GETTING TO YES: THE CASE AGAINST BANNING CONSENSUAL RELATIONSHIPS IN HIGHER EDUCATION

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I. INTRODUCTION

In most legal contexts, we have finally arrived at a consensus that a competent adult woman's expressed desire not to have sex shall be conclusive on the issue of whether she consented to a sexual contact. The popular form of this idea is the notion that "no means no." Unfortunately, there is no similar consensus that "yes means yes." Instead, there has been much debate about when the expressed consent of a competent adult to sexual contact should be considered legally ineffective. Many contend that expressed consent to sexual relationships between professionals and their patients/clients should be considered legally ineffective, and that such unions should be prohibited.1 Colleges and universities are now debating the need for policies that prohibit consensual sexual relationships between professors and students.2

Although prohibitions on professional-client sexual relationships are ostensibly gender-neutral, most supporters concede that the intent of the restrictions is to protect women clients from male

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1. See, e.g., 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, 647-48 & 672-83 (1991) (noting that sexual relationships between psychotherapists and their patients are proscribed by the ethical standards of the various professional associations); cf infra part IV (discussing the rationale behind those proscriptions); see also Dan S. Murrell, J.L. Bernard, Lisa K. Coleman, Deborah L. O'Laughlin, & Robert B. Gaia, A National Survey of Attorney-Client Sexual Involvement: Are There Ethical Concerns?, 23 MEM. ST. U. L. REV. 483 (1999) (commenting that the Illinois Disciplinary Commission determined consensual attorney-client relationships did not constitute misconduct, but that the New Hampshire Committee on Professional Conduct determined such a scenario was tantamount to misconduct).

2. See infra part II (discussing consensual relationship policies that have been adopted at various colleges and universities).
professionals. The paternalistic character of the restrictions has not generated much opposition, even though it has been acknowledged that:

by creating an absolute presumption of harm, the legislature implicitly decides that a woman "will always be incapable of giving informed consent to a sexual relationship" once she comes under the domineering influence of a male professional. Instead, the proponents of consensual relationship policies in higher education enthusiastically endorsed the incapacity argument. Analogizing students to children molested by parents, and to mental patients undergoing psychotherapy, proponents claim that there is no such thing as a consensual relationship between a student and a professor because students are incapable of giving effective consent. This incapacity allegedly arises from a power differential between the parties and/or the phenomenon of transference.

Although this incapacity argument is often attributed to campus feminists, it is based upon a fundamental distrust of women's judgment and of their perceptions of their own experience. The suggestion that otherwise competent adult women are so incapable of making decisions about their personal lives that colleges and universities should step in and regulate their sexuality is not an obviously feminist position. The notion that (predominantly male) administrators should feel free to ignore a woman's own perceptions and stated preferences about her life and her exercise of her own sexuality is deeply anti-feminist. Further, if consent given within a relationship where there is a power imbalance is routinely considered ineffective, the sexual autonomy of women will be severely restricted. Life occurs under conditions of inequality. Only a small subset of power imbalances are extreme enough to vitiate consent. Female university students are in the process of increasing their power rating

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4. Id. at 1323 (citations omitted).
5. See infra note 117 and accompanying text (contending that both professor-student sexual relations and child molestation are acts of domination).
6. See generally infra part IV (asserting that regulations that are reasonable in the psychotherapeutic environment are also necessary in the higher education environment).
7. See generally infra part IV (explaining that where power differentials exist, there can be no mutual consent).
8. See infra notes 111-122 and accompanying text (describing the role disparity between professor and student).
9. See infra notes 128-131 and accompanying text (analyzing the psychoanalytic phenomenon in the professor-student context).
in society. They graduate into a world where they will have to function effectively, both personally and professionally, under conditions of power inequality. What these students want and deserve is equality of opportunity and equality of respect, not protection from decisions that others deem unwise. A university or law school truly concerned about enhancing the educational and professional opportunities of its women students can more effectively use the institutional resources currently consumed in the exercise of drafting, debating and enforcing sex codes. It is time to get back to the feminist basics of listening to women, believing women, respecting women, and empowering women.

Since my own experiences have shaped my views on this subject, it seems appropriate to explain my situation. I have been a law professor at a small law school in rural Ohio for eight years. I do not date students. My university recently adopted a complete ban on sexual relationships between faculty and students. I am generally opposed to governmental, corporate, or institutional regulation of private conduct.

By far, the most important influence on my views is the respect I have developed over the years for the extraordinary women who come to my university to study law. Ranging in age from twenty-two to over sixty, they have brought an incredible diversity of life experience to their studies. Many of our students are non-traditional students, coming to law school after careers as nurses, soldiers, teachers, and construction workers. One woman was a “military wife” who graduated with honors from the University of Pennsylvania in the 1940s, then moved with her husband to posts around the world. Another was a soldier who served in the Gulf War.

Some are women who found the courage to leave an abusive relationship, and others are single mothers struggling to make a life for themselves and their children. All are bright, determined, ambitious people who threw what they could into a car and headed for a strange place to wrestle with the complexity of the law. They were not deterred by the obstacles behind them, and they were not deterred by the prospect of attending a school with a predominantly male student body and a predominantly male faculty, on their way to a career in a predominantly male profession. These women want to be lawyers because they want to make a difference in the world. As

11. OHIO NORTHERN UNIVERSITY, FACULTY HANDBOOK 1995-96 [hereinafter OHIO NORTHERN UNIVERSITY] § 2.3(3)(F), at 14-15 (1995) (“Faculty and staff members should not have sexual relations with students to whom they are not married.”).
mothers, soldiers, and nurses, many have been responsible for life and death decisions in the past. As lawyers, they will all be responsible for decisions that affect their clients' most treasured rights—their liberty, their property, the custody of their children. It seems to me that those who contend that such women are no more capable of deciding who to date than children or mental patients bear a heavy burden of persuasion. The proponents of consensual relationship policies have not carried that burden.

II. THE PROLIFERATION OF CONSENSUAL RELATIONSHIP POLICIES

Consensual relationship policies are a relatively recent development in higher education. The first consensual relationship policies were adopted in the mid-1980s. By the mid-1990s, the popular press was reporting that a growing number of institutions were considering similar policies. Leading professional organizations have urged colleges and universities to consider discouraging romantic relationships between professors and students, and to adopt policies declaring such relationships unprofessional. The Association of American Law Schools has issued a statement declaring sexual relationships between professors and students inappropriate in some circumstances. A growing professional literature describes the consensual relationship policies of various institutions.

Most institutions do not have any formal restrictions on consensual relationships. It should be noted, however, that the lack of a

15. National Education Association, Policies on Sexual Harassment and Personal Relationships in Higher Education, reprinted in THE EDUCATOR'S GUIDE, app. V at 129 (stating that the National Education Association "urges its affiliates in institutions of higher education to establish strong policies declaring such relationships unprofessional").
17. See, e.g., Martha Chamallas, Consent, Equality, and the Legal Control of Sexual Conduct, 61 S. Cal. L. Rev. 777, 845 (1988) (discussing consensual relationship policies at the University of Iowa, Temple University, Hampshire College, the University of Minnesota, Massachusetts Institute of Technology, Harvard University and the University of Michigan); 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, 145-47 (1988) (discussing the policies at Harvard and the University of Iowa); and Hoffmann, supra note 12.
18. DeChiara, supra note 17, at 138.
formal prohibition does not mean that such relationships are considered unproblematic by the institution. Most universities have rather vague policies, forbidding "unethical behavior" or "conduct unbecoming a member of the faculty" or even "moral turpitude", that can be invoked to punish professors who participate in romantic relationships with students that the university later decides were inappropriate. In fact, the only reported case upholding sanctions imposed upon a faculty member for engaging in a consensual relationship with a student involved an institution that did not have a consensual relationship policy.

The policies that have been adopted are far from uniform, but there are a few dominant variations. One type of policy attempts to discourage faculty-student relationships, but does not forbid them. The University of Minnesota Policy on Consensual Relationships, for example, states that faculty-student relationships "while not expressly forbidden, are generally deemed very unwise." The policy warns professors that it considers a professor's power to "greatly diminish the student's actual freedom of choice," and that if a charge of harassment is subsequently lodged it will be "exceedingly difficult" for the professor to prove consent. Similarly, the University of Michigan's Faculty Guidelines warn that sexual relationships between faculty members and students are "potentially exploitative and should be avoided." The Code of Conduct of the University of California Santa Cruz prohibits only unwelcome relationships, but urges individuals in positions of "power/authority/control over others" to examine such relationships "in terms of emotional health,

19. DeChiara, supra note 17, at 145 (noting that in 1987, a survey of 38 universities across the country revealed that only two prohibited consensual faculty-student relationships).
20. See Naragon v. Wharton, 572 F. Supp. 1117 (M.D. La. 1983), aff'd 737 F.2d 1403 (5th Cir. 1984) (holding 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. The Court held that the action of the University was not discriminatory because "each case of teacher misconduct and its resulting effect on the mission of the University must be considered on its own."). The scarcity of cases on this subject may indicate that universities are more interested in adopting consensual relationships policies than they are in enforcing them. On the other hand, it may simply demonstrate that where the relationship is truly consensual, complaints are unlikely. At any rate, it would appear that sexual exploitation of students is not as common as proponents suggest.
22. Id.
23. Id.
24. Id.
25. Chamallas, supra note 17, at 845.
self-esteem, and respect for the independence of the persons involved" before engaging in them.26

The policies of the University of Minnesota, University of Michigan, and the University of Santa Cruz do not forbid conduct that the faculty and/or administration has determined is problematic enough to discourage. These policies do not clarify what, if any, sanctions may be imposed upon a faculty member who engages in the discouraged behavior. Finally, they do not appear to be limited to situations where the professor has some direct academic responsibility for the student, and they do not explain the rationale for discouraging relationships outside the instructional context.

The New York University Law School (NYU) adopted an interesting variation on the “discourage but don’t forbid” policies.27 In addition to a set of anti-bias rules that can be enforced with formal sanctions, NYU has promulgated a set of “aspirational standards” that are “promoted only through active education and enforced only through voluntary mediation.”28 One aspirational standard:

creates 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 presumption applies to teaching assistants, journal editors, and instructors, as well as to professors. It does not prohibit sexual relations, but rather places upon the more powerful party the burden for assuring that the relation truly is consensual.29

This policy is an improvement because it is explicit about the lack of formal sanctions, and offers instead a mediation process that may actually resolve disputes rather than exacerbate them. It also appears to be unique in suggesting that some relationships between students are potentially exploitative.

The more common policies forbid faculty-student relationships only where the professor has direct academic responsibility for the student. These policies may be characterized as conflict-of-interest policies. They generally apply where the professor assigns grades to the student, serves as an academic advisor, or is in a position to supervise or evaluate the student’s work as a teaching assistant, research

27. Sylvia A. Law, Good Intentions Are Not Enough: An Agenda on Gender for Law School Deans, 77 IOWA L. REV. 79, 85 (1991) (remarking that the NYU policy does not prohibit sexual relations, but rather places the burden of proving consent on the party with more power).
28. Id. at 85.
29. Id.
assistant, or similar position. The National Education Association’s policy belongs in this category, as do the policies adopted by Harvard, the University of California, Temple, Tufts, and the University of Virginia.

A third type of policy forbids consensual relationships where they pose a conflict of interest, and discourages them in the absence of a direct conflict. The best example of such a policy is the Consensual Relationship Policy of the University of Iowa. The conflict of interest portion of the policy is exemplary for its clarity. “No faculty member shall have an amorous relationship (consensual or otherwise) with a student who is enrolled in a course being taught by the faculty member or whose academic work (including work as a teaching assistant) is being supervised by the faculty member.”

The University of Iowa policy also explains the rationale behind the prohibition. The policy states that when a faculty member has professional responsibility for a student, amorous relationships are wrong because there is a possibility that the faculty member will abuse his or her power and sexually exploit the student. Given the imbalance of power in such a relationship, a student’s voluntary consent is suspect. This unprofessional behavior places the faculty member in a position to show favoritism and implicitly makes benefits contingent on sexual favors. If faculty members engage in amorous relations with students who are subject to their supervision, it will be viewed as unethical by the University even when it appears that the student consented to the relationship.

Unfortunately, when the policy discusses relationships outside the instructional context both the precision and the justifications are left behind. The reader is warned that relationships outside the instructional context “may lead to difficulties," particularly when the faculty member and student are in the same academic unit or in units

30. National Education Association, supra note 15, app. V at 129 (stating that the Association “believes that sexual relationships between a faculty member and a student currently enrolled in the faculty member’s course, or under the supervision or direction of the faculty member, are unprofessional”).
31. Hoffman, supra note 12, at 111.
32. Hoffman, supra note 12, at 111.
34. Morrison, supra note 13, at B7.
35. Morrison, supra note 13, at B7.
37. The University of Iowa, supra note 36, at § 7.
38. The University of Iowa, supra note 36, at § 6(b).
39. The University of Iowa, supra note 36, at § 8.
that are academically allied." The only rationale given for the warning is that "relationships that the parties view as consensual may appear to others to be exploitative." It is not clear what, if any, sanctions will be applied where the relationship occurs outside the instructional context.

In another example of this kind of policy, the Statement on Consensual Relationships of the University of Wisconsin-Madison requires that conflicts of interest be resolved. The policy then warns that consensual relationships "may cause serious consequences even when conflicts of interest are resolved." In listing the consequences, the policy observes that alleged consent may not be an effective defense to a charge of sexual harassment, and that consensual relationships may be outside the scope of employment. The defendant may, therefore, not be covered by the state's liability protection in the event of litigation. The Association of American Law Schools' policy deems faculty-student relationships inappropriate where the professor has a professional responsibility for the student, but only suggests that the professor be "sensitive to the perceptions of other students" when dating a student outside the instructional context.

The final option is to prohibit sexual relationships between faculty and students altogether. The Consensual Relationship Policy at Ohio Northern University simply states that "faculty and staff members should not have sexual relations with students to whom they are not married."

Although only a handful of institutions have adopted consensual relationship policies, the fact that they are being so widely debated indicates that there must be some problem that these policies are intended to address. Part III examines the perceived problems that have begun to generate relationship policies in institutions of higher education.

40. The University of Iowa, supra note 36, app. V at 271.
41. The University of Iowa, supra note 36, app. V at 271.
43. Id.
44. ASS'N OF AM. LAW SCH., supra note 16, at 89.
45. OHIO NORTHERN UNIVERSITY, supra note 11, at 14-15; see also Jerome W.D. Stokes & D. Frank Vink, Consensual Sexual Relations Between Faculty and Students in Higher Education, 96 EDUC. LAW REP. 899 (1995) (noting that University of Virginia, William & Mary, University of Texas at Arlington, and University of Washington considered complete bans on faculty-student relationships but the proposals were defeated).
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III. CONSENSUAL RELATIONSHIP POLICIES: WHO NEEDS THEM?

Consensual relationship policies evolved out of institutional efforts to meet the statutory duty to eliminate sex discrimination from higher education.\(^{46}\) Title IX of the Education Amendments of 1972 provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any education program or activity receiving Federal financial assistance...\(^{47}\)

In *Meritor Savings Bank, FSB v. Vinson*,\(^ {48} \) the United States Supreme Court held that sex discrimination in employment occurs where a supervisor sexually harasses a subordinate.\(^ {49} \) In *Franklin v. Gwinnet County Public Schools*,\(^ {50} \) the Court held that sexual harassment of a student by a teacher constitutes sex discrimination under Title IX.\(^ {51} \)

The rationale for treating sexual harassment as sex discrimination was well-stated by an early commentator, Ronna Greff Schneider. Schneider explained that it is essential to intellectual growth and development that a student be in a nondiscriminatory environment.\(^ {52} \) A sexually abusive environment prevents a student from obtaining the most from an academic program and inhibits him or her from developing his or her intellectual potential. Loss of an academic benefit on the basis of sex violates Title IX.\(^ {53} \)

Students aggrieved by a violation of Title IX have a private cause of action against the offending institution,\(^ {54} \) and can recover damages as well as equitable relief.\(^ {55} \) Institutions subject to the requirements of Title IX must adopt and publish policies that define and prohibit

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\(^{48}\) 477 U.S. 57 (1986).

\(^{49}\) Id. at 64.

\(^{50}\) 503 U.S. 60 (1992).

\(^{51}\) Id. at 75.


\(^{53}\) Id. at 551 (citations omitted).

\(^{54}\) Cannon v. University of Chicago, 441 U.S. 677 (1979) (holding that a female who was denied admission to medical schools had a right under Title IX of the Education Amendments of 1972 to pursue a private cause of action against the universities).

\(^{55}\) Franklin, 503 U.S. at 72 (holding that a damage remedy was available to a high school student who brought a Title IX action for alleged intentional gender-based discrimination by a coach-teacher).
sexual harassment, as well as grievance procedures, to resolve student complaints of sexual harassment.\(^56\)

In defining sexual harassment in the context of higher education, many institutions have looked to guidelines issued by the Equal Employment Opportunity Commission (EEOC) pursuant to Title VII of the Civil Rights Act of 1964.\(^57\) Conduct constitutes sexual harassment when (1) submission to such conduct is a condition of a person's employment, (2) a person's submission to or rejection of such conduct is used as the basis for employment decisions, or (3) the conduct creates a hostile work environment or has the purpose or effect of hindering an individual's work performance.\(^58\)

The same principles apply when evaluating whether a person has been subjected to sexual harassment in an educational setting.\(^59\) In an educational setting, quid pro quo harassment can occur when a professor conditions some academic benefit—a grade, a job, a recommendation—on sexual favors. The conduct may consist of a threat to give a lower grade than the grade the student earned if she does not comply with the demand, or an offer to give a higher grade than the one she earned if she does comply. Unwelcome sexual advances not accompanied by threats or promises may create a hostile environment that impairs a student's academic performance. Students other than the student directly harassed by the professor also may have a hostile environment claim if they are injured by the conduct. For instance, other students may be disadvantaged in the competition for some scarce benefit or concerned that their grades will also be conditioned on meeting the illegitimate demands of a professor.

Virtually every institution of higher learning in the United States now has a policy forbidding sexual harassment and providing a procedure for resolving claims that harassment has occurred.\(^60\) Legal liability aside, no institution has any interest in condoning, much less promoting, the kind of conduct prohibited by Title IX. Once an institution has a sexual harassment policy in place, however,

\(^{56}\) Patricia L. Winks, *Legal Implications of Sexual Contact Between Teacher and Student*, 11 J.L. & EDUC. 437, 467 (1982).


\(^{58}\) 29 C.F.R. § 1604.11(a) (1988).


\(^{60}\) But see DeChiara, *supra* note 17, at 146 (noting that in 1987, Brigham Young University, Butler University, University of Connecticut, and Rice University did not have sexual harassment policies).
is it desirable to go beyond the prohibition on sexual harassment and forbid consensual relationships as well?

Consensual relationships, by definition, fall outside Title IX’s prohibition of sexual conduct that is “unwelcome.” Therefore, banning consensual relationships should not have any impact on the institution’s legal liability. So why try to regulate them? One potential benefit is that by prohibiting such unions altogether, the institution can avoid situations where relationships that were consensual at one point become occasions for harassment, or false allegations of harassment, when the companionship ends. Further, a complete ban may eliminate cases of “unintentional coercion,” where the professor does not intend to coerce the student, but the student nevertheless feels coerced. Another possible benefit is eliminating the need to resolve disputes over whether a relationship was in fact consensual. Finally, banning such relationships can cut down on favoritism or a perception of favoritism by other students.

None of these potential benefits, however, justify a complete prohibition of consensual unions. If the conduct is unwelcome, it is already prohibited by any sexual harassment policy. This is true regardless of whether similar conduct may have been welcome at another time, or whether the professor intended to harass or coerce the student. If the student is aggrieved, the student is entitled to relief. There is no need to ban consensual relationships to accomplish this result.

In addition, the resolution of credibility disputes through sexual harassment procedures is no more difficult than the resolution of credibility disputes in other cases of alleged academic misconduct. Adoption of a consensual relationship policy would still require the resolution of disputes about whether the alleged relationship in fact took place. Therefore, the potential elimination of credibility

61. See DeChiara, supra note 17, at 143.
62. See DeChiara, supra note 17, at 142 (quoting Tuana in Sexual Harassment in Academe: Issues of Power and Coercion, 33 COLLEGE TEACHING 53, 61 (1985)) (noting that even where it appears a student is consenting to a relationship with a professor, factors such as fear may actually force the student into the relationship).
63. See DeChiara, supra note 17, at 142 (explaining that the pressure a student may feel to enter a relationship with a professor may invalidate any appearance of consent, therefore, resolving such disputes is difficult).
64. See DeChiara, supra note 17, at 144-45 (noting that even consensual teacher-student relationships can lead to problems of favoritism).
65. For a discussion of the relief available to aggrieved students and the grievance procedures for individual universities and colleges, see FRANKLIN, MOGLEN, ZATLIN-BORING & ANGRESS, supra note 26, at app.; Ingulli, supra note 33, at apps. A-F; and Schneider, supra note 52, at 572-74.
disputes is not a persuasive justification for the adoption of the policies.

One concern that is arguably addressed by consensual relationship policies is the problem of favoritism. Institutions of higher education have a legitimate interest in preserving both the appearance and the fact of academic integrity. A sexual relationship between a professor and a student for whom that professor has academic responsibility generates at least the appearance of impropriety. Although the professor may not promise or intend any quid pro quo, the student may anticipate academic benefits or fear academic reprisals. Further, the potential for unconscious bias on the part of the professor, and speculation and resentment on the part of other students, justify institutional intervention.\(^6\) Perceptions of favoritism are most likely and most harmful where there is a conflict of interest. Institutional requirements that professors eliminate potential conflicts of interest are clearly legitimate and have been widely adopted.\(^7\) Prohibitions of consensual relationships where there is no conflict of interest are needlessly intrusive and serve no legitimate purpose.

The final justification asserted for prohibiting consensual relationships is that such relationships are inherently harmful to the students.\(^8\) Proponents of consensual relationship bans argue that such relationships are always harmful to the student because, no matter what the student may believe, no affiliation between a professor and a student is ever truly consensual.\(^9\) In support of that

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66. See DeChiara, supra note 17, at 145 (stating that favoritism or the perception of favoritism can cause other students to be resentful, demoralized or hostile, and to "lose faith that academic rewards are distributed by merit") (citations omitted); see also Chamallas, supra note 17, at 856 (stating that even if the student involved in the relationship has not been coerced, the "message transmitted to other [students] may be coercive and threatening") (citations omitted).

67. See DeChiara, supra note 17, at 147 (commenting that the Massachusetts Institute of Technology, Brown University and the University of California have policies that warn teachers who are sexually involved with students to be aware of "potential conflicts of interest") (citations omitted). But see Paul Kidd, Professor-Student Sex “Never Appropriate” Rights Hearing Told, THE TORONTO STAR, July 9, 1993, at A2 (quoting the testimony of Michele Paludi, psychology professor at Hunter College in New York, who stated that for a professor to just declare that there is a conflict of interest if he/she enters a sexual relationship with a student is inadequate).

68. See DeChiara, supra note 17, at 138 (arguing that "consensual sexual relationships between a teacher and student may in some cases be harmful to the interests of the student involved, unfair to other students, and bad for the academic process").

69. See Phyllis Coleman, Sex in Power Dependency Relationships: Taking Unfair Advantage of the "Fair" Sex, 59 ALBANY L. REV. 95, 119 (1986) (declaring that even when a student seems to consent to a sexual relationship with her professor, the consent is inherently suspect because of the "power dependency" relationship; thus, a fiduciary duty has been breached by the professor); Winks, supra note 56, at 444 (stating that a "teacher’s exploitation of his student is no less present when the association is consensual").
position, proponents contend that students are *incapable* of giving effective consent to a sexual relationship with a professor.  

### IV. DISPARITY OF POWER AND THE VALIDITY OF CONSENT

The question of whether professionals should abstain from sexual relationships with clients has generated a significant amount of scholarly commentary. It has become common to advocate bans on these relationships in a variety of professional settings, without much reflection about whether the situations are actually similar. This "one-justification-fits-all" fallacy explains the excesses of many of those who would ban consensual relationships in higher education without any evidence of either coercion or conflict of interest. A more contextual analysis suggests that regulations that are reasonable in a psychotherapeutic environment are needlessly restrictive in the very different environment of higher education.

One author who considers many different professional relationships to present problems similar enough to call for a single solution states her thesis succinctly:

> An adult's choice to enter into a sexual relationship with another consenting adult is ordinarily a matter of private rather than legal concern. Sexual contact occurring within certain human relationships, however, falls on a continuum of a presumption of exploitation due to what might be called "power dependency." Specifically these relationships include parent-child, psychotherapist-patient, physician-patient, clergy-penitent, professor-student, attorney-client, and employer-employee..."[C]onsent" to a sexual relationship obtained in such a power dependency

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70. See infra notes 108-134 and accompanying text (evaluating the theory that students are incapable of consenting to a sexual relationship with a professor).


72. See Coleman, *infra* note 69, at 119-20 (commenting that the professor-student relationship is distinguishable from psychotherapist-patient sexual relationships).
relationship is inherently suspect and therefore should be legally ineffective.\textsuperscript{73}

Another author similarly describes sexual relationships between “a man and a woman who have a professional relationship based on trust, specifically when the man is the woman’s doctor, psychotherapist, pastor, lawyer, teacher, or workplace mentor” as “sex in the forbidden zone.”\textsuperscript{74} Without discussing the possibility that the dynamics of the various relationships on his list might be dissimilar, he proceeds to discuss the “forbidden zone” in terms more appropriate to his own professional specialty as a therapist than the average encounter between a woman and her professor or workplace mentor. Consider the following:

The forbidden zone is a condition of relationship in which sexual behavior is prohibited because a man holds in trust the intimate, wounded, vulnerable or undeveloped parts of a woman. The trust derives from the professional role of the man . . . and it creates an expectation that whatever parts of herself the woman entrusts to him (her property, body, mind or spirit) must be used solely to advance her interests and will not be used to his advantage, sexual or otherwise.\textsuperscript{75}

In such situations, power, trust, and dependency work together to make it impossible for a woman to freely consent, or effectively withhold consent. Therefore, any sexual contact is improper regardless of who initiates it or how willing the parties appear.\textsuperscript{76}

These sentiments have gained wide acceptance in the context of the psychotherapeutic relationship. They are probably appropriate in that context. The question is whether they can be imported into other relationships without losing their justification. The following sections explore that question.

\textbf{A. Sexual Relationships Between Therapists and Their Patients}

Our society has developed a broad consensus that children are incapable of giving effective consent to sex.\textsuperscript{77} When arguing that the apparent consent of an adult is equally suspect, it is common to analogize the adult’s situation to that of a child, faced with a demand from an important and powerful person in their life. Proponents of

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\item \textsuperscript{73} Coleman, \textit{supra} note 69, at 95-96 (citations omitted) (exploring what the author terms “power dependency relationships”; this article proposes that sexual contact between certain people is inherently exploitive).
\item \textsuperscript{74} \textsc{Peter Rutter, Sex in the Forbidden Zone} 22-23 (1989).
\item \textsuperscript{75} \textit{Id.} at 25.
\item \textsuperscript{76} \textit{Id.}
\item \textsuperscript{77} \textit{See generally} Coleman, \textit{supra} note 69, at 100-03.
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restrictions on sexual relationships between therapists and their patients have been quite explicit in suggesting the "childlike" quality of patients. For example, "[m]ost clients are vulnerable when they enter therapy... Struggling with their private crises, many clients are in a helpless, almost childlike position in relation to the therapist. The therapist often becomes a parental-type caretaker, exercising a power over the patient similar to a parent's power over a child."8

Another commentator is even more emphatic:

In short, the woman patient at such moments is in a state of psychological regression—a retreat into a childhood state not only emotionally, but also intellectually. At that moment she becomes the helpless child again, reliving the experiences from the past, unable to cope with what is happening to her, feeling robbed of the ability to make choices, perceiving herself as small and weak and therefore unable to defend herself, hoping that whatever she is caught up in will represent an expression of love instead of the hate such patients remember from the past.79

The woman is thus "led into a mesmerized state that precludes her from coming to terms realistically with what is happening."80 Thus, a patient who is in therapy for treatment of emotional or psychological problems is presumed incapable of granting valid consent, which is characterized as "clinically impossible" given the knowledge and power of the therapist.81

But what is the basis for the contention that the adult patient is so much like a child that she has lost the capacity to consent to a sexual relationship? One possibility is that her illness renders her peculiarly susceptible to over-reaching or, perhaps, even legally incompetent. The problem with this argument is that in many cases it is quite clear that the woman is not legally incompetent. People can be vulnerable, fearful, anxious or depressed without facing involuntary commitment. Patients are not ordinarily deemed incompetent to consent to a long and expensive course of treatment, or so impaired that their lack of

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78. See generally, Linda Jorgenson & Rebecca M. Randles, Time Out: The Statute of Limitations and Fiduciary Theory in Psychotherapist Sexual Misconduct Cases, 44 Okla. L. Rev. 181, 209-22 (1991) (citations omitted) (expressing the belief that fiduciary responsibility should be applied to psychotherapist misconduct cases as the basis for tolling the statute of limitations because victims are often unable to prosecute claims within the period allowed by most states).

79. SYDNEY SMITH, The Seduction of the Female Patient, in SEXUAL EXPLOITATION IN PROFESSIONAL RELATIONSHIPS 58 (Glenn O. Gabbard ed. 1989).

80. Id.

81. See Laurie A. Morin, Civil Remedies for Therapist-Patient Sexual Exploitation, 19 Golden Gate U. L. Rev. 401, 418 (1990) (explaining that courts often have reasoned that a patient is incapable of both granting and withholding consent from a therapist; thus, the courts have found therapists liable for evading their duty to avoid sexual relations with their patients).
contractual capacity renders the fee agreement unenforceable. 82 Further, there is no suggestion that the patient would be incapable of giving valid consent to sexual relations with someone other than the therapist. 83 Therefore, the incapacity cannot be attributable to the woman's condition alone. Perhaps the incapacity is attributable to some characteristic of the therapist, or to the dynamics of the therapeutic relationship. 84

Many commentators contend that the "power" of a therapist precludes valid consent by a patient to a sexual relationship. The factors most relevant to a therapist's power over his patient are knowledge, charismatic personal qualities, and status. 85 To the extent that the therapist's status is attributed to something other than his professional knowledge or the personal information revealed by the patient, it appears to be simply a matter of his age and gender, 86 and his membership in a prestigious profession. 87 As before, these characteristics are apparently only relevant in combination with others, because there is no suggestion that women patients are incapable of consenting to sex with any other man, or with any other high income or high status man.

As for the effect of the therapist's special knowledge, this too would appear to be only one factor among several rather than decisive in itself. It is often the case that one must rely on the specialized knowledge or skill of another. The patient relies on the therapist to provide the assistance she needs in resolving her emotional or psychological problems. The patient also relies, though, upon the optician to make emergency repairs when she breaks her glasses, and upon the mechanic when the brakes on her car become unsafe. Clearly, it would be wrong for the professional to extort sexual favors as a condition of providing the needed service. Yet, it would be difficult to convince most people that the special knowledge and professional status of an optician or a mechanic is so overwhelming that it vitiates consent when a female customer chooses to have sex with him.

83. Id.
84. See generally Coleman, supra note 69, at 95; Illingworth, supra note 82, at 396; Jorgenson & Randles, supra note 78, at 189; 2 Jorgenson & Randles, supra note 78, at 189; Jorgenson, Randles & Strasburger, supra note 1, at 651; Thomas L. Schaffer, Undue Influence, Confidential Relationship, and the Psychology of Transference, 45 NOTRE DAME L. REV. 197, 197 (1970).
85. Dobash, supra note 71, at 1738 (commenting that these three powers work together and enhance each other).
86. Dobash, supra note 71, at 1734.
87. Dobash, supra note 71, at 1734.
If neither the characteristics of the patient nor the characteristics of the therapist can justify the notion that the patient is incapable of consenting to a sexual relationship, the key to that theory must lie in the nature of the therapeutic relationship. In fact, it is the nature of the relationship that provides much of the basis for the assertion that the patient is "vulnerable." The dynamics of the relationship are also used to explain the "power" that the therapist holds over the patient. It is the process of therapy that undermines the ability of the patient to give effective consent to a sexual relationship with the therapist. Key elements in that process include "the client's initial vulnerability, the therapist's control of the environment, confidentiality, client intimacy, and unilateral self-revelation." The most relevant aspect of the therapeutic relationship, however, is the development and professional handling of the "transference phenomenon." Transference has been defined as the "process by which clients attribute to the neutral, objective psychoanalyst 'unfinished business' from past relationships with significant others." Transference is the heart of the psychoanalytic method. "A patient in transference 'unconsciously attributes to the psychiatrist or analyst those feelings which he may have repressed towards his own parents... It is through the creation, experiencing and resolution of those feelings that [the patient] becomes well."
Transference "can provide both the analyst and patient with much needed data about the patient's psychic life,"96 because the feelings date from her early childhood and can teach the analyst about this crucial period in her life.97 Nevertheless, because the repressed feelings often originate in the relationship between the patient and her parents, and often manifest themselves as feelings of "love," some authorities characterize sex between therapists and patients as "incestuous."98

As a result of the transference, adult patients may attempt to change the relationship from therapeutic to sexual. Such behavior is analogous to the "flirtatious" behavior of a daughter with her father. Nevertheless, just as the father must encourage his daughter to develop her sexuality without responding to her in an overtly sexual manner, the psychotherapist must deny the patient sexual gratification while providing a safe place for exploration of her sexual nature.99 Consequently, sexual contact with a patient is a gross mishandling of the transference.100 A very high percentage of the patients who engage in sexual relationships with their therapists are harmed by the experience.101 The harm suffered by the patient is often quite serious. "Injuries suffered by victims of psychotherapist sexual exploitation include sexual dysfunction, anxiety disorders, psychiatric hospitalizations, increased risk of suicide, depression, dissociative behavior, internalization of feelings of guilt, shame, anger, fear, confusion, and hatred, and feelings of worthlessness."102

Therapist-patient sex is generally considered professional misconduct.103 It violates the ethical codes of the various professional associations.104 In some jurisdictions, therapist-patient sexual

96. Illingworth, supra note 82, at 400 (citing SIGMUND FREUD, THE DYNAMICS OF TRANSFERENCE 100 (1958)).
97. Illingworth, supra note 82, at 400.
98. Coleman, supra note 69, at 103 (citation omitted).
99. Coleman, supra note 69, at 104 (citations omitted).
100. Jorgenson, Randles, & Strasburger, supra note 1, at 656-57; Morin, supra note 81, at 410-11.
101. Jorgenson & Randles, supra note 78, at 186 (citing Nanette Gartrell, Judith Lewis Herman, S.W. Olarte, M. Feldstein & S. Localio, Psychiatrist-Patient Sexual Contact: Results of a National Survey, I. Prevalence, 143 AM. J. PSYCHIATRY 1126, 1128 (1986), which states that 87% of patients are harmed by sexual contact with their therapist).
102. Jorgenson & Randles, supra note 78, at 186 (citations omitted). See also Jorgenson, Randles, & Strasburger, supra note 1, at 662 (describing the damage caused to patients by being sexually exploited by their therapist).
103. See infra notes 105-108.
104. Jorgenson, Randles & Strasburger, supra note 1, at 647-48 (explaining the prohibitive stance major mental health organizations have taken in response to psychotherapist-patient sexual relations).
relations is grounds for denying or revoking professional licenses.\textsuperscript{105} In other jurisdictions, it is a criminal offense.\textsuperscript{106} It is also a form of professional malpractice that can result in tort liability.\textsuperscript{107} These punitive actions, and the reasons behind them, are often considered when regulators contemplate taking action against sexual activity within the context of other professional relationships. For example, sexual relations between professors and students are often equated with such relations between therapists and patients. The following section considers whether this is a fair comparison.

\textbf{B. Sexual Relationships Between Professors and Students}

Proponents of policies forbidding sexual relationships between professors and students argue that students should be presumed incapable of giving valid consent to the relationships, just as patients are presumed incapable of consenting to a sexual relationship with their therapists. The alleged impossibility of consent is often simply stated as a fact, with no attempt at proving the truth of the assertion.\textsuperscript{108} "For all the uproar discussions of 'consent' have evoked on some campuses, it appears to me an absurdly vacuous issue. . . ."\textsuperscript{109} Those proponents that do offer an explanation for the student's alleged incapacity to consent simply appropriate the justifications offered in the therapist-patient context—disparity of power and transference.\textsuperscript{110} But whatever explanatory force those factors may have in the therapeutic context, they must be stretched to the point

\begin{itemize}
\item \textsuperscript{105} See Jorgenson, Randles, & Strasburger, \textit{supra} note 1, at 715-29 (noting that all states license psychiatrists and psychologists and half of the states have enacted laws that call for disciplinary action in cases of psychotherapist sexual relations with a patient).
\item \textsuperscript{106} See Jorgenson, Randles & Strasburger, \textit{supra} note 1, at 672-83 (describing legislation that prohibits psychotherapist-patient sexual exploitation).
\item \textsuperscript{107} See Jorgenson, Randles & Strasburger, \textit{supra} note 1, at 684-91 (describing the common law actions available to victims of sexual exploitation in therapist-patient relationships).
\item \textsuperscript{108} See generally Coleman, \textit{supra} note 69, at 96 (contending that consent in "power dependency" relationships is inherently suspect) (citations omitted); Kidd, \textit{supra} note 67, at A2 (quoting the testimony of psychology professor Michele Paludi that there is no such thing as a consensual relationship between a student and a faculty member). The lack of substantiation has not gone unremarked. See David R. Pichaske, \textit{When Students Make Sexual Advances}, CHRON. HIGHER EDUC., Feb. 24, 1995, at B1 (claiming that such statements, "[I]ike mantras, owe their power more to frequent chanting than to powerful analysis").
\item \textsuperscript{109} BILLIE WRIGHT DZIECH & LINDA WEINER, THE LECHEROUS PROFESSOR: SEXUAL HARASSMENT ON CAMPUS xviii (2d ed. 1990) [hereinafter THE LECHEROUS PROFESSOR] (attempting to bring sexual harassment in higher education to the forefront, the authors discuss the environment of higher education, myths about college women, the developmental patterns of male professors, and the professional dilemmas of female faculty that contribute to the problem).
\item \textsuperscript{110} See \textit{infra} notes 120-122 and 128-133 and accompanying text (arguing that where a teacher is not in a position to evaluate the student, there are not the same problems of coercion or harassment; proponents of bans on teacher-student relationships argue, however, that transference still occurs because trust is a primary element of the relationship).
\end{itemize}
of absurdity in order to explain a similar incapacity in the context of higher education.

In discussing the disparity of power between a professor and a student, it is important to consider whether the professor has direct academic responsibility for the student. As noted above, regulations designed to eliminate conflicts of interest are appropriate. Where the professor is not responsible for evaluating the student, however, the "coercion" argument becomes quite weak. In expanding their proposal to ban relationships in the absence of professional supervision, proponents of consensual relationship policies go even further than professional societies and state legislatures in regulating private relationships. Those rules only forbid therapists from having sex with their own patients.

Proponents of the educational relationship policies tend to offer arguments that may be sensible in the instructional context, but are far less convincing outside that context. They often neglect to specify whether their proposals are to be confined to instructional situations or applied across the board. For example, one proponent states that "[s]tudents are keenly aware of their vulnerability to the broad discretionary powers of faculty." Coercion to comply with sexual advances by faculty is potentially present because students are unsure of the consequences of noncompliance. "Therefore, what may appear to be an adult, consensual, private relationship may be the product of implicit or explicit duress, and thus, may constitute the basis for

111. Coleman, supra note 69, at 126; Keller, supra note 46, at 40-41.
112. See supra note 67 and accompanying text (discussing conflict of interest policies as opposed to complete bans).
113. It should be noted that not all of the proponents of consensual relationship policies urge a ban. One author suggests that the rationale for banning relationships disappears outside the instructional context. Keller, supra note 46, at 40-41. Others never directly address the point, but their proposals are not explicitly limited to the instructional context; see, e.g., Chamallas, supra note 17, at 858-59 (arguing that there are articulable reasons for banning sexual relations of teachers and students or employers and employees even when there is no direct supervision); Winks, supra note 56, at 444 (explaining that women are in an inferior position to men in the academic hierarchy and, thus, an egalitarian relationship is never possible). But other commentators make it clear that they believe that the policies should cover at least some cases beyond those in which the professor is in a position to evaluate the student. See DeChiara, supra note 17, at 139 (noting that universities should adopt written rules which ban all consensual faculty-student relationships that infringe upon the interests of the student involved or any other parties); Kidd, supra note 67, A2 (quoting Michele Paludi, psychology professor at Hunter College in New York City, who believes that there is never an appropriate situation for a professor and student to be sexually intimate).
114. The ambiguity does not always appear to be accidental. In fact, one author suggests that institutions may adopt a broad "definition of asymmetric relationships hoping to chill risky relationships without actually having to enforce the ban." Chamallas, supra note 17, at 858. Yet, there is little attempt to justify the position that relationships outside the instructional context are risky enough that we should want to chill them.
115. Keller, supra note 46, at 28 (citations omitted).
individual or institutional liability."

Another commentator claims that the seduction of a young woman by a man who has the power to academically evaluate her, give her recommendations for graduate school, or expose her to specialized training, often causes the woman great harm. The student may suffer from profound embarrassment, self-consciousness and humiliation. As a result, such behavior by a man in a powerful position can be very “destructive to a woman’s ego.” Seductive gestures by professors “constitute mental rape,” and “are acts of domination, as despicable as the molestation of the daughter by the father.”

Putting aside whether it really is as despicable to date an adult student as it is to molest your child, statements like the above seem totally implausible where the professor has no direct academic responsibility for the student.

No one would contend that professors should be allowed to extort sexual favors by threatening adverse academic outcomes for refusal or promising unearned academic benefits for compliance. That conduct is already prohibited by institutional sexual harassment policies and Title IX, and properly exposes the offender to institutional sanctions as well as criminal and civil liability in appropriate cases. Conflict of interest policies also provide adequate protection for students where the student may feel some subtle coercion although the faculty member never intended to coerce the student and was unaware of the student’s concerns.

Proponents of total bans, however, persist in arguing that there is a decisive power disparity whether or not the professor is in a position to evaluate the student. “Usually, a student, because of unequal bargaining power and disparity of roles between a faculty member and a student, will be exploited in any sexual relationship with a professor.”

But if the professor is not in a position to evaluate the student, just what are they bargaining over, and how did the professor gain some

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116. Keller, supra note 46, at 28 (citations omitted).
117. Adrienne Rich, Taking Women Students Seriously, in ON LIES, SECRETS, AND SILENCE 242-43 (1979) (encouraging women teachers to help female students identify and resist the male bias of education and to teach them on different terms and in a different style, so that the students can learn in a way more natural to them).
118. Schneider, supra note 52, at 572; Winks, supra note 56, at 466.
119. See supra note 67 and accompanying text (discussing conflict of interest policies rather than complete bans).
120. Coleman, supra note 69, at 126 (discussing the impact on sexual exploitation when a professor has direct supervision over a student versus when he does not); Keller, supra note 46, at 40-41.
121. Connolly & Marshall, supra note 59, at 391 (citation omitted). The relationship is allegedly no less exploitative just because the student consents to it. Winks, supra note 56, at 444; see also DeChiara, supra note 17, at 141-42 (discussing the factors a student might take into consideration when entering a relationship with a professor).
advantage in that negotiation? In what sense is the student being exploited? Why is there always an unstated assumption that apparently consensual sex between two adults is a benefit to the professor and a detriment to the student?

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. A more "sophisticated" explanation might be characterized as a structural, institutional, or conspiracy model. For example, one commentator argues that male professors dominate in the academic hierarchy. Male professors take a higher position by virtue of their gender. The "dominant male and the complaisant woman preserve the structure of the male-centered university." Women who are lower in rank are "perceived as sexually available. . . ." The "status overlay" militates against the possibility of an egalitarian relationship. Further, this alleged sexual availability is no accident:

The education system, from nursery school through college, reinforces women's dependency and reliance on authority. Women are taught submission, not aggression. They learn that being 'good' implies not acting but reacting, not trusting oneself, but entrusting oneself to the authorities—parents, clergy, teachers—that promise reward. Forced into a choice between a teacher's wishes and their own, some students do what they have learned to do best—defer, submit, agree. In their own peculiar ways, they once again act out the roles of 'good little girls,' doing what teacher says is best.

Apparently, the authors have no difficulty arguing that these "good little girls" should distrust their own perceptions about the nature of

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122. Early proponents argued that student-teacher relationships are exploitative because there was no effective consent because "the power imbalance and role disparity are too great." THE LECHEROUS PROFESSOR, supra note 109, at 25. How can we tell how much of a power imbalance can exist without vitiating consent? Unfortunately for those who find both coercion and celibacy unacceptable, "true consent demands full equality and full disclosure." THE LECHEROUS PROFESSOR, supra note 109, at 75.
123. DeChiara, supra note 17, at 141-42.
124. Winks, supra note 56, at 444 (explaining that since male professors are the ones most often in highly placed positions at a university, students must go to these men for recommendations and other academic needs; as such, these male professors have discretion in determining what and who is acceptable. This is a very powerful position to have.).
125. Winks, supra note 56, at 444.
126. Winks, supra note 56, at 444 (citations omitted).
127. THE LECHEROUS PROFESSOR, supra note 109, at 78.
a personal relationship and defer to the judgment of institutional authorities regarding whom they should date.

Given the difficulty of establishing a decisive power imbalance in the absence of direct academic supervision, it is not surprising that proponents try to invoke transference to substantiate their claim that there is a sufficient imbalance of power to invalidate apparent consent, even where the professor has no formal power over the student. Nonetheless, proponents' arguments in support of a transference phenomenon strong enough to vitiate consent in the context of a professor-student relationship are less than persuasive.

The tendency to extend the concept of transference beyond its origin in the psychotherapeutic relationship is not limited to those who would regulate relationships between teachers and students. In the context of attorney-client sexual relationships, several commentators have asserted that transference may occur in "any professional relationship that involves an element of trust." Transference in the teacher-student relationship is said to arise from the fact that teachers have an "aura of parental power" as well as greater knowledge of the subject matter and "life in general." These factors lead to the development of trust, idealization, and love that normally would be directed toward a parent. When transference occurs, those feelings are directed toward a teacher.

But how persuasive is the notion of transference in the context of higher education, especially where the professor has no direct academic responsibility for the student? If we compare this situation with the psychotherapeutic relationship in which the concept of transference was developed, there are some rather crucial differences. Unlike the therapeutic setting, the development and resolution of transference is not the primary goal of the teacher-student relationship. The student has not sought out the professor because of his presumed expertise in handling transference, and there is no suggestion that transference is necessary or even helpful in accomplishing the goals of the educational enterprise. Other factors identified as encouraging the development of transference in the

128. Coleman, supra note 69, at 126-27 (noting that transference does not stop when the teacher-student relationship ends, unlike in the therapist-patient relationship, because the student may never know she is experiencing transference and not love).
129. O'Connell, supra note 710, at 920; see also, Livingston, supra note 71, at 45-46 (noting that clients of lawyers may also experience transference when they develop close and trusting relationships with each other); Schaffer, supra note 84, at 214 (discussing the benefits of understanding how transference works and that it is an "essential tool" in the attorney-client relationship).
130. Coleman, supra note 69, at 120-21.
131. Coleman, supra note 69, at 120-21.
psychotherapeutic relationship, such as confidentiality, client intimacy and unilateral self-revelation, do not apply in the academic context. To argue that "vulnerability" attributable to nothing more than youth, "power" attributable to nothing more than incrementally greater information and experience, and "seduction" that consists of nothing more than "[listening intently]"\(^\text{132}\) adds up to a situation so inherently coercive that the most emphatic consent must be dismissed as ineffective, stretches the notion of exploitation beyond any reasonable limits. What sexual relationship could ever be consensual under such a regime?

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.\(^\text{133}\) The proponents of such policies have not shown that a professor's age, gender, job, or income undercut the student's capacity to consent.\(^\text{134}\) They have not shown that the teacher-student relationship results in a form of transference that vitiates consent. They have not shown that participants in consensual relationships, as distinct from victims of unwelcome 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. The proponents of relationship policies have, however, garnered support for their incapacity argument from an unexpected source. Oddly enough, some feminists support the proposition that adult women should be deemed incapable of giving effective consent to disfavored sexual relationships.

V. FEMINISM MEANS NEVER SAYING THAT WOMEN ARE, AS A CLASS, IDIOTS

The belief that women "are deficient in those faculties necessary to make important decisions"\(^\text{135}\) has been identified as one source of discrimination against women. Therefore, it seems incongruous that women should be urging male dominated institutions to declare (other) women so incapable of choosing their sexual partners wisely that their choices should be regulated by the institutions. People who consider themselves feminists have reached this position through a

\(^{132}\) Jorgenson, Randles & Strasburger, supra note 1, at 657.
\(^{133}\) See infra part V (discussing female students' capacity to consent).
\(^{134}\) See infra part V (conveying the influences of status and income).
process of trying to identify and protect victims of gender discrimination. Unfortunately, in their effort to protect all who need protection, they made the fatal error of presuming that they could disregard the perceptions and wishes of adult women who have earned the right to make their own decisions. No matter how well-intentioned, the restriction of the autonomy of women and the promotion of the view that women are incapable of making decisions that men and their institutions are bound to respect is not a feminist project.

A. "Feminist" Support for Female Incapacity

Feminist support for consensual relationship policies can be traced to early efforts to address the problem of sexual harassment in higher education. Title IX\textsuperscript{136} was enacted in 1972, and a private cause of action for injured students was established by 1979.\textsuperscript{137} Yet, the existence of a damage remedy was unclear until 1992.\textsuperscript{138} Because only equitable relief was available to a successful litigant prior to 1992, students had little incentive to pursue Title IX claims. Those who remained enrolled long enough to avoid having their claims declared moot by reason of their graduation would still receive little benefit from the adoption of court-ordered institutional sexual harassment policies. Consequently, few students victimized by sexual harassment chose to litigate Title IX claims.

Sexual harassment, however, was prevalent in the academy.\textsuperscript{139} Students were subjected to repeated propositions from professors, who were in a position to influence their grades, jobs or academic opportunities.\textsuperscript{140} Female students endured unwanted physical

\begin{footnotesize}
\textsuperscript{137} See Cannon v. University of Chicago, 441 U.S. 677, 688 (1979) (holding that the female plaintiff has a right under the Education Amendments of 1972 to a private cause of action against the universities which denied her admission to medical school).
\textsuperscript{138} See Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60, 76 (1992) (holding that monetary damages may be pursued in Title IX violations).
\textsuperscript{139} See THE LECHEROUS PROFESSOR, \textit{supra} note 109, at 12-15 (citing various survey results and concluding that 20 to 30\% of female students reported being harassed by male faculty).
\textsuperscript{140} See, e.g., Alexander v. Yale Univ., 631 F.2d 178 (2d Cir. 1980) (discussing the sexual harassment suit brought by five female students, who complained about male faculty members and administrators); Cockburn v. Santa Monica Community College Dist. Personnel Comm'n, 207 Cal. Rptr. 589 (Cal. Ct. App. 1985) (recounting an instructor's repeated embracing and kissing of a female student who was employed by the instructor as a laboratory assistant); Wexley v. Michigan State Univ., 821 F. Supp. 479 (W.D. Mich. 1993) (affirming the sanctions against a tenured professor for making sexual advances to a number of female students); see generally THE LECHEROUS PROFESSOR, \textit{supra} note 109 (discussing incidents of sexual harassment that did not result in litigation).
\end{footnotesize}
contact from professors and even law school deans. Students were asked to allow professors to look up their skirts while they worked, and offered grade changes in return for oral sex. Women subjected to such indignities were clearly not receiving educational opportunities equal to those of their male classmates. Characterizing them as the victims of professional misconduct has helped stimulate policies to protect them from future victimization. Feminist faculty worked hard to construct institutional policies forbidding such misconduct, complete with workable grievance procedures and meaningful sanctions.

Unfortunately, once sexual harassment policies were in place, some of the policy creators expanded the “victim” class to include students engaged in consensual relationships with professors. Arguing that apparent consent is not effective where there is disparity of power between the parties, they declared that relationships between students and faculty are so inherently unequal that sexual relationships can never be truly consensual. Ultimately, this “feminist” position questions the competency of adult women to choose their own sexual partners, alleging that women are routinely dominated by the “power” of individuals of higher status, higher income, greater age and experience, or simply the male gender. To prevent the exploitation of this class of potential victims, proponents contend that it is necessary to enact protective regulations that make their sexual decisions for them.

141. See, e.g., Cockburn, 207 Cal. Rptr. at 590 (recounting an incident involving an 18 year old student who was sexually assaulted when she began work as a lab assistant); Bustos v. Illinois Inst. of Cosmetology, 1994 WL 710830 (N.D. Ill. Dec. 15, 1994) (alleging that the defendant president of the school, continually sought “hugs, kisses, gropes and sexual innuendos” to the point where the student plaintiffs had to withdraw from school); Starishevsky v. Hofstra Univ., 612 N.Y.S.2d 794, 797 n.1 (1994) (recounting a faculty member’s kissing of a student at the end of a training session); see generally THE LECHEROUS PROFESSOR, supra note 109 (recounting and analyzing tales of unwanted sexual advances by professors).

142. See In re Peters, 428 N.W.2d 375 (Minn. 1988) (reciting unwelcome sexual advances by the dean who touched the student research assistant’s waist, rib cage, and hair).

143. Student account in THE LECHEROUS PROFESSOR, supra note 109, at 10.

144. See Slaughter v. Waubonsee Community College, 1994 WL 663596 (N.D. Ill. Nov. 18, 1994) (describing a student who discussed her poor grade with the professor who wrote, during their meeting, “a quick B.J. and your panties,” which the student refused).

145. See Carrie N. Baker, Proposed Title IX Guidelines on Sex-based Harassment of Students, 43 Emory L.J. 271, 271 n.121 (1994) (stating that “a policy barring all consensual sexual relationships between students and teachers may impose a chill on other desirable social interactions”).


147. See supra notes 117 and 123-125 and accompanying text.

148. See supra note 135 and accompanying text (discussing historical contentions that women are unable to make key decisions).
The notion of female incapacity has a long, if not distinguished, history. The tendency to equate the capacity of women to that of children or the mentally impaired is not a recent innovation. Schopenhauer wrote that women are "in every respect backward, lacking in reason and reflection . . . a kind of middle step between the child and the man." In *Uncommon Law*, A.P. Herbert observed that:

It is probably no mere chance that in our legal text-books the problems relating to married women are usually considered immediately after the pages devoted to idiots and lunatics. Indeed, there is respectable authority for saying that at Common Law this was the status of a woman . . .

While that statement was made in jest, married women did in fact suffer a variety of legal disabilities under the common law. A married woman's lack of contractual capacity, inability to dispose of property without the consent of her husband, etc., all resembled the legal disabilities of the mentally incompetent. Most legal disabilities of married women were removed by statute during the mid-nineteenth century. One would assume that, 100 years later, a woman's ability to enter into a binding contract or to give effective consent to sexual contact on the same terms as a man would no longer be questioned. That assumption is generally accurate with respect to contractual capacity. When it comes to sex, unfortunately, there are

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151. Bender, supra note 149, at 24 (quoting Schopenhauer, *On Women in SELECTED ESSAYS* at 338-46 (E.B. Bax ed., 1900)).


153. Id. at 5-6.

154. See SAMUEL WILLISTON, *A TREATISE ON THE LAW OF CONTRACTS* § 11:1 (4th ed. 1993 & Supp. 1995) (discussing the capacity of the married woman in contract law and surmising that historically "common law merged the married woman's identity into that of her husband"). At common law, a married woman could not bind herself by contract, *id.* at § 11:2. A married woman could not transfer title to personal property or alienate real property without the consent of her husband, *id.* at § 11:3. These legal incapacities should be compared with those legal disabilities of lunatics in § 10:2. "The fundamental idea of a contract is that it requires the assent of two minds. But a lunatic or a person non compos mentis has nothing which the law recognizes as a mind, and it would seem therefore, upon principle, that he cannot make a contract which may have any efficacy as such," *id.* at 225-26 (quoting Dexter v. Hall, 82 U.S. 9, 21 (15 Wall.) (1872)).

155. WILLISTON, supra note 154, at § 11:3 (noting that a number of statutes addressing the legal capacity of married women were passed and were collectively known as the married women's property acts).
those who are prepared to argue that a woman's apparent consent is or should be ineffective.

Initiatives to limit the effectiveness of a woman's apparent consent to sex have drawn the support of both conservative traditionalists and "new feminists." Further, conservatives who advocate traditional sex roles often use the language of protective feminism. One example of traditionalist efforts to limit the effectiveness of a woman's consent to a sexual relationship is the law of statutory rape. It should be noted, however, that statutory rape laws limit the effectiveness of consent given by minors, not adult women. Statutory rape laws declare minors, specifically female minors, incapable of giving consent to sexual contact with an adult. They were designed to protect young women "from their own uninformed decisionmaking, and are based on the premise that young women, unlike young men, are "legally incapable of consenting to an act of sexual intercourse." An early justification offered for statutory rape laws was that they protect society by protecting the virtue of young and unsophisticated girls. As recently as 1964, the same court elaborated upon the reasoning behind such laws, holding that the under-age female is presumed too innocent and naive to comprehend the nature and consequences of her own sexual conduct. The young woman's legal incapacity to consent is "explained in part by a popular conception of the social, moral and personal values that are preserved by the abstinence from sexual indulgence." The court concluded that because "an unwise disposition of her sexual favor"

156. See Cathy Young, The New Madonna/Whore Syndrome: Feminism, Sexuality, and Sexual Harassment, 38 N.Y.L. Sch. L. Rev. 257, 258 (1993) (stating that sex is the one subject on which the "new feminist" and the anti-feminists agree, with both groups exploring the relationships of sex to female victimhood). Professor Young goes on to argue that new feminism, with its preoccupation with sexual harm, "inevitably mirrors and reinforces traditional paternalism toward women," and may be properly characterized as "protective feminism," id. at 262.

157. Id. at 276. Another commentator notes that "feminist pronouncements about politically desirable and undesirable forms of sexuality bear a striking resemblance to those of the dominant culture." Carol S. Vance, Pleasure and Danger: Toward a Politics of Sexuality, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 22 (Carol Vance ed., 1989).

158. Statutory rape laws that forbid sex with female minors, but not male minors, have been upheld by the United States Supreme Court. Michael M. v. Superior Court of Sonoma County, 450 U.S. 464 (1981).

159. Michael M., 450 U.S. at 496 n.10 (Brennan, J., dissenting) (citations omitted).

160. Michael M., 450 U.S. at 494 (Brennan, J., dissenting) (citations omitted).


162. See People v. Hernandez, 393 P.2d 673, 674 n.1 (Cal. 1964) (stating that the unsophisticated girl does "harm both to herself and the social mores" when she naively confers "sexual favors").

163. Id. at 674.

164. Id.
harm the young woman herself as well as society in general, the law of statutory rape intervenes to curb this disposition.\textsuperscript{165}

Feminists find it easy to dismiss traditionalist initiatives as "anti-women." A more troubling set of issues involves support for limiting the capacity of women to consent to sex on the part of "new feminists."\textsuperscript{166} While certainly not "anti-women," and ordinarily not inclined toward alliances with conservative traditionalists, this group may be characterized, with some justification, as "anti-sex." As one commentator notes, "there are those who believe that all sexual interaction is exploitative - under any circumstances whatsoever."\textsuperscript{167} Catharine MacKinnon, for example, argues that "coercion is paradigmatic of heterosexual relations and constitutive of the social meaning of gender under gender inequality."\textsuperscript{168} She claims that under conditions of male dominance it is difficult for women to distinguish between consensual intercourse and rape,\textsuperscript{169} and that consent may not be a meaningful concept at all.\textsuperscript{170} Frances Olsen contends that there is no clear distinction between consensual and coercive sex because "the exploitative content of so much of sexuality in our society pervades all of its forms,"\textsuperscript{171} and "heterosexual behavior in our society is seldom fully voluntary; sex is usually to some extent imposed on females by males."\textsuperscript{172} New feminists do not uniformly support the anti-sex initiatives of the conservative traditionalists. They even lack unanimity in their support of statutory rape laws.\textsuperscript{173} Conservative traditionalists and new feminists, however, seem to share an affinity for the public regulation of private decisions. They also

\textsuperscript{165} Id.

\textsuperscript{166} See generally Young, supra note 156 (discussing the new feminism as a focus on sexual harms to women as in pornography and sexual assaults).


\textsuperscript{168} Abrams, supra note 135, at 763 (citing Catharine MacKinnon, Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence, 8 SIGNS 65 (1983)).

\textsuperscript{169} CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 174 (1989).

\textsuperscript{170} See id. at 178 (noting that "[i]f sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept").


\textsuperscript{172} Id. at 428.

\textsuperscript{173} Still, the arguments against statutory rape laws offered by new feminists are generally not ringing endorsements of female autonomy and self-direction. For example, one criticism of statutory rape laws is that outlawing the coercion of particularly vulnerable women may serve to deflect awareness of the domination and submission that characterizes heterosexuality in general. Olsen, supra note 171, at 402 n.71.

By isolating those cases in which it is obvious that a young woman had no meaningful choice and that her sexuality was expropriated, statutory rape laws may pacify women by encouraging them to believe that their own choices are voluntary and that they are not exploited in their sexual encounters. Olsen, supra note 171, at 402.
seem to agree that the decisions of women should be subject to special regulatory scrutiny. It appears that the main difference between the traditionalists and the new feminists is that the traditionalists are reluctant to continue the distinctive legal disabilities of women past the age of majority, and the new feminists would like to prohibit as much heterosexual sex as they can get away with.

B. Reclaiming Capacity

In adopting a broad view of incapacity in the face of power differentials, feminists concede what they most need to contest. Feminists should not be in the business of reducing the range of choice available to women, no matter how much they may question the wisdom of some of the choices that are made. Feminists should not be in the business of discrediting a woman’s own account of her life and her experience. Feminists should not promote an image of women as helpless victims incapable of functioning under conditions of inequality of power. While we must acknowledge existing inequality, we must also resist it. Resistance requires the capacity for choice, and for action, under current conditions.

Feminists should remember that the core of feminist thought and practice is the injunction to listen to women, believe women, respect women, and empower women. That objective cannot be achieved by claiming for women the incapacity of children, or of people with some inherent defect of mind or will that prevents them from taking responsibility for their actions and entitles them to special protection from their “betters.” What must be claimed for women is full equality, with all of its associated opportunities and responsibilities. The ultimate goal of all feminist effort is to end the social subordination of women. That project requires the taking of responsibility. Adrienne Rich wrote that “[r]esponsibility to yourself means refusing to let others do your thinking, talking and naming for you.” In pursuit of that personal responsibility:

[f]eminist method starts with the very radical act of taking women seriously, believing that what we say about ourselves and our experience is important and valid, even when (or perhaps especially when) it has little or no relationship to what has been or is being said about us.

174. Bender, supra note 149, at 4.
176. Littleton, supra note 146, at 764.
It is especially important that women claim for themselves the right
to define their own sexual experiences and aspirations.

Sexuality has been described as both a fundamental right and a site of struggle.  
Feminists recognize that one important aspect of self-determination and self-definition for women is the power to be
"sexually self-defining"—choosing when to have sex and with whom, defining sexual experience on their own terms, respecting their own needs and desires.  
Most women want the freedom to choose relationships which are based "on mutual respect and care rather than domination and dependency," and to create public institutions that honor their choices.  
Women cannot end their social victimization until they are able to imagine themselves as sexual subjects, people who get to determine "if, when, how, under what circumstances, with whom or without whom [they have sex] . . . ."  

Sexual harassment is properly prohibited because it is an abuse of power that involves the victimization and objectivization of women.  
Consensual relationship policies, however, do not necessarily address a situation where there has been an abuse of power, nor do they increase the power or control of the women they are allegedly designed to protect. Instead, consensual relationship policies presume that the women are incapable of exercising responsible choice, and so deprive them of any choice at all. Resembling paternalistic measures like curfew regulations and restrictions on overnight visitation abandoned years ago, consensual relationship policies "constitute a basic abridgment of the right of students to be treated as adult members of the community."  
In a misdirected effort to protect women from themselves, the policies reinforce and perpetuate the perceived vulnerability of women. If subordination is the problem, requests for "protection" cannot be the solution.

178. STEVEN SEIDMAN, EMBATTLED EROS: SEXUAL POLITICS AND ETHICS IN CONTEMPORARY AMERICA 81 (1992) (quoting Sandra Coyner, Women's Liberation and Sexual Liberation in Marriage and Alternatives 221 (Roger Libby & Robert Whitehurst eds., 1977)).  
179. Finley, supra note 150, at 943.  
181. Hoffmann, supra note 12, at 113-14. The author argues that sexual harassment is caused by the relatively disadvantaged status of women, and that its consequences include lowered self esteem, diminished sense of autonomy, and feelings of lack of control. She concludes that the solution to the problem of sexual harassment lies in strategies which "empower women and return control to victims." Hoffman, supra note 12, at 113-14.  
The fact that consensual relationship policies constrain women rather than empower them is troubling, as is the fact that such policies appear to resemble paternalistic regulations that have never been a positive force for the elimination of subordination. However, the "incapacity" argument offered by proponents of the policies is far more troubling, especially when it is represented as a feminist position. In arguing that women lack the capacity to consent to particular sexual relationships, and that we may disregard the woman's own perception that this relationship is one that she has chosen and continues to value, proponents of consensual relationship policies disregard a fundamental principle of feminism.\textsuperscript{183}

It is an unforgettable, irreversible and definitive fact of feminist experience that respect for women's experience/voice/perception/knowledge, our own and others', is the ground and foundation of our emancipation. . . . Thus, it is only by a violent dishonesty that we could, or can, fail to give credence to women's voices—even when they differ wildly and conflict.\textsuperscript{184}

Catharine MacKinnon states that:

feminism is built on believing women's accounts of sexual use and abuse by men. The pervasiveness of male sexual violence against women is therefore not denied, minimized trivialized . . . or placed to one side while more important matters are discussed.\textsuperscript{185}

Unfortunately, proponents of consensual relationship policies are quite willing to deny, minimize and trivialize the experience of actual women if that is what it takes to convince the regulators to act.

While it is a serious error for feminists to suggest that women's credibility should be questioned and their decisions overridden for their own good, the notion that there is something about women that renders them \textit{incapable} of giving consent under conditions of inequality has implications that are even more problematic. After all, unequal conditions are the only conditions that we have at the moment. Moreover, the fact that this incapacity argument is applied primarily to "women seem[s] to mark them as distinctively impaired."\textsuperscript{186}

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\item\textsuperscript{183} Mary E. Becker, \textit{Prince Charming: Abstract Equality}, in \textit{Feminist Jurisprudence: The Difference Debate} 99 (Leslie Goldstein Friedman, ed., 1992). A key element in the subordination of women is that others have defined women's identity and needs. Feminists have emphasized "listening to what women say, rather than dictating what woman should say and feel." \textit{Id.} at 122-23.
\item\textsuperscript{184} Marilyn Frye, \textit{The Possibility of Feminist Theory}, in \textit{Theoretical Perspectives on Sexual Difference} 177 (Deborah Rhode ed., 1990).
\item\textsuperscript{185} \textit{Catharine A. MacKinnon, Feminism Unmodified: Discourses on Life and Law} 5-6 (1987).
\item\textsuperscript{186} \textit{Id.} at 326.
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When women workers or students are told that because of their gender they have less power than men who appear to be their social equals, or that they should feel demeaned, threatened, and intimidated when a man shows sexual interest in them, surely that can have a demoralizing effect. All assumptions of female passivity and psychological helplessness cannot fail to have a damaging, if not devastating, effect on how women are perceived in society.  

All choice is constrained in one way or another. However, "we ordinarily treat even those people in the grip of inequality as having rudimentary faculties of responsibility and choice." As Schroeder notes, even if one agrees that "women's lives and sexuality are extremely constrained in masculinist society," there is still reason to question the implication that "constrained consent fails to reflect sufficient voluntarism to make such consent meaningful—that it imposes no responsibility on the person consenting." To label all women as "'powerless' [is] dubious, if not insulting." Women should fight for acknowledgment of their right to choose, not for protective regulations limiting their choice. To be designated the "powerless sex" is not very different than to be designated the "weaker sex." Women must demand the rights and responsibilities of full citizens, not the disabilities and protection traditionally accorded to children and the incompetent.

VI. CONCLUSION

No student should be subjected to coercion, intimidation or unwelcome sexual advances from a professor. Such misconduct is properly prohibited by institutional sexual harassment policies. Universities also have a legitimate interest in eliminating the possibility of unintended coercion, favoritism, and any appearance of favoritism that compromises the academic integrity of the institution. Conflict of interest policies address all of those concerns. However, consensual relationship policies that forbid sexual relationships between professors and students for whom they have no direct academic responsibility serve no legitimate institutional interest.

187. Young, supra note 156, at 284.
188. Seidman, supra note 178, at 196.
191. Id. (agreeing with Catharine MacKinnon's conception of meaningful consent).
192. Young, supra note 156, at 285.
193. Young, supra note 156, at 285.
When consensual relationships do not involve sexual conduct that is unwelcome, banning them does not have any effect on the institution’s liability under Title IX. Proponents have not shown that students are incapable of consenting to such relationships. In the absence of any evaluative role for the professor, little justification exists for the assertion that there is a disparity of power between the parties sufficient to vitiate consent. There is nothing about either the parties or the relationship that supports the analogy to the relationship between a psychotherapist and his patient, or that suggests that such relationships will ordinarily be attributable to the development and exploitation of transference. There is simply no reason for the university to treat its adult students as anything less than adults, even if they happen to be women.

The most pernicious idea to emerge from the debate on consensual relationship policies is the notion that feminists should be in the business of questioning the capacity of women, limiting the choices available to women, or urging institutions to disregard the testimony of women about their lives, their aspirations, and their emotional commitments. The goal of feminist efforts is to eliminate the subordination of women in our society. To argue that women should be treated as though they were children or incompetents—two of the very few groups in our society that are even more subordinated than women—is to take a step in the wrong direction. To contend that “power differentials” generate this incapacity would make the consensual capacity of women suspect in many if not most sexual relationships. The idea that women cannot acclimate to the rigors of professional life has been decisively rejected only recently. Feminists should not put forth the proposition that women are unsuited to the rigors of a personal life. Once generated, it is unlikely that the notion of incapacity can be easily contained. The students I have been privileged to teach deserve much better from those who presume to speak on their behalf.