she can have. Even where a student's desire is more fixed, a 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*, as a teacher – to direct his student's desire away from himself, and towards its proper pedagogic object: her epistemic empowerment. 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 sexualise what is an earnest expression of the desire to learn. If, as per (2), the student's desire is ambivalent, or as per (3) and (4), the student's desire is 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 sort of case that I think rare in the pedagogic context – Kincaid needs to see whether he can make something useful of that desire, to convince the student that it is not him that she really wants, but what it is he has. Failing to try to do this, Kincaid fails to do 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 allowing or 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 sexualisation of the pedagogical relationship, although that is a particularly clear instance. Part of what is striking, for example, about the case of Avital Ronnell, the NYU professor of German and Comparative Literature who was recently found by her university to have sexually harassed her graduate student,¹⁵⁷ is how little of the abuse she allegedly perpetrated was sexual in nature: the demand that her student spend countless hours seeing Ronnell 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.¹⁵⁸ Had Ronnell 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 as a means of gratifying 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 of any gender. What is it that Kincaid tacitly recognises and wants to hide from view? Most obviously, that the pattern

¹⁵⁷ See fn. 14

¹⁵⁸ <https://blog.simplejustice.us/wp-content/uploads/2018/08/FINAL-Complaint-Reitman-v.-Ronell-and-NYU.pdf>

that he is in fact describing – older, male professor; younger, female student – is, overwhelmingly, the most common form of professor-student sexual relationship. In other words, Kincaid doesn't 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 the fact that men and women, boys and girls, are socialised to relate sexually to power differentials in different ways: that boys and men are socialised to find being in positions of dominance sexy, and girls and women are socialised 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 importantly, the way that women are socialised 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, straight and gay alike, to regulate their relations to women in a way that is congenial to patriarchy.¹⁵⁹ 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 can't 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?'.¹⁶⁰ The presupposition of Barreca's question is 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 socialised to do: wanting to be like them.¹⁶¹ 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.'¹⁶² Or, we might add, make him 'hers'.

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 socialisation.¹⁶³ There might well be something inherently erotic about the pedagogical enterprise. But the particular form those erotic

¹⁵⁹ Rich *ibid*

¹⁶⁰ Regina Barreca, 'Contraband Appetites', in *The Erotics of Instruction*, Regina Barreca & Deborah Denenholz Morse eds. 1997, at 2.

¹⁶¹ And, at the limit, desiring to destroy and replace them: its own source of psychic drama.

¹⁶² Robin West, 'The Difference in Women's Hedonic Lives: A phenomenological Critique of Feminist Legal Theory', 15 *Wisconsin Women's Law Journal* Vol 15, 149-215, 2000, at p 178.

¹⁶³ 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.

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.¹⁶⁴

I am not saying, as the Avital Ronnell case makes clear, that it is any less a pedagogical failure for a female professor to sleep with her male student, or for her to sleep with her female student, or for a male professor to sleep with his male student.¹⁶⁵ Indeed, I think that 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 towards its apt object. It is a failure that involves taking advantage of the fact that women are socialised in a particular way under patriarchy – that is, socialised in a way that conduces *to* patriarchy – for the satisfaction of his own 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 equally accrue to men and women. In such cases, sleeping with one's student is not simply a pedagogical failure, but moreover a patriarchal one. Behind teacher-student sex lies, as it so often does, gender.

6. Consensual Sex as Sex Discrimination

I would like to now return to where I began: with 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 it.¹⁶⁶ 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 has little other choice, given the power that the man has over her. 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 realise that she was just one in a string of students, and that their affair was less a sign of her intellectual specialness

¹⁶⁴ Indeed, even those who have criticised the invocation of Freudian transference (Sanger *ibid*) and Platonic ascent (Deresiewicz *ibid*) in defences 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 (*ibid*) 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.

¹⁶⁵ See discussion above in fn 14. 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* (Linda Garber ed. 1994). See also bell hooks, 'Eros, Eroticism and the Pedagogical Process' (1993), *Cultural Studies* 7:1, 58-64

¹⁶⁶ Young *ibid* at 279; see also Jane Gallop, 'Resisting Reasonableness', *Critical Inquiry* 25, spring 1999 at 600, and Elliot *ibid*, at 53ff.

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 that happens to many women, and almost no men; and recall further that this is not because of some natural division of sexual labour 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 of the Education Amendments Act of 1972: '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'. I think it 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'?

What I am suggesting is that, while genuinely consensual (or 'wanted') professor-student relationships do not constitute sexual harassment, they might still count as sex discrimination under Title IX. Such relationships often, and predictably, and seriously, harm women's educations.¹⁶⁷ 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 equality 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 ingenué – erotically underscores the standard heterosexual dynamic? I 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 in refutation of 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 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

¹⁶⁷ For a discussion of such harms, see Sanger *ibid*; Mack *ibid*, section II; and Caroline Forell, *What's Wrong with Faculty-Student Sex-The Law School Context*, 47 J. LEGALEDUC. 47, 72 (1997). Sanger comes close to something like my suggestion here: 'although consensual relationship may not be harassment, they may still constitute a category of behaviour about which academic institutions are properly concerned... There is also the general matter of women and the atmosphere of education. It would be nice to think that girls could just attend school... there 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 *ibid* 1878-9).

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 recognised 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 behaviour. 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.¹⁶⁸ 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 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?

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’.¹⁶⁹ But there appears to be nothing essential to harassment, as opposed to forms of ‘wanted’ workplace behaviour, that allows it to play this role-policing function. Suppose a woman worker believed that, in times of economic pressure, women should be the first to be laid off, regardless of seniority or competence. Her boss, who shares her views, lays her off. The discriminatory treatment is wanted. Is it any less discriminatory for that? If not, then why might the consensualness of some faculty-student relationships present a bar to their being discriminatory?

One might worry that I am moralising. There is admittedly something salacious about professor-student sex; if not quite worthy of the tabloids, it is worthy of countless books and movies and anonymous blog posts.¹⁷⁰ 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 such a reason, is that its practice 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 such relationships as perfectly normal, are both equally irrelevant. What matters is the role that 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 might well 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 might be discriminatory in that they harm women in their capacity 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 re-enforce women’s unequal status in the university and beyond. Crucial here is

¹⁶⁸ Farley *ibid*. See also Siegel *ibid* and Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683 (1998).

¹⁶⁹ Schultz *ibid*, at 1687.

¹⁷⁰ For a survey of recent cultural representations of professor-student relationships, see Deresiwicz *ibid*.

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 erotic 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 women and men students are susceptible, in the case of women students this failure is also both expressive and productive of women's unequal standing in the university.¹⁷¹ And insofar as faculty-student relationships are indeed productive of women's inequality in the university and beyond, women as a sex class are harmed by such relationships.

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.¹⁷² The desired 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 recognise 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 colour 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.¹⁷³ They are assumed to be less intellectually capable, called on less often, encouraged to be less risk-taking and ambitious, given less mentoring, socialised 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 underscored and inflected when women are also non-white or poor. 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 behaviours 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.

It is this final factor that gives me, and should give us all, most serious pause. Would the further expansion of Title IX make campuses safer for women, for queers, for immigrants, for those precariously

¹⁷¹ It might well be that certain groups of men – e.g. black men – who are socially coded as 'non-academic' are also liable to this second sort of (status) harm.

¹⁷² See fn. 167

¹⁷³ On this theme, and the myth of 'coeducation', see Adrienne Rich, 'Taking Women Students Seriously', in *On Lies, Secrets, and Silence*.

employed, for people of colour?¹⁷⁴ 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.¹⁷⁵ In 1984, the year after the first consensual relationship policies appeared on US campuses, a court for the first time was asked to decide on whether a university was justified in sanctioning one of its teachers for a sexual affair with a student.¹⁷⁶ The case, *Naragon v. Wharton*, involved a graduate student at Louisiana State University at Baton Rouge, 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 students' 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. 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,¹⁷⁷ unfair in themselves but also doubly unfair in that they often disproportionately target those who are already marginalised? Would such an expansion inadvertently strengthen the hand of cultural conservatives, 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? The history of sexual harassment law is in many ways a history of the law mobilised in the service of gender justice. But that history also points to the limits of the law. Where precisely those limits are – where the law must not try to guide culture, but must instead impatiently wait for it – is a question not of principle, but of politics.

7. Conclusion: Teaching how to Teach

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. What did one do with the body in the classroom?'¹⁷⁸ What one is supposed to do or not do with one's body, and with one's student 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 professor of law, recently described to me the awkwardness of sharing a gym with many of his undergraduates. They

¹⁷⁴ On the failures of Title IX in this respect, see Janet Halley, 2015. 'Trading the Megaphone for the Gavel'. Harvard Law Review Forum, Vol 128:103; Emily Yoffe, 'The Question of Race in Campus Sexual-Assault Cases', *The Atlantic*, September 11 2017; Jacob Gersen and Jeannie Suk Gersen, 'The Sex Bureaucracy', *The Chronicle of Higher Education*, January 06, 2019.

¹⁷⁵ Emily Yoffe *ibid*.

¹⁷⁶ *Naragon v. Wharton* 737 F.2d 1403 (5th Cir. 1984)

¹⁷⁷ See Halley *ibid*; Yoffe *ibid*; Emily Yoffe, 'The Uncomfortable Truth About Campus Rape Policy', *The Atlantic*, September 6 2017; Elizabeth Bartholet, Nancy Gertner, Janet Halley and Jeannie Suk Gersen, 'Fairness For All Students Under Title IX', August 21 2017; Nancy Gertner, Sex, Lies, and Justice, *American Prospect* (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice>.

¹⁷⁸ bell hooks *ibid*, at 58.

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.¹⁷⁹ Except that this is not self-evident to many, sometimes with poignant consequences. Another friend, when he was a graduate student, was deeply 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 women 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 training of any sort. But this difference in training does not, I would 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-teacher sex, permissible, we might ask ourselves: does the difference simply lie in the contingencies of history? Freud wrote thoughtfully but unequivocally about the sexual ethics of psychoanalysis at the start of the 20th 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 towards increased campus regulation of sex offers an opportunity for professors, 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 towards 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 *qua* therapists owe to their patients *qua* patients.¹⁸⁰ 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

¹⁷⁹ 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, that are differently racialised, 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.

¹⁸⁰ See fn. 104

of interest – but in terms of what university teachers, *qua* teachers, owe their students, *qua* students? What might it be for us to articulate a sexual ethics of pedagogy?