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REGULATING SEXUAL RELATIONSHIPS BETWEEN FACULTY AND STUDENTS

*Margaret H. Mack**

INTRODUCTION

A student who finds a professor staring at her, leaning close when they meet in his office, or asking her out for a drink may or may not revel in her right to consent to have sex with him.¹ If she feels uncomfortable, she will not necessarily seek guidance from a dean or sexual harassment counselor. She might talk to a friend. She might keep it to herself. We cannot think about faculty-student relationships in the abstract if our goal is to arrive at ways to help this student. We should not be content only to prevent serious abuses of power. It is not possible to predict how an individual student will react to sexual attention from her professor. But it is common enough for sexual advances to interfere with education and with students' trust of professors. My focus is on finding ways to minimize that interference, and ensuring that students maintain control over their education and growth in college.

The relationship between a teacher and a student depends on trust and benefits from mutual respect. As soon as a teacher makes a sexual advance, the relationship is altered irrevocably. At that point there are many directions their relationship can take, all of them colored by the awareness that the teacher, whatever his other thoughts about the student may be, desires her sexually. I would like to know that she has access to an adviser who will listen to her in confidence, and that she knows she does. This is where university policy can be

* J.D., 1999, University of Michigan Law School; M.A., 1991, University of Chicago; A.B., 1988, Brown University.

1. Most faculty-student sexual relationships are between male faculty and female students. See Caroline Forell, *What's Wrong with Faculty-Student Sex? The Law School Context*, 47 J. LEGAL EDUC. 47, 49 (1997). I will therefore generally refer to the teacher as "he" and the student as "she." In part IV, *infra*, I relate the stories of two female professors who have had sexual relationships with their students.

useful.² Universities can train and install advisers and let students know where to find them.

It would be great if policy could persuade professors to wait until the semester is over or a student's thesis completed before becoming involved with her. Some universities impose bans in the hope that sanctions will deter sexual advances. But since these bans will not eliminate faculty-student sex, and sexual advances will continue to be a problem for some students, those students should be given an avenue of support and information by the university. Advisers and peer counselors can offer students an opportunity to talk through their reactions, to feel some degree of control over the situation, and to decide what steps to take next. If a student has a close, trusting relationship with a different teacher, so much the better for her—she will have the same opportunity as other students to know that her ideas and intellect can be valued by a professor. The relationship between a professor and his student is built on trust. If it is a strong relationship, the student will open herself to the professor and seek his advice and judgment. She is in a vulnerable position. When a professor transforms that relationship into a sexual one, he violates the trust that has developed between them.³

The stories of three women I know have shaped my thinking. Lauren was in an art class with me in college that was taught by an older, tenured professor. I do not remember whether I had heard about the professor's reputation for making sexual advances on students before I signed up for the class, but it would not have changed

2. I will use "university" to refer to postsecondary institutions including colleges and professional schools as well as universities.

3. This article was written to provide an alternative to Professor Gary Elliott's liberty-focused view, published in this issue. See Gary E. Elliott, *Consensual Relationships and the Constitution: A Case of Liberty Denied*, 6 MICH. J. GENDER & L. 47 (1999). Professor Elliott focuses on the right of professors to be as free from regulation in their sex with students as in their speech. My focus is on students' interest in their education and in building relationships of trust with professors. For a discussion of an egalitarian, versus liberal, ideal of sexual conduct, see Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 858-62 (1988). Chamallas writes that in developing consensual relationships policy, "The egalitarian perspective on asymmetric relationships . . . attempts to balance the interest in avoiding sexual coercion with the interest in affording opportunities for the formation of noncoercive relationships." Chamallas, *supra*, at 861. She contrasts the liberal approach, explaining that "the egalitarian, unlike the liberal, is wary of apparently consensual behavior that is nonetheless unwelcome, and does not regard the lack of an overt complaint as precluding the need for legal intervention." Chamallas, *supra* at 843.

my choice, since he was the only professor teaching that class. One of our first assignments was to make a self-portrait, and Lauren's included several small photographs of her face. I remember the professor spending a lot of time staring closely at the photographs, and then stepping back to look at Lauren. At the end of the semester we were to meet with the professor one-on-one to discuss our work. Lauren asked me to come with her to her meeting. I did not know her well, but the request and look she gave me told me that she was uncomfortable being alone with the professor; I understood that something had happened over the course of the semester that made her uneasy. I went to the meeting. Lauren did not explain my presence to the professor, and he did not ask why I was there. After that, I was no longer comfortable being alone with the professor.

Erin and I became friends while she was writing her doctoral dissertation. She told me she was reluctant to call her dissertation adviser to plan her defense. They had been sexually involved for over a year, and then he left her for someone new to the department. Erin told me that she had grown attracted to the professor early in graduate school as they worked together and talked about their common interests. She did not expect a relationship to develop between them because he was already involved with an older graduate student. The professor invited her out for a drink one night; he explained that his current relationship was as good as over and that he planned to ask his lover to move out. He told Erin he wanted to get to know her better. She was surprised and flattered by his attention. Their relationship had been over for more than two years by the time I got to know Erin, but she was still uncomfortable talking to him or his colleagues about her work.

Lauren and Erin may have learned from these experiences, but they were also harmed by them.⁴ Both are strong women; both came up with strategies to keep their education from being derailed by their professors. But there is something more than a little perverse in requiring women to learn *in spite of* their professors. I can see the educational advantages of challenging students intellectually. I cannot see much advantage to giving women the message that their value in college and graduate school is sexual.

These two stories have focused on the difficulty that individual students face when they are approached directly by faculty. But there are other students in the class, or the department, who are also

4. See *infra* note 105 and accompanying text.

affected when a professor exercises his sexual liberty. Jen had a professor in college who was sleeping with a woman in their seminar. Jen only became aware of their relationship late in the semester. She remembered that the professor and student had done most of the talking in class, paying little attention to the other students. The dynamic changed abruptly late in the semester to an angry one, and then the student stopped coming to class. She subsequently pursued a sexual harassment charge against the professor. After Jen heard about the sexual harassment proceeding, she realized that some or most of the other students in the class had probably suspected or known that the professor was sleeping with their classmate. Jen remembered that some of them had lost their early motivation to participate in class, as the professor focused his energy on one student. The other students could reasonably have lost confidence that the professor would treat them fairly, and assumed that the one student was guaranteed an easy A.

These stories make it clear that relationships between faculty and students do not happen in a vacuum; their context and aftermath should be important to how we evaluate them. When sex or even simply sexual advances are introduced into a faculty-student relationship, students are deprived of the mentoring trust that should foster their intellectual development and personal growth.

The point of consensual sex policies should be to prevent situations that do not amount to actionable sexual harassment from interfering with students' education. Students should have the opportunity to learn in an atmosphere free from potential favoritism and sexual intimidation that can come with sexual relationships. They should have recourse when a professor uses the trust in his relationship with a student for sexual advantage.⁵ Sexual harassment policies that are not supplemented by consensual sexual relationships policies will leave some students without adequate support and resources. If a student consents simply to date a professor, she may lose any later claim of sexual harassment.⁶ A good consensual sexual relationships

5. I am aware that students initiate or willingly enter into sexual relationships with professors. My concern is to give support to students when sexual advances or relationships interfere with their education, whether or not they should have expected problems.

6. University sexual harassment policies draw on Supreme Court case law, where sexual advances must fit a legal standard of "unwelcomeness" (in contrast to involuntariness) to constitute harassment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68

policy will give students an avenue of support to get advice about how to handle the situation and whether to make a complaint. Students do not always know how to proceed in uncomfortable situations and may remain silent rather than seek help.⁷ To avoid a professor, a student

(1986). For a policy example, see Rutgers, The State University of New Jersey, *The University's Policy Prohibiting Harassment*, Part IV(C)(4)(a) (effective Sept. 1, 1997) <<http://www-rci.rutgers.edu/~msgriff/webdoc5.htm>> [hereinafter Rutgers Policy] ("A student's 'voluntary' participation in a sexual relationship does not alone demonstrate that the respondent's conduct was not unwelcome"). The Department of Education's 1997 guidance on sexual harassment under Title IX provides a detailed discussion of welcomeness and relevant case law. See Department of Education, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, 62 FED. REG. 12038, 12038-51 (1997). The guidance lists factors that will be considered in determining whether sexual conduct was "welcome," including, "[t]he nature of the conduct and the relationship of the school employee to the student, including the degree of influence (which could, at least in part, be affected by the student's age), authority, or control the employee has over the student." Department of Education, *supra* at 12040. The guidance points out: "Of course, nothing in Title IX would prohibit a school from implementing policies prohibiting sexual conduct or sexual relationships between students and adult employees." Department of Education, *supra* at 12049 n.41. For discussions comparing workplace harassment under Title VII of the Civil Rights Act of 1964 to harassment in school under Title IX of the Education Amendments of 1972, see Kimberly A. Mango, Comment, *Students versus Professors: Combating Sexual Harassment under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355 (1991); Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 TEX. L. REV. 525 (1987).

7. In an interview with the *L.A. Times*, Professor Norma Chinchilla:

recall[ed] a student who came sobbing into her office after a male faculty member had dumped her.

She said, "I was so flattered. He was the first man I had ever met who wasn't interested in my body, but was interested in my mind."

She found that incredibly wonderful. But then she found out it wasn't her mind that he was interested in. When I suggested that maybe she wanted to make a complaint, because after she had backed off she felt really pressured in her act, she said, "No, it was my fault for not realizing what was happening in the first place."

Bob Sipchen, *A Lesson in Love?: The Latest Campus Debate Is Whether Student-Professor Romances Are About Power or Passion*, *L.A. TIMES*, Sept. 16, 1994, at E6. Chinchilla said, "So many women faculty members end up having to put the pieces together after these things go awry, after these students have major trauma." Sipchen, *supra* at E1. In less traumatic situations, according to the article, women may not know that they are entitled to some assistance.

Bernice Sandler, a scholar with the National Assn. for Women in Education, a 3000-member professional support and development group, has studied numerous surveys of harassment on college campuses. She says that 20% to 30% of undergraduate women and 30% to 40% of women in

may stop going to class or give up her thesis.⁸ The strongest argument for instituting a policy that discourages sexual relationships is that it may prevent these harms by giving the student grounds to file a complaint and resources to consult. It may also discourage professors from engaging in sex with students by making the risks clear to them.⁹ In situations where a university sexual harassment policy or sexual harassment law might not offer relief to a consenting student, a consensual sex policy that reaches a broader range of conduct and breaches of trust or ethical duties could be useful. It could also consider and protect the interests of third parties—other students in the class—and foster an educational environment where favoritism is minimized, and where students feel comfortable around their professors.

Universities must create an effective learning environment for students; university policy should be directed at creating an atmosphere of mutual respect and trust.¹⁰ Whenever a faculty-student sexual

graduate programs report that professors have subjected them to behavior that is defined as sexual harassment by those conducting the surveys—although the students did not initially consider it such.

Sipchen, *supra* at E1.

8. An article in the *New York Times* illustrates the point that sexual advances are interfering with education:

Students who have been romanced by professors often report discomfort, with some going so far as to transfer. Typical is Beth Visceglia, a senior at Georgetown University in Washington, where a statement discouraging faculty-student liaisons is in the drafting stage.

"I had a professor that asked me out," Ms. Visceglia said, "and it was very stressful, and I didn't feel comfortable going to class."

Jane Gross, *Love or Harassment? Campuses Bar (And Debate) Faculty-Student Sex*, N.Y. TIMES, Apr. 14, 1993, at B9.

9. Some professors, at least in the 1980s, seemed to act without inhibitions. "A survey of 235 male faculty members at the University of California at Berkeley revealed that 'although the majority of responses focused on mentoring and social interaction (with female students), a sizable minority (twenty-six percent) reported sexual involvement with women students.'" Mango, *supra* note 6, at 359 (quoting 18 ON CAMPUS WITH WOMEN 8 (Spring 1989)). But today the risks may be greater. See *infra* notes 57–58 and accompanying text. I am not aware of recent studies showing whether faculty sexual advances have declined.
10. University policies on sexual harassment and consensual sexual relations often include language referring to the academic environment. See, e.g., Yale University, *Policies on Sexual Harassment and Sexual Relations between Teachers and Students* 2 (approved 1998) [hereinafter Yale Policy]; Elaine D. Ingulli, *Sexual Harassment in Education*, 18 RUTGERS L.J. 281, 333, 341 (1987) (quoting the policies of the University of Iowa and the University of Pennsylvania). Some of this language is quoted *infra* part I.

relationship causes a student to drop a class, or a thesis, or school, that student has suffered a serious harm. Universities cannot simply answer that the student consented to the relationship and should handle the consequences. A university without a well-established and promulgated policy, one that at least acknowledges the risks involved in faculty-student sexual relationships and gives students a list of faculty and staff members to contact for support, seriously fails the students. Professors should not be sexually involved with students who are in their classes or working closely with them on research or a thesis; students should have access to support. The difficulty should not be in deciding whether to have an established and easily accessible consensual relationships policy. The difficulty comes instead in deciding whether to ban or simply discourage sexual relationships, and in developing effective mechanisms to promulgate and enforce the policy. Part I of this article will evaluate university consensual relationships policies that ban or discourage sexual relationships. Part II focuses on consent and the potential harms that policy makers should consider in developing or reevaluating their policies. Part III critiques the liberal view that regulation of faculty-student sex overburdens individuals' right to privacy. Part IV focuses on the writings of Jane Gallop and bell hooks, who offer stories about faculty-student relationships from the two professors' points of view.

I. UNIVERSITY POLICIES THAT DISCOURAGE OR BAN FACULTY-STUDENT SEX

The integrity of the teacher-student relationship is the foundation of the University's educational mission. This relationship vests considerable trust in the teacher, who, in turn, bears authority and accountability as mentor, educator, and evaluator.¹¹

University policies are being written and revised to address faculty-student sexual relationships and the ways in which these relationships interfere with the educational mission of universities.¹²

11. Yale Policy, *supra* note 10, at 2.

12. See *supra* note 10 and accompanying text; see also Rutgers Policy, *supra* note 6; University of Virginia, *Conflict of Interest Policy* (Sept. 2, 1993) <<http://minerva.acc.virginia.edu/~provost/conflict.htm>>; Stanford University, *Sexual*

Consensual relationships policies have a place either within or alongside sexual harassment policies because they address the fact that relationships may include both consent and coercive pressure to be sexual.¹³ A study of women graduate students demonstrates that consent can be offered at one stage of a relationship but not at the next: of the students who reported that they had consented to date faculty, one-third experienced "pressure to be sexual," and a smaller group reported that there was coercion even at the dating stage of the relationship.¹⁴ Another study shows that women who had entered sexual relationships with faculty reevaluated those relationships in retrospect: 51 percent of the graduate students surveyed who had sexual relationships with faculty later came to believe there was "some degree of coercion" involved in the relationship.¹⁵ These studies show that consent cannot be generalized; the stories of individual students fragment consent still further. To say that a student consented to a relationship with her professor merely begins the inquiry. Good consensual relationships policies enable the inquiry to proceed along productive lines, and ideally would allow students to stay in school without encountering the obstacles that sexual pressure can impose. The argument that a simple sexual harassment policy is all a university needs¹⁶ fails to acknowledge that sexual harassment policies do not address an adequate range of troubling and potentially harmful situations.

Universities and colleges have been creating consensual sexual relationships policies since 1984; many include them in their sexual

Harassment (Guide Memo 23.2, Mar. 15, 1996) <<http://www-portfolio.stanford.edu:80/200034>>; Southern Methodist University, *Policies and Procedures: Sexual Harassment and Consensual Relationships* (Dec. 1, 1997) [hereinafter SMU Policy].

13. The separation of "voluntary" sexual conduct from "welcome" conduct in sexual harassment law in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), only begins to acknowledge the difficulties encountered in analyzing consent in relationships. See *Meritor*, 477 U.S. at 68.
14. The study included 356 graduate women, of whom 13% reported consensual dating. Of the consensual daters, 30% experienced pressure to be sexual. Another 9% of the total group directly categorized their dating as coercive. See Forell, *supra* note 1, at 49 n.11 (citing Beth E. Schneider, *Graduate Women, Sexual Harassment, and University Policy*, 58 J. HIGHER EDUC. 46, 51-52 (1987)).
15. See Forell, *supra* note 1, at 57 n.39 (citing Robert D. Glaser & Joseph S. Thorpe, *Unethical Intimacy: A Survey of Sexual Contact and Advances Between Psychology Educators and Female Graduate Students*, 41 AM. PSYCHOLOGIST 43, 49 (1986)).
16. See Jane Gallop, *Feminism and Harassment Policy*, 80 ACADEME 16, 23 (1994) [hereinafter Gallop, *Feminism*]; Elliott, *supra* note 3, nn.14-20 and accompanying text.

harassment policies.¹⁷ There are four basic types of policies that universities use to regulate consensual faculty-student relationships.¹⁸ First, there are advisory policies that discourage but do not expressly prohibit faculty-student sexual relationships.¹⁹ Second, there are limited bans, included within sexual harassment policies or in separate "conflict-of-interest" policies, which "forbid faculty-student relationships only where the professor has direct academic responsibility for the student."²⁰ Third, there are policies that combine these two options, "forbid[ding] consensual relationships where they pose a conflict of interest, and discourag[ing] them in the absence of direct conflict."²¹ And finally, there may be policies that ban faculty-student sexual relationships completely.²²

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17. In 1984 Harvard University became the first to adopt a policy banning sexual relationships between faculty and students they taught or supervised, followed by the University of Iowa in 1986. See Gross, *supra* note 8, at B9; Jerome W.D. Stokes & D. Frank Vinik, *Consensual Sexual Relations Between Faculty and Students in Higher Education*, 96 ED. LAW REP. 899, 900 (1995).
 18. See Stokes & Vinik, *supra* note 17, at 900; see also Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U.J. GENDER & L. 269, 273-74 (1996).
 19. This type of policy is used by the University of California at Santa Cruz, the University of Minnesota, New York University [hereinafter NYU], and Rutgers University. See Young, *supra* note 18, at 273-74; Rutgers Policy, *supra* note 6. The University of Michigan's policy also appears to be one of these, since relationships "are not expressly prohibited." However, Michigan does require disclosure of the relationships, though it does not impose sanctions for nondisclosure: "[C]onsensual romantic or sexual relationships between faculty or staff and students [like familial relationships] also require disclosure to the appropriate administrative supervisor so that arrangements can be made for objective evaluation and decision-making with regard to the student." The University of Michigan, *Faculty/Staff Sexual Harassment Policy*, THE UNIVERSITY OF MICHIGAN STANDARD PRACTICE GUIDE 201.89 at 2 (March 14, 1994) [hereinafter Michigan Policy].
 20. Young, *supra* note 18, at 274; see also Stokes & Vinik, *supra* note 17, at 900. Young reports that Harvard University, Temple University, Tufts University, the University of Virginia, and Yale University use these policies. See Young, *supra* note 18, at 274; see also Frances Grandy Taylor, *Student, Faculty: Dangerous Liaisons*, THE HARTFORD COURANT, Mar. 20, 1997, at A1 [hereinafter Taylor, *Dangerous Liaisons*]; Frances Grandy Taylor, *Yale Professor Found Guilty of Sexual Harassment*, THE HARTFORD COURANT (Nov. 9, 1996, at A11 [hereinafter Taylor, *Yale Professor*]; Yale Policy, *supra* note 10, at 2. Consensual relationships policies, like those of Yale and the University of Iowa, specifically include relationships between graduate student instructors and students within their prohibitions. See Taylor, *Student*, *supra* at A1.
 21. Young, *supra* note 18, at 275-76. The University of Iowa uses this approach. See Young, *supra* note 18, at 275. Trinity College also has such a policy; it "ban[s] intimate relationships between faculty and students when the faculty member is teaching or advising the student. The faculty manual also strongly discourages it under any other circumstance." Taylor, *Dangerous Liaisons*, *supra* note 20, at A1.
 22. Young writes that Ohio Northern University, where she works, prohibits faculty-student relationships altogether; however, the language she quotes seems more like discouragement: "Faculty and staff members *should not* have sexual relations with

Whether or not a university chooses to ban sexual relationships, it may acknowledge the power imbalance in faculty-student relationships by placing the burden of proving consent on the faculty member accused of sexual harassment. The NYU School of Law and Yale University use this approach.²³ The NYU School of Law's policy is stronger, establishing a presumption of nonconsent in faculty-student relationships:

[There is] a presumption that sexual relations are not consensual when they are entered into by two people, one of whom exercises power conveyed by the law school, over the other. . . . [The policy] does not prohibit sexual relations, but rather places upon the more powerful party the burden for assuring that the relation is truly consensual.²⁴

The University of Michigan's policy is milder; rather than impose a presumption, it adopts a disapproving tone which might be ambiguous in its actual application: "In the event of a charge of sexual harassment, the University will, in general, be unsympathetic to a defense based upon consent when the facts establish that a professional faculty-student, staff-student, or supervisor-employee power differential existed within the relationship."²⁵ Since defenses and presumptions only come to bear in formal proceedings, policies still need to raise awareness and attempt to prevent problems before cases are brought. Nevertheless, these provisions can communicate to faculty members

students to whom they are not married." Young, *supra* note 18, at 271 n.11, 276 (emphasis added). Stokes and Vinik also write that bans exist, but do not cite any universities that have actually adopted a complete ban. I was unable to find an example. The Committee on Women's Concerns at the University of Virginia proposed such a policy, but "[h]eated debate ensued on campus . . . faculty objected . . . [and] [e]nsuing media attention caused the Committee on Women's Concerns to modify its stance" and propose the accepted conflict-of-interest policy. Stokes & Vinik, *supra* note 17, at 901.

23. See Dan Subotnik, *What's Wrong With Faculty-Student Sex? Response II*, 47 J. LEGAL EDUC. 441, 444 (1997) (citing Sylvia A. Law, *Good Intentions Are Not Enough: An Agenda on Gender for Law School Deans*, 77 IOWA L. REV. 79, 85 (1991)); Yale Policy, *supra* note 10, at 1. Minnesota and Tufts University also use this approach. See Carol Sanger, *The Erotics of Torts*, 96 MICH. L. REV. 1852, 1879-80 & n.84 (1998) (reviewing JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997)).

24. Subotnik, *supra* note 23, at 444 (quoting Sylvia A. Law, *Good Intentions Are Not Enough: An Agenda on Gender for Law School Deans*, 77 IOWA L. REV. 79, 85 (1991)).

25. Michigan Policy, *supra* note 19, at 3.

the responsibility that comes with their position and put them on notice that entering sexual relationships with students brings risks.

Placing greater responsibility on faculty for avoiding sexual relationships with students, and a greater burden in proceedings, seems fair because of the institutional power imbalance that the policies identify. There are further, related reasons to expect faculty to be more responsible: they generally remain at the university longer than students do and thus have more opportunity to think about the risks involved in faculty-student sexual relationships. They are also responsible to the university, and should avoid exposing it unnecessarily to conflict situations, bad publicity, and legal liability. A good policy, whether or not it imposes sanctions, can highlight these risk and encourage faculty to consider the potential impact of their actions on the university community.

The University of Michigan's consensual relationships policy and Yale University's policy illustrate the difference between the discouragement and limited ban approaches to regulation; Michigan simply discourages sexual relationships, whereas Yale recently adopted a ban on sex in supervisory relationships.²⁶ Both address major points of concern with faculty-student sex, focusing on the potential for harm. Michigan's policy begins,

Romantic and sexual relationships between supervisor and employee or between faculty or other staff and student are not expressly prohibited by University policy. However, even when both parties have consented to the development of such relationships, they can raise serious concerns about the validity of the consent, conflicts of interest, and unfair treatment of others.²⁷

This policy acknowledges problems with the power imbalance in faculty-student sex: "[T]he asymmetry of the faculty-student relationship means that any sexual relationship between a faculty member and a student is potentially exploitative and should be avoided."²⁸ The

26. See Michigan Policy, *supra* note 19, at 2; Yale Policy, *supra* note 10, at 2.

27. Michigan Policy, *supra* note 19, at 2.

28. Michigan Policy, *supra* note 19, at 2. Southern Methodist University's policy language is more detailed:

A consensual sexual relationship between a faculty member and a student, particularly when the faculty member is in a position of power, will irrepa-

policy also points out that evaluative responsibilities can arise after sexual relationships have begun: "Faculty and staff engaged in [sexual] relationships should be sensitive to the constant possibility that they may unexpectedly be placed in a position of responsibility for the student's instruction or evaluation."²⁹

Michigan's policy addresses important concerns in its regard for student well-being, faculty responsibility, and "the validity of the consent."³⁰ But it discourages rather than bans relationships, so assistance to students is on the level of providing counselors and helping students to determine whether harassment, which is actionable, has occurred. To point students in the right direction, the policy provides guidelines for distribution, prevention and education:

[T]his policy will be published in pamphlet form and disseminated to the University community. The pamphlets will be included in orientation materials for new students, faculty, and staff and made available in the Affirmative Action Office and other appropriate locations on each campus. In addition, appropriate educational sessions will be conducted by the University on an ongoing basis to (1) inform students, faculty, and staff about identifying sexual harassment and the problems it causes, (2) to advise members of the University community about their rights and responsibilities

rably undermine this professional relationship. The issue of power and control over the student remains so strong in a sexual relationship that voluntary consent by a student is improbable and highly questionable. What one thinks is voluntary consent may be only forced consent, which the hidden, subtle pressure stemming from the faculty member's position of power has transformed into a "voluntary" act. Such a relationship creates an inevitable conflict of interest when the teacher makes judgments about a student's work.

SMU Policy, *supra* note 12, § B.

The AAUP's Committee W on the Status of Women in the Academic Profession raises similar concerns in its statement on consensual relations. The statement points out that "faculty are expected to be aware of their professional responsibilities and avoid apparent or actual conflict of interest, favoritism, or bias." AAUP Committee W on the Status of Women in the Academic Profession, *Consensual Relations Between Faculty and Students*, in AAUP POLICY DOCUMENTS AND REPORTS 174 (1995).

29. Michigan Policy, *supra* note 19, at 2.

30. Michigan Policy, *supra* note 19, at 2.

under this policy, and (3) train personnel in the administration of this policy.³¹

Yale University recently changed its policy from one of discouragement to one banning sex between a faculty member and student "over whom he or she has direct supervisory responsibilities regardless of whether the relationship is consensual."³² In 1996 a Yale grievance board found that a professor had violated Yale's then-existing regulations, which "d[id] not explicitly bar faculty from sexual relationships with students, but . . . urged [them] to avoid such relationships."³³ At the time, Yale's policy "place[d] the burden of proving the relationship was consensual on the teacher, if a sexual harassment complaint ar[ose]."³⁴ In the wake of this case, Yale decided to impose its current ban:

[N]o teacher shall have a sexual relationship with a student over whom he or she has direct supervisory responsibilities regardless of whether the relationship is consensual. Teachers must avoid sexual relationships with their students, including those for whom they are likely to have future supervisory responsibility. Conversely, teachers must not directly supervise any student with whom they have a sexual relationship. Violations of or failure to correct violations of these conflict of interest principles by the teacher will be grounds for disciplinary action.³⁵

Yale's shift from a Michigan-style discouragement policy to a ban on faculty-student sex in supervisory relationships may change some behavior and prevent some harm. Even if it has only limited effects, the high-profile policy change did at least bring consensual sex policies into a public debate and will hopefully encourage more universities to train advisers and to let students know about them. Attempting to foster an educational environment of trust through regulations and disciplinary action may seem unproductive. On the

31. Michigan Policy, *supra* note 19, at 3.

32. Yale Policy, *supra* note 10, at 2.

33. Taylor, *Yale Professor*, *supra* note 20, at A11.

34. Taylor, *Yale Professor*, *supra* note 20, at A11.

35. Yale Policy, *supra* note 10, at 2. The policy was proposed by the Ad Hoc Committee on Faculty-Student Consensual Sexual Relations on Nov. 14, 1997, and approved by the Provost in 1998.

other hand, consensual sex regulations, whether or not they include a ban on some relationships, may be the best means for universities to ensure that most of their students can participate fully in school.

II. RECOGNIZING HARM IN SPITE OF CONSENT

To find that a student consented to sex with a professor cannot mean that her harm is her problem. This is the core idea behind consensual sexual relationships policies, and the reason universities are expanding on existing sexual harassment policies. University consensual sex policies outline some potential harms that faculty-student relationships bring as they consider that consent in relationships of unequal power may not be meaningful. Consent does not eliminate the potential harms that sex between a professor and student can bring to students and the classroom, but it can determine the level of a university's interest in a particular relationship. If the potential for harm is minimal and the consent is informed, the university's interest in preventing a sexual relationship may be low. Policy and enforcement procedures may benefit by maintaining flexibility, so an evaluation of harm and consent in individual cases is possible.

Opponents to regulation think consent should remove sexual relationships from university concern. Liberal writers like Elliott argue simply that where there is consent there should be no regulation, and that sexual harassment policies adequately cover any real problems.³⁶

36. See Elliott, *supra* note 3, nn.14–20 and accompanying text; Gallop, *Feminism*, *supra* note 16, at 23. According to Elliott, where there is consent, there is no place for regulation; only where consent is absent does a student have grounds to complain, and then he or she can use existing sexual harassment law for relief. See Elliott, *supra* note 3, nn.14–20 and accompanying text. Elliott's position that universities need only enforce existing sexual harassment law fits the liberal model that Chamallas describes:

[T]here is little, if any, room for the legal regulation of amorous relationships under the liberal view of sexual conduct. Unless the lower status party to the relationship complains of exploitation, the relationship is likely to be viewed as a private consensual matter that does not warrant intervention. The disparity in power alone, absent evidence of economic coercion on an individual level, will not likely operate to vitiate consent.

Chamallas, *supra* note 3, at 861. Chamallas offers the response:

Feminism is now challenging the liberal tendency to presume the appropriateness of sexual conduct simply from the absence of a complaint by either party. Rules intended to foster sexual freedom for women cannot

They support this position with an argument I take more seriously, that regulating student sex is an effort to protect college women which is not only unnecessary but also paternalistic.³⁷ The liberal writers also rely on a privacy argument that sex between freely consenting adults is no one's concern but their own, and must not be regulated by universities.³⁸ Jane Gallop pushes the liberal model further by asserting that students' intellectual development is enhanced by sexual relationships with professors and arguing that regulation therefore stifles education itself.³⁹

Responding to these anti-regulation arguments are professors and others who take the position, as consensual relationships policies do, that student consent should be understood within the context of the institutionally reinforced power imbalance between professors and students, and that regulation is an appropriate means of mitigating the harm that can take place. They point out that regulations are often minimal and merely restrict faculty-student behavior for the limited time that a student is enrolled in a class with, or is supervised by, the professor.⁴⁰ They may agree that close emotional involvement benefits education, but believe that sex between professors and students goes outside the boundary of appropriate behavior and defeats the pedagogical goal.⁴¹ I find this position to be the strongest.

unreflectively judge the propriety of sex by the acquiescence of individual women. The risk is too great that acquiescence reflects inequality, not free choice.

Chamallas, *supra* note 3, at 862.

37. Young, *supra* note 18, at 298–302.

38. See Elliott, *supra* note 3, nn.28–51 and accompanying text.

39. See JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* 23 (1997) [hereinafter GALLOP, *FEMINIST ACCUSED*]. For further discussion of Gallop's work see *infra* part IV.

40. See Chamallas, *supra* note 3, at 843–44, 861–62; Karen Czapanskiy, *Anti-Harassment: Building Law School Policies*, 4 MD. J. CONTEMP. LEGAL ISSUES 163, 165–66 (1993); Forell, *supra* note 1, at 68–72.

41. See Sanger, *supra* note 23, at 1877. Sanger discusses a teacher who has taken this position:

The notion of restraint in the context of teaching is disarmingly discussed by Michèle Barale in an essay focusing on the problems of erotic pedagogy particularly for gay and lesbian teachers. . . . Barale stays out of student beds exactly to preserve the pedagogical use of the classroom's erotic charge. Her explanation seems right for professors across the board:

"Since neither the material of the classroom nor pedagogy itself ever can or should be made off-limits for erotic pleasure, the students must be. The boundary that separates our sexual desire from that of our students has to

An in-depth analysis of the university context is important to any evaluation of university policies. The faculty-student sex that seems to be prohibited most commonly is sex that takes place between a professor and a student who is currently enrolled in his class.⁴² That professor, therefore, has evaluative power over the student and supervisory responsibility conferred and reinforced by the university. The professor is also responsible for evaluating the student's classmates and peers. A sexual relationship between that professor and one of his students raises obvious questions of conflict of interest. The institutional hierarchy that distinguishes faculty from students may reinforce other imbalances due to gender, age, and experiential differences between faculty and students. College students are adults, but they do not come to college or graduate school as fully developed individuals; their experiences shape their ideas about themselves and their expectations for the future.⁴³ Because the faculty member and his or her colleagues are responsible for grading the student, for writing recommendations, and for providing references that will impact the student's life and career, the faculty member's institutional role enacts a power imbalance even when faculty and students are close in age or of the same sex. This power imbalance necessarily complicates sexual relationships between faculty and students.⁴⁴

be intentionally established to allow no negotiation [Otherwise] it will be only too easy to use the classroom as a way to feel good about ourselves. . . ."

Sanger, *supra* note 23, at 1876 (quoting Michèle Aina Barale, *The Romance of Class and Queers: Academic Erotic Zones*, in *TILTING THE TOWER* 16, 18–19 (Linda Garber, ed. 1994)). Regina Barreca, a professor at the University of Connecticut, shares this view: "[Teaching] is seducing students into your ideas and making them fall in love with the subject, as opposed to you." Taylor, *Dangerous Liaisons*, *supra* note 20, at A1.

42. See *supra* notes 20–21 and accompanying text.

43. See Katherine M. Franke, *What's Wrong With Sexual Harassment?* 49 STAN. L. REV. 691, 762–71 (1997) (arguing that gender roles are reinforced and normalized by sexual harassment).

44. It is possible that the institutional model that creates and reinforces the faculty-student hierarchy should be changed. Feminists have criticized and worked hard to change our society's gender-based power imbalances by identifying how hierarchies are constructed, developing strategies for breaking them down, and empowering people who are disadvantaged by them. One approach to faculty-student relations would be to undertake a similar criticism and deconstruction of the power imbalance that exists within the university. Formally hierarchical teaching styles can be alienating to some students and can be detrimental to their learning experiences. But the project would entail more than a shift in faculty methods. The power structure is reinforced

Caroline Forell has analyzed the risks involved in faculty-student relationships, applying insights from her work on fiduciary responsibilities and attorney-client sexual relationships.⁴⁵ Forell believes that "dual relationships," the "sexual relationships that coincide with evaluative relationships and thereby implicate teachers' fiduciary obligation toward their students," should be prohibited.⁴⁶ While Forell recognizes the potential harms and risks involved in other faculty-student relationships, she would ban only these "dual relationships" and strongly discourage others in order to balance the interests at stake. "[R]egulation of sexual relationships should be aimed only at preventing harm stemming from dual relationships where the teacher has both intimate personal power and academic or other institution related evaluative power."⁴⁷

Forell focuses on the law school setting specifically, where, because so many students have already been out of college for a few years, "[t]hat aspect of power imbalance rooted in disparity of age and experience is . . . minimized."⁴⁸ Unlike other graduate students, law students do not necessarily depend on one professor as a mentor or dissertation adviser (although there may be only one professor in a

by the university and beyond it by employers of students, hiring and fellowship committees, and others who depend on transcripts and recommendations when they assess candidates. Many faculty members and students believe there are educational benefits to having some level of hierarchy, partly because it can help create a respectful, controlled learning environment. My project has been to consider how a university and its faculty can make effective policy within the existing institutional framework and power structure.

45. Forell helped develop the Oregon Bar Association's rule that made "attorney-client sexual relations *per se* unethical." Forell, *supra* note 1, at 50. She then was appointed to "an ad hoc 'amorous relationships' committee" at the University of Oregon after an incident there raised the university community's concern. Forell describes the incident, which shows how consent can defeat a harassment claim.

A group of women students claimed that a senior professor had engaged in a pattern of sexually harassing women students over a period of years. While finding that he had engaged in actionable misconduct, the university rejected the most serious allegation of sexual harassment, which included what the university viewed as a consensual sexual relationship between him and his graduate student accuser.

Forell, *supra* note 1, at 51. Forell's "amorous relationships" committee met for two years, and then she and another member drafted the University of Oregon's policy on consensual faculty-student relationships. See Forell, *supra* note 1, at 51.

46. Forell, *supra* note 1, at 49.

47. Forell, *supra* note 1, at 57.

48. Forell, *supra* note 1, at 52.

given law field), so they might more easily avoid or limit the evaluative aspects of relationships with a professor. Finally, law students are usually graded anonymously, which reduces, though by no means eliminates, the risk of bias.⁴⁹ Nonetheless, Forell argues that the nature of the faculty-student relationship even in this context is fraught with potential for harm because it combines the "trust and the inherent imbalance of power" that define fiduciary relationships.⁵⁰ Fiduciaries are in a "'position to exert unique influence over the dependent party.'" ⁵¹ The "dependent party" in school has many needs; she relies on teachers for evaluation in class, for recommendation letters, and for advice and guidance. When she trusts a professor enough to become emotionally close to him, she increases her vulnerability to harm. The relationship, like one between a doctor and patient or therapist and client, is built on trust and confidence. A professor who uses that trust to become sexually intimate with his student takes a selfish and unnecessary risk of harming the student emotionally and academically. The professor is in a position to prevent sexual relationships with students from taking place, and should do so.

Carol Sanger points out that students who are sexually involved with a professor risk more than their education in one class. Once in a relationship, a student may change or abandon her own academic aspirations as she subordinates them to the professor's.⁵² One former "student-girlfriend," Leslie Irvine, described her experience powerfully:

For a long time, I went around feeling naïve, humiliated, and ashamed. Many of [the professor's] 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

49. See Forell, *supra* note 1, at 58.

50. Forell, *supra* note 1, at 54.

51. Forell, *supra* note 1, at 56 (quoting *Barbara A. v. John G.*, 193 Cal. Rptr. 422, 432 (Ct. App. 1983)).

52. See Sanger, *supra* note 23, at 1873-74 (citing Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 109 (1987)).

I could not think for myself, only defend my master on command.⁵³

Some women overcome these obstacles and achieve their goals; others don't. If Forell's regulation of "dual relationships" prevents or even simply postpones sexual relationships, students may maintain focus with minimum interference. The interests of other students are also at stake. Professors have a responsibility to treat all of their students fairly; when they enter intimate relationships with students they risk favoritism and the appearance of unfairness.

Harvard Law School's policy focuses on favoritism as the motivation for its limited ban:

Romantic relationships between Law School faculty and their students create the appearance of favoritism and are fraught with potential for actual favoritism and for quid pro quo sexual harassment. . . . Law School faculty are therefore forbidden to request or accept sexual favors from or to solicit a romantic or sexual relationship with any student currently enrolled in their classes or otherwise subject to their formal academic supervision.⁵⁴

Students may feel awkward or vulnerable when they learn that a professor has had sexual relationships with students, and may feel less comfortable seeking advice or help from him. Some women may come to feel that they are seen as sexual objects in school, not as intellectually valuable participants.⁵⁵ To foster trust and a productive educational environment, professors need to show that they will treat students fairly; having sex with students will defeat this trust.⁵⁶

53. Sanger, *supra* note 23, at 1875 (quoting Leslie Irvine, *A "Consensual" Relationship*, in *SEXUAL HARASSMENT ON CAMPUS* 234, 242 (Bernice Sandler & Robert Shoop eds., 1997)).

54. Harvard Law School, Sexual Harassment Guidelines (Apr. 1995) <http://www.law.harvard.edu/Administrative_Services/Personnel/harassment.html>.

55. See Forell, *supra* note 1, at 56-60; Sanger, *supra* note 23, at 1875.

56. William C. Heffernan argues that third-party harm rationales for bans on faculty-student sex are their strongest justification. William C. Heffernan, *Privacy Rights*, 29 *SUFFOLK U. L. REV.* 737, 795, 805-06 (1995). To Heffernan, students involved in sexual relationships are adequately protected by their ability to choose, and by the sexual harassment policies in place. Heffernan, *supra* at 805. Third-party students, on the other hand, are not protected from biased treatment by a professor who is involved with one of their classmates, so "a per se ban is indeed a narrowly tailored

Faculty engaged in consensual relationships face professional risks: they may lose the respect not only of their students in the classroom but also of their colleagues. They may get sued for sexual harassment, even if they believed that their sexual relationships were consensual, not coerced. As Jeffrey Toobin recently pointed out in an article about a Yale professor accused of sexual harassment, this can ruin a career.⁵⁷ Toobin's account is especially sobering for faculty because it indicates that university administrators may pursue investigations, or at least encourage them, even when students have no initial interest in doing so.⁵⁸

Rutgers' harassment policy preamble sets out the goal of university policy as one that encompasses the well-being of the university community:

The University recognizes the human dignity of each member of the Rutgers University community and believes that each member has a responsibility to promote respect and dignity for others so that all employees and students are free

means of warding off harm to students who are not sexually involved with a professor." Heffernan, *supra*, at 806.

57. See Jeffrey Toobin, *The Trouble With Sex*, THE NEW YORKER, Feb. 9, 1998, at 48. Professor Jay Jorgenson's case shows the enormous risks that a teacher takes when he becomes involved with a student. Jorgenson, a temporarily appointed assistant professor, was simply reprimanded by Yale for the relationship, but the student then went public with the story, it was taken up by the press, and Ohio State University ultimately withdrew its job offer from Jorgenson. See Toobin, *supra*, at 52, 54.
58. It is unclear whose idea it was for the student to pursue charges against Professor Jorgenson. Toobin makes it sound as though the university pursued the case; he reported that the student mentioned the relationship to a resident dean in her dormitory during a conversation about dropping out of school: "[the student] acknowledged from the start that she was a willing participant in any relationship she had with Jorgenson, but Yale launched a sexual harassment investigation nonetheless." Toobin, *supra* note 57, at 52. But Frances Taylor reported simply that the student filed charges against Jorgenson. See Taylor, *Dangerous Liaisons*, *supra* note 20, at A1. In another example, the parents of a student who was involved with her female graduate-student teacher complained so adamantly to the school that an investigation was undertaken and the teacher lost her teaching responsibilities. See *Naragon v. Wharton*, 572 F. Supp. 1117 (M.D. La. 1983), *aff'd* 737 F.2d 1403 (5th Cir. 1984). *Naragon v. Wharton* held "that the University's decision to remove a female instructor from teaching duties because of her relationship with a female student was lawful even though no university policy prohibited consensual relationships and the University did not punish similar relationships between male faculty and female students." Young, *supra* note 18, at 273 n.20. The case is complicated by the possibility that it was pursued due to homophobia, while heterosexual faculty-student affairs were ignored by the university.

to pursue their goals in an open environment, able to participate in the free exchange of ideas, and able to share equally in the benefits of the University's employment and educational opportunities.⁵⁹

Universities should recognize that sex between faculty and students affects the university community and may interfere with the interests of other students to learn and to be treated fairly.

Sherry Young trivializes the argument that professors' power influences students' consent: "Apart from their power over grades, what factors explain the allegedly overwhelming sex-appeal of middle-aged academics? Predictably, there is the unsubstantiated contention that age, gender, prestige of position, and 'clout at the university' function as some sort of general aphrodisiac."⁶⁰ As Jane Gallop and bell hooks point out in their candid discussions of their own sexual relationships with professors, these factors are precisely what have attracted students to faculty.⁶¹ In light of readily available accounts like theirs, Young's criticism and demand for substantiation seem disingenuous.⁶² Her conclusion continues in the same vein:

Ultimately, the proponents of total bans have failed to demonstrate that there is any reason to question the capacity of adult students to consent to sexual relationships with professors, at least where the professor does not exercise academic authority over the student. . . . They have not shown that participants in consensual relationships, as distinct from victims of unwelcome

59. Rutgers Policy, *supra* note 6, at 1.

60. Young, *supra* note 18, at 290 (citing Peter DeChiara, *The Need for Universities to Have Rules on Consensual Sexual Relationships Between Faculty Members and Students*, 21 COLUM. J.L. & SOC. PROBS. 137, 141-42 (1988)).

61. See *infra* part IV.

62. See, e.g., Gross, *supra* note 8, at B9. Gross writes:

Like so many other academics, [Robert H.] Kretsinger noted that faculty-student courtships were as old as Heloise and Abelard and as common as fall leaves on the quadrangle.

He said he could think of "hundreds of examples without exaggeration," some that worked to the benefit of both people, and others that produced "broken hearts and abuse." And since the issue came up at the campus [of the University of Virginia] in Charlottesville, Mr. Kretsinger said that his phone had been ringing off the hook and that he had "learned more about the intimacies of my colleagues than I ever wanted to know."

Gross, *supra* note 8, at B9. See also Sanger, *supra* note 23, at 1874.

sexual advances, suffer any harm from the relationship. In addition, they have not shown that universities have the right, much less the obligation, to limit the ability of adult students and faculty to determine with whom they will engage in intimate relationships.⁶³

Young's argument seems counterproductive; as long as students encounter difficulties when they engage in or end relationships with faculty, universities do have the right and obligation to develop policies to address those harms.

Among the criticisms of regulation, I am most sympathetic to concerns that regulations may be seen as paternalistic. College students are adults and they make important choices for themselves all the time, so how can a university impose restrictions on their behavior? There is also a feminist concern: university policies are gender-neutral, but there is the risk that policies will be seen as protective of women in particular, implying women do not know what they want.⁶⁴ It is important to acknowledge that students are adults. But it does not follow that adult behavior should not be regulated. Restrictions on faculty behavior simply help level the playing field, and they attend to the concerns of third-parties whose consent is not at issue. Students have handled and will continue to handle sexual relationships with professors on their own.⁶⁵ As Forell writes, "[t]he reason for regulating faculty-student sex is not that students are immature, or that women don't know what they want"; for Forell, "the reason is that the power disparity is too great."⁶⁶ And the reason is that students have a lot to lose if a sexual relationship interferes with their learning. Thoughtful consensual relationships policies that acknowledge potential harm and provide avenues of support for students are worth having if they give a student the help she needs to pursue her intellectual goals.

III. LIMITING PRIVACY IN UNIVERSITY POLICY

Stalwart foes of regulation like Professor Elliott insist that consensual sex policies impinge impermissibly on individuals' privacy

63. Young, *supra* note 18, at 292.

64. See *infra* part IV.

65. See *supra* notes 7 and 8.

66. Forell, *supra* note 1, at 63–64.

rights.⁶⁷ But privacy, like consent, should not be oversimplified or defended at the expense of other interests. For example, we no longer defend marital or domestic privacy in the context of domestic violence. Blanket defenses of privacy rights are no longer tenable, and context must be considered. Faculty-student sex policies must strike a balance between respecting privacy and protecting the interests of students in their education.⁶⁸ Unlike Elliott, I believe there is ample ground on which to develop effective policy without overburdening individual rights. I do not envision a lot of professors turning each other in under consensual sex policies; most seem to keep any disapproval to themselves or their closer friends. Since bans that have been enacted so far are limited bans—directed at relationships between a professor and a student who is currently enrolled in his class—the restriction on privacy is minimal, narrowly focused on situations where the potential for harm to all of the students in the class is greatest.

Students are not well-served if, in the name of protecting privacy, universities provide no policy language to address the potential risks involved in their sexual relationships with professors or the avenues of support available to them. Nor does it serve the faculty or the university when problems develop in sexual relationships that disrupt classes or cause students to drop them. Privacy interests should be balanced against the harms that I have outlined—harms to students and to the university community. Sex in private is not always protected to the exclusion of other rights; privacy, like liberty, is a privilege that is qualified by specific situations. Keeping faculty-student relationships private will not effectively alleviate the potential harms to students and the university community. Developing effective and fair policy requires making choices. The best balance may be to regulate only those relationships that take place between a faculty member and a student over whom he has evaluative responsibilities (though that line may be difficult to establish in situations where evaluation takes place outside the classroom, in recommendation letters or award nominations). Differing limitations on privacy can be imposed depending on the situation and the extent of potential harm. A university might decide, for example, that the only complaints that will lead to sanctions are those brought by affected students, or perhaps that reporting on

67. See Elliott, *supra* note 3, nn.28–51 and accompanying text.

68. For a thoughtful discussion of some of the problems with defending privacy see Ruth Gavison, *Feminism and the Public/Private Distinction*, 45 STAN. L. REV. 1 (1992).

one's colleagues is only appropriate when a professor is having sex with a student who is currently enrolled in one of his classes.⁶⁹ Third-party students or faculty might always have an available avenue for advice and complaint, but the sanctions available might be limited to cases where third-party harm can be shown. In this way, universities can offer some protection for privacy in less harmful situations, while at the same time protecting the interests of students and faculty in a productive, effective learning environment.

A policy that defends privacy interests without qualification will deny students protection in the subtly coercive, asymmetrical sexual relationships that sexual harassment policy does not reach. Policies that address consensual faculty-student sex give students who are not (or not yet) seeking to pursue a sexual harassment claim an established, effective avenue of support. With such a policy in place, universities demonstrate to students that their concerns are legitimate. They also require the university to devote attention and resources to maintaining support for sexual relations concerns. A student with no interest in pursuing a sexual harassment claim might not otherwise seek advice. With only a sexual harassment claim available, a student's options are too confined; she would either have to ignore her concerns or shape them into what she understands a sexual harassment claim should look like. By articulating and establishing consensual sexual relationships policies, a university best serves the student by identifying those relationships as an area of university concern, even apart from sexual harassment.

Universities have been criticized for putting consensual sexual relationships policies within sexual harassment policies, but I find the

69. The University of Michigan policy includes a disclosure requirement:

The University's nepotism policy precludes individuals from evaluating the work performance of others with whom they have intimate familial or close personal relationships, or from making hiring, salary, or similar financial decisions concerning such persons, without prior written approval. The same principles apply to staff-student or faculty-student relationships in the context of work or academic evaluation. Thus, consensual romantic or sexual relationships between faculty or staff and students also require disclosure to the appropriate administrative supervisor so that arrangements can be made for objective evaluation and decision-making with regard to the student.

Michigan Policy, *supra* note 19, at 2. Most policies apparently do not require disclosure; Rutgers "encourages" reporting incidents of harassment in its policy, and presumably this could be extended to the consensual relationships discussed within the policy. See Rutgers Policy, *supra* note 6, at 6.

practice helpful and perhaps necessary.⁷⁰ On a practical level, it is not always easy to find a university's consensual sexual relationships policy or determine whether there is one at all; since everyone has sexual harassment policies, a cross-reference to consensual sex policies at least would be helpful. But it is equally important to recognize that faculty-student sex may contain elements both of consent and of harassment; a student complaint may fit somewhere between harassment and consensual sex. By putting the two policies together, a university can describe any salient differences between them under university policy, and can indicate to a student that sexual harassment may be a part of her relationship with a professor and enable her to understand that she may go on to pursue a sexual harassment complaint if she finds that course of action appropriate. But it would also confirm to her that a professor's breach of trust and his ethical responsibility to his students is an actionable harm in itself, so even if the sex did not amount to actionable sexual harassment she could still make a valid complaint. Articulating a consensual faculty-student sexual relationships policy and enabling students to make some choices about whether or not they will keep a relationship private may be the best way to give students more control in a difficult situation. If students can get confidential advice, and then decide whether or not to preserve their privacy, they have a meaningful choice. If, on the other hand, a university only provides relief to students who can prove sexual harassment, it may preserve privacy but does so at the expense of student choice and empowerment. I would rather reduce the power imbalance by giving students more avenues to pursue.

IV. SEX FROM THE PERSPECTIVES OF PROFESSORS

Sex between faculty and students resists any attempt at generalization, because individual experiences vary greatly. While this should not prevent universities from developing policy, it certainly complicates the task. Many professors and administrators have colleagues who are happily married to former students; they may also know professors who see students as a source of casual sex. Two women professors, Jane Gallop and bell hooks, have written of relationships they had with faculty as students and then with students when they

70. See Elliott, *supra* note 3, nn.8-11 and accompanying text.

became professors. Both favor at least some types of these sexual relationships, and are wary of the negative effects that prohibitions may have. But hooks also explores some of the negative aspects of professor-student sexual relationships in her rich and insightful article.⁷¹

Unfortunately, the account I have from a male professor is more notorious than nuanced; William Kerrigan takes the position that he is doing his women students a favor by relieving them of their "unnaturally prolonged" virginity.⁷² Kerrigan wrote,

[I]f she loses that virginity with a man who is not a teacher, she's going to marry that man, boom. And I don't think that marriage is going to be very good.

There have been times when this virginity has been presented to me as something that I, not quite another man, half an authority figure, can handle—a thing whose preciousness I realize.⁷³

As Sanger writes, "Yeah, yeah."⁷⁴ A gendered power imbalance, where the student is a woman and the professor a man, compounds the difficulties raised by the institutional power imbalance. University policy makers must be mindful of the different ways in which a professor may have power over students, and develop policy that considers overlapping asymmetries in power. Universities recognize that sexual relationships that develop between professors and students vary widely and do not all involve a "lecherous professor."⁷⁵ They should address

71. See bell hooks, *In Praise of Student/Teacher Romances*, UTNE READER, Mar.-Apr. 1995, at 37; GALLOP, FEMINIST ACCUSED, *supra* note 39; Gallop, *Feminism*, *supra* note 16.

72. Sanger, *supra* note 23, at 1871 (quoting Colloquy, *New Rules About Sex on Campus*, HARPER'S MAG., Sept. 1993, at 35-36). Sanger aptly describes him as "consenting professor *ad infinitum et nauseam*." Sanger, *supra* note 23, at 1865.

73. Sanger, *supra* note 23, at 1871-72 (quoting Colloquy, *New Rules About Sex on Campus*, HARPER'S MAG., Sept. 1993, at 35-36).

74. Sanger, *supra* note 23, at 1872.

75. BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS* (2d. ed. 1990). Dziech, in her Author's Note to the second edition, points out that "the vast majority of male academicians are anything but 'lecherous.'" But she goes on to stress the point that

[p]hysical intimacy with students is not now and never has been acceptable behavior for academicians. . . . Where power differentials exist, there can be no "mutual consent." The infinitesimal number of cases in which professors/teaching assistants and students do develop genuine and seemingly

situations that arise in the greyer areas between meaningful consent and sexual harassment.

Jane Gallop

Jane Gallop wrote an article and then a book defending her belief that sex between professors and students is an important part of the educational experience.⁷⁶ Her writings focus on sexual harassment proceedings brought against her by two graduate students. She argues that kissing an advisee in public was not only appropriate but even a contribution to pedagogy.⁷⁷ Gallop uses her own personal history as a student and a teacher to argue that sex between professors and students can be an empowering "part of our embrace of the intellectual life."⁷⁸ As a student in the early seventies, Gallop felt empowered by open sexual relationships with professors; she is disturbed by what she sees as a current rejection of this practice.⁷⁹ By telling her own story about her positive sexual experiences, Gallop hopes to show her readers that the current climate of disapproval is harmful to students' educational experience.⁸⁰

Gallop acknowledges Catharine MacKinnon's argument about consent but does not agree with it. MacKinnon questioned "whether,

abiding attractions can, as the book suggests, be treated on individual bases without denying students protection from the campus lotharios who claim 'consent' every time they seek to bed a confused or intimidated victim.

DZIECH & WEINER, *supra* at xvii-xviii.

76. See GALLOP, *FEMINIST ACCUSED*, *supra* note 39; Gallop, *Feminism*, *supra* note 16. Carol Sanger recently published an excellent review of Gallop's book. See Sanger, *supra* note 23.

77. See GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 91.

78. Gallop, *Feminism*, *supra* note 16, at 22.

79. See Gallop, *Feminism*, *supra* note 16, at 22-23.

80. Two of Gallop's own graduate students sounded just like her in a recent Dateline interview:

College is the space where people notoriously go off to get involved with people. I mean, it's the spot, right? And so the idea that—that you do that with someone who was—someone who inspired you to think things you'd never thought before, inspired you to read things you'd never read before, inspired you to have dreams or aspirations, the idea that that passion would translate into a passion for that person seems totally, totally normal to me.

Unidentified Man #4, Dateline NBC, *Profile: Teacher's Pet? Professor Jane Gallop Views Sexual Affairs Between College Students and Professors as Natural, Even Educational*, 9/23/98 Dateline NBC, 1998 WL 6615913.

under conditions of male supremacy, the notion of consent has any real meaning for women . . . whether it is a structural fiction to legitimize the real coercion built into the normal social definitions of heterosexual intercourse’⁸¹ Gallop emphasizes the need to recognize students’ consent:

I do not think the solution is to deny people with less power the right to consent . . . which protects women by restricting us. As a feminist, I recognize that women are at a disadvantage but believe that denying women the right to consent further infantilizes us, denies us our full humanity.⁸²

By aligning herself with the women on the side with less power both in this passage and throughout her book, Gallop makes a questionable and disturbing move that oversimplifies her position. She submerges her institutional position of power as she focuses on gender hierarchy. In her view, she remains with the students on the side with less power, and claims to speak for their power to consent. But of course in her own sexual harassment case Gallop was the person who wielded institutional power. She built relationships with the students who brought the complaint against her as their teacher and adviser. According to the facts of Gallop’s case as she relates them, it was precisely the use of her institutional role, her “negative evaluations” of her students’ work, that caused them to bring their claims.⁸³

Gallop assumed that because she is a woman her sexual contact with a student was empowering, not harassment.⁸⁴ And yet she was apparently unsure that her readers would feel the same way, so the article (written first) omits the fact that Gallop kissed her advisee in public, in a bar, during a conference.⁸⁵ In the article, Gallop fails to mention the kiss or any physical contact between herself and her accusers. She claims instead, in the article and the book, “I was construed a sexual harasser because I sexualize the atmosphere in

81. Gallop, *Feminism*, *supra* note 16, at 22 (quoting CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979)).

82. Gallop, *Feminism*, *supra* note 16, at 22.

83. See Gallop, *Feminism*, *supra* note 16, at 18.

84. Gallop analyzes the role of a woman professor and complaints from students who have found her authoritarian. See GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 20–25.

85. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 83–101.

which I work.”⁸⁶ She writes that she was found in violation of the consensual relationships policy for “flirtatious banter and frank sexual discussion” with one of the students.⁸⁷ The “somewhat lengthy kiss” is only revealed ten pages before the end of the book.⁸⁸ Readers of the article may have been troubled at how a university apparently could punish a faculty member for mere “frank sexual discussion.”⁸⁹ But to her advisee, and to the university, the kiss was more important. Gallop’s account sounds self-serving: “In the climate of the nineties, our engagement in a *consensual* sexual relation (albeit one that lasted no more than a minute and didn’t go below the neck), could actually function as ‘proof’ of harassment.”⁹⁰ Gallop is skeptical of the student’s sexual harassment complaint that “alleged” that the student “was upset by the kiss but had been too intimidated to tell me.”⁹¹ She does not consider the possibility that her student really was intimidated when their relationship took a concretely sexual turn—to Gallop the sexual was always present in their intellectual engagement, and the kiss “was, after all, just a kiss.”⁹² Her case demonstrates how misguided faculty can be about their students’ consent. In her case, Gallop’s memory of her desires as a student and her opinions may be what keeps her from seeing the student’s point of view.⁹³ I disagree with Gallop’s conclusion that “the prohibition of consensual relations [is] an incongruity in a policy against *unwanted* sexual advances.”⁹⁴ I

86. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 11. See also Gallop, *Feminism*, *supra* note 16, at 16–18.

87. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 33.

88. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 90–91, 96.

89. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 33. See Elliot, *supra* note 3, at n.21 and accompanying text.

90. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 93.

91. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 93.

92. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 98.

93. Gallop writes the kiss was a performance between likeminded feminists, when “somehow the usual good-bye peck suddenly became a real kiss.” GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 91.

[W]e kissed like that because we knew we were being watched. And it was precisely the knowledge of being watched that made it sexy.

I thought of the kiss as very much a part of the conference, a sort of advance commentary on her paper the next day. . . . To my mind, our student-teacher kiss enacted a fantasy of lesbian pedagogy: women together tasting from the forbidden tree of knowledge.

GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 91.

94. Gallop, *Feminism*, *supra* note 16, at 23.

think her own case shows how fragile the line between consensual relationships and sexual harassment can be, illustrating the need to include consensual relationships in policy and discussion.

Gallop tries hard to separate her authority in the classroom from the authority of male professors, and claims the sexual harassment charge against her was merely a gripe against her as a feminist who acts as an authority in the classroom.⁹⁵ Thus Gallop writes on page 21 of the book (seventy pages before she acknowledges kissing her student),

[O]ne of the students states in her complaint against me: "it is at the level of the institutionally enforced power differential that I wish to locate my harassment charge." She found it humiliating that I had power over her and considered it a betrayal of feminism. Harassment for her in fact meant precisely experiencing what she calls "the power differential."⁹⁶

Gallop fails to give her student much credit. I imagine the student was bothered by more than the fact that Gallop is a woman in power. If a male professor had kissed her in a bar, she may have brought a complaint against him. Though the situations are not the same, both share the aspect of a professor betraying trust in a supervisory relationship by enacting her, or his, sexual desire. Gallop is "[t]roubled by [the] move to a gender-neutral understanding of sexual harassment."⁹⁷ My hypothetical shift to a male professor kissing the graduate student would bother her. She believes a man in power is a world apart from a woman in power, and thus disagrees with "the current trend in thinking about harassment that reduces power to mere institutional position."⁹⁸ To her, this "forgets the feminist insight that the most distinctive abuses of power occur because of widespread, deeply rooted social and psychological reinforcement."⁹⁹ If Gallop means you have to be a man to harass a woman, that "psychological

95. See GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 20–22.

96. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 21–22.

97. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 25. Gallop writes, "Explanations of sexual harassment are beginning to move away from the idea that gender is the key factor and toward a gender-neutral notion of power. While a number of feminists have embraced this move, I consider it to be a serious departure from feminism." GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 24.

98. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 25.

99. GALLOP, *FEMINIST ACCUSED*, *supra* note 39, at 25.

reinforcement" will not come from an institutionally reinforced power differential ("mere institutional position"), then her analysis is limited indeed. The complaint that her graduate students brought against her should have shown her otherwise.

Gallop's story shows that the professor does not always know best how to interact with her students. She believes sexual contact should not be avoided: "It is precisely because I believe it is not possible to neatly separate the sexual from other sorts of relations that I find the movement to bar the sexual from pedagogy not only dangerous but supremely impractical."¹⁰⁰ Yet she says she has not had sexual contact with a student since the charge was brought, so it seems she can keep the sexual on the level of discussion, not action.¹⁰¹ Why not make the neat separation there?¹⁰²

bell hooks

bell hooks does not propose answers, but in a couple of pages she manages to convey the complexity of consensual relationships between faculty and students. Hers is a rich and nuanced account of consensual sexual relationships between students and professors.¹⁰³ The strength of hooks' article lies in her ability to convey a range of motivations and effects of faculty-student sexual relationships. The point of departure is the close teaching relationship:

Throughout my years as a student, I was always mindful of the way in which devotion to a teacher within a learning community, whether in a classroom setting or in a religious context, can arouse erotic longings. Passionate pedagogy in any context is likely to spark erotic feeling. I have known such feeling as a student and experienced it as a teacher.¹⁰⁴

Hooks revisits relationships she had as a student with professors.

100. Gallop, *Feminism*, *supra* note 16, at 23.

101. See Dateline, *supra* note 80.

102. For the views of professors who acknowledge a sexual charge but will not act on it, see *supra* note 41.

103. See hooks, *supra* note 71.

104. hooks, *supra* note 71, at 38.

When I was a student I observed teachers manage our desire to be close to them, to be erotically involved. Several times, I engaged in sexual relations with older male professors, not so much because I felt engaged in a peer relation but because I wanted to be physically close to teachers I admired and/or loved. In those few situations I learned that my longing to use the erotic for growth by these encounters was rarely shared—that the men were in fact abusing their power. In my case, I did not feel damaged by these encounters because I learned from them. I did feel hurt.¹⁰⁵

Hooks then describes a relationship she had as a professor with a student. She only entered the relationship once the student was no longer in her class. Nevertheless, the power differential between them remained an obstacle. "From the onset, the unequal power relations between us were a source of tension and conflict we did not resolve."¹⁰⁶ Hooks does not express regret for entering the relationship. She does not work to distinguish it much from the relationships she had as a student. I would have liked to read more of her thoughts in retrospect. But hooks's article serves as a reminder that faculty-student relationships vary greatly from one to the next. We know of stories like hers that sound very little like harassment, stories of relationships that may not have ended badly, of professors who married their students. This may be why total bans on faculty-student sex have been unpopular, and why partial or temporary bans are the strongest universities are imposing.¹⁰⁷

Hooks does write a few words of caution; she believes silence about faculty-student relationships is harmful, and writes that it is "important not to deny erotic feelings between teachers and students, [because] that denial precludes the recognition of accountability and responsibility. . . . [I]n my experiences as a student, it was precisely silence and taboo that made coercion and exploitation more possible."¹⁰⁸ Her solution is open dialogue: "The moment power differences are articulated in a dialogue where erotic desire surfaces, choice is possible, accountability can be clearly assessed."¹⁰⁹ Students

105. hooks, *supra* note 71, at 37–38.

106. hooks, *supra* note 71, at 38.

107. See *supra* notes 19–22 and accompanying text.

108. hooks, *supra* note 71, at 38.

109. hooks, *supra* note 71, at 38.

may have less power than professors, but if they can openly acknowledge and assess the aspects of power and sexual feelings in professor-student relationships, they can make more informed choices. Consent in an atmosphere of silence and taboo is not as meaningful as informed consent. Hooks emphasizes that students, even though they can be victimized, do make choices:

It is troubling when focus on the ways teachers can victimize students, especially via erotic engagement, denies the complex subjectivity of the students and makes them into objects by assuming that unequal power means that they are always acted upon and are without any agency. While there are clearly instances of serious victimization, there are many other instances in which desire emerges between individuals with unequal power where both retain degrees of agency and choice.¹¹⁰

CONCLUSION

My own thoughts about policy have changed as I have developed this article, but my focus has stayed on giving students more control and ensuring that their education is not jeopardized by sexual relationships. I believe that sexual relationships should be prohibited as long as faculty have supervisory or evaluative control over a student. These relationships pose the most serious risks of harm to students and the educational environment in the classroom. But implementing such a ban could produce its own harms. At worst, an enforced ban could permit uneven or vindictive reporting out of anger, hostility, or prejudice.¹¹¹

Nevertheless, university policy can show respect for students and demonstrate that their relationships with faculty are taken seriously by taking a strong position against faculty who breach or take unfair advantage of students' trust. Since it is not always easy for outsiders to

110. hooks, *supra* note 71, at 38.

111. The harms might be alleviated somewhat if sanctions were fairly modest. For example, the conflict of interest could be removed by taking the student out of the professor's class, having her work evaluated by a third party, or imposing a mandatory pass/fail grade option.

tell when a student needs help, policy should be set up to give students choices and avenues of support and guidance. ♣