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A recent *New Yorker* cartoon depicts a military plane tilting downward in attack mode with a voice coming out of the cockpit: "Dropping bombs is all the sex I need."[1] The message seems clear: Lieutenant Kelly Flinn, General Ralston, et al. don't really need to fool around. Power equals sex.

But if power equals sex, the contrapositive is not true. Sex is not merely the result of the strong imposing their will on the weak; powerlessness can also equal sex. If the boss hooks up with the secretary, it is not hard to imagine that the boss's power plays an important role for both parties. No less imaginable is that the parties seek to reverse socioeconomic roles through sex—the boss to make himself vulnerable, and the secretary to be the real number one.

Caroline Forell dares to upset the complex and often fragile ecology in this system.[2] Holding that consent is problematic in a sexual relationship between unequals, she calls for regulation of such relationships. Several years ago, she tells us, she "participated in the Oregon Bar Association's adoption of a rule" banning sexual relationships between attorneys and their clients (50). "The discrepancy in power between the attorney and the client," she has explained, "makes exploitation probable and makes it highly unlikely that a client's consent to a sexual relationship is truly voluntary."[3] "[I]t is the extraordinary situation where neither the client's interests nor the attorney's professional conduct [is] adversely affected by their sexual relationship. . . . [C]lients are indeed victims."[4]

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1. June 23 & 30, 1997, at 8.
2. What's Wrong with Faculty-Student Sex? The Law School Context, 47 J. Legal Educ. 47 (1997).
3. Oregon's "Hands-Off" Rule: Ethical and Liability Issues Presented by Attorney-Client Sexual Contact, 29 Willamette L. Rev. 711, 725–26 (1993) (footnote omitted).
4. Caroline Forell, Lawyers, Clients and Sex: Breaking the Silence on the Ethical and Liability Issues, 22 Golden Gate U. L. Rev. 611, 621 (1992). Perhaps we can begin to test the proposition by looking to a regular bone of contention between clients and attorneys: fees. Implicit in Forell's position is that a client engaged in a sexual relationship with her attorney will be less likely to contest a bill. But is this so? Do sexually active people, including married couples, fight less over money than others?

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Forell now seeks our assistance in extending the offensive to the academy. The AALS Statement of Good Practices already declares sexual liaisons between faculty and students to be "inappropriate" whenever a "professor has a professional responsibility for the student in such matters as teaching a course or in otherwise evaluating, supervising, or advising a student as part of a school program."[5] Forell would strengthen the policy by making a faculty-student liaison a per se violation on the part of the law teacher.

Forell's argument is simple. Law school is "a stressful—and, for some students, terrifying—experience" (58). Students need to rely on faculty to see them through. Sex in this fiduciary context is "inherently coercive." It is not that "students are immature, or that women do not know what they want," but that, again, there is a "tremendous power disparity between teacher and student" (63–64).

I am not writing a brief for faculty-student sex. There certainly have been serious abuses on the part of academics, some of which Forell documents (58–60). And the reliance by students on faculty should give us pause about normalizing such relationships. For these reasons, and especially because the typical class is of short duration (a point Forell does not make), it does not seem unnecessarily harsh to ask a faculty member to defer sexual involvement for a few months. The problem is that Forell proves too much. This may be apparent from an analysis of the ordinary employment relationship.

For all that has been written about the relation between sex and power, to the best of my knowledge no one has advocated an absolute ban on sexual relationships between supervisor and subordinate in the workplace.[6] And there the power differential is great, greater surely than that between a teacher and a student. The student can often avoid the teacher by registering for a different course. There is no easy escape from a supervisor. Nor can a rule applicable only in the school setting be explained by reference to the age and maturity of students. Law students today come in all ages and with all kinds of experience. If in the workplace we mediate the goals of freedom of association and freedom from abuse of power through sexual harassment guidelines, we have to wonder whether that isn't good enough at a law school.

Forell places almost as much emphasis on fairness to third parties as she does on fairness to the alleged student victim. But the same problem exists here as in the workplace. If, for example, a junior associate in a law firm is given no right to prevent a competitor from sleeping with a supervising partner, why should the situation be otherwise in a law school? Students

5. Statement of Good Practices by Law Professors in the Discharge of Their Ethical and Professional Responsibilities (Nov. 17, 1989), *reprinted in* Association of American Law Schools, 1995 Handbook 89, 91 (Washington, 1995).

6. I tried to test the market for such a rule several years ago. I asked Touro students whether in the interest of reducing sexual harassment on the job they would support a rule banning sexual relationships between supervisors and subordinates. I explained that at best such a rule would mean that where two individuals wanted to pursue a forbidden relationship one would have to transfer to a different department. Ninety percent of both men and women said they opposed the rule.

paying tuition are entitled only to be graded fairly.[7] They are not entitled to meddle in the affairs of others.

There are other problems with Forell's argument. The urge to merge is a powerful one; recognizing that, we allow a great deal of latitude to sexual players—all's fair in love and war. Virtually every state has abolished the torts of seduction, breach of promise, and alienation of affections, and, except in the most extraordinary cases, no cause of action is available against someone who misrepresents himself for sexual gain.[8] Since a frequent goal of the misrepresenter is to enhance his or her power in the sexual marketplace, the suggestion that the mere existence—not the actual use—of an economic power differential between supervisor and subordinate should lead to a ban on sexual relationships between them would seem to make little sense.

Forell also claims that a per se rule would aid in the battle against anti-gay discrimination. She cites *Naragon v. Wharton*,[9] in which the Fifth Circuit affirmed a university's decision to relieve a graduate teaching fellow of her duties upon complaint by the parents of an undergraduate student about their daughter's sexual relationship with her. Forell deduces from reading the opinion that "[i]f there had been a rule prohibiting dual relationships, it is likely that the heterosexual relationship would have been treated [differently]" (68). But a per se rule cannot logically be founded on an anti-discrimination principle. If we want to end discrimination, we are better off directing our efforts explicitly to that goal.

The foregoing, however, are not the most striking aspects of Forell's article. She quotes a woman who had clerked, as a student, for a partner in a law firm and who had been on the brink of a sexual relationship with him when at the last moment he pulled back:

> The moment which freed me from the incest pact, has allowed whatever I have since accomplished, even my failures, to be *mine*. And I am sure that my ability to have the kind of intimate relationship with a man I have now, which is one of complete psychological equality, also grew from that healing moment (66).

Forell concludes: "I believe there are times when the sexual desire and the decision to refrain are mutual, and that such a moment is empowering for the student" (66).

Since the woman was recounting the incident many years later, is it not possible, even likely, that her principal objective in this passage was to justify

7. I recognize, of course, that much law school grading is on a curve so that there is a relationship between all grades. I assume for this purpose that classes are large enough so that the actual effect of any single grade on any other is trivial. If in a specific case the assumption is unwarranted, or perhaps honors are at stake, I do not preclude the possibility of a complaint to the dean's office. It is probably the fear of investigations following such complaints that has kept (known) abuses to an absolute minimum.

8. Reference here is to the heartbalm movement and contemporary proposals to reverse its effects discussed in Dan Subotnik, "Sue Me, Sue Me, What Can You Do Me? I Love You": A Disquisition on Law, Sex, and Talk, 47 Fla. L. Rev. 311 (1995).

9. 737 F.2d 1403 (5th Cir. 1984).

the course of action that had been taken? How else can we understand the claimed centrality of this experience for her when, by her own admission, she played a passive role in it?[10] More important, do grownups, particularly women, need Forell to tell them about the power that comes from resisting an urge? Finally, is a ban appropriate when, as Forell concedes, "[m]any sexual relationships between teacher and student are positive for the parties involved; many have resulted in successful marriages or analogous long-term relationships" (52). Sherry Young complains about those who would limit the capacity of women to consent to sex. "While certainly not 'anti-women,'" she writes, "this group may be characterized, with some justification, as 'anti-sex.'"[11] Given Forell's efforts at controlling the academy and the bar, it does not seem unfair to place her in this category.[12]

Which leads to our conclusion. "As a feminist," writes Forell, "I view skeptically any policy that focuses on women as needing protection" (64). And yet she is ready to effectively rule out *any* choice by women with a per se rule in one area of human activity where such rules, by all accounts, have done a great deal of harm.[13] A reluctance to eliminate all freedom of choice in one area is no doubt why the Oregon Bar rule has not been adopted elsewhere. It is also why many schools do not have per se rules.[14]

Would not a narrow, precatory rule premised on a limited fiduciary principle, then, be preferable to one premised on an all-too-simple and politically loaded model of the psychological dynamics of sexual relationships? Can we not agree that there are few relationships where there is an equality of socioeconomic power and that therefore we cannot and should not be trying to prevent the Elizabeth Taylors from getting together with the Larry Fortenskys, the Princes with the Cinderellas? A better, more nuanced, way of dealing with the issue raised by Forell, I suggest, is through the aspirational standard adopted not long ago by the New York University School of Law, which created

> 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. . . . It does not prohibit sexual relations, but rather places upon the more powerful party the burden for assuring that the relation is truly consensual.[15]

10. But even if the essential decision were made by the student, would it not have been empowering precisely because sex was not forbidden? If we adopt Forell's proposal, in other words, students will not be empowered; they will only be following the rules.

11. Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education, 4 Am. U. J. Gender & L. 269, 297 (1996).

12. In Forell's scheme wayward lawyers would be subject not only to discipline by the bar, but also to civil action by clients. See Forell, *supra* note 3, at 748–49. Surprisingly, Forell says nothing about such liability in the faculty-student context.

13. For example, the erstwhile social stigma placed on all nonmarital sex.

14. See Young, *supra* note 11, at 272–76.

15. Sylvia A. Law, Good Intentions Are Not Enough: An Agenda on Gender for Law School Deans, 77 Iowa L. Rev. 79, 85 (1991) (footnote omitted).