Like many others, I am outraged by the egregious incidents of sexual misconduct made public recently through carefully documented journalism. I applaud the removal of many alleged perpetrators who have clearly abused their positions of power, often through force and even violence. I celebrate those who have stepped forward to call out sexual misconduct and demand changes in the degrading culture that has characterized working conditions for women in too many settings for too long.

However, I am concerned that in the recent rush to judgment, principles of basic fairness, differences between proven and merely alleged instances of misconduct, and important distinctions between different kinds of sexually charged conduct have too often been ignored. Similar problems plagued the imposition of new sexual harassment guidelines for colleges and universities by the administration of former President Barack Obama. I was involved in attempts to push back against those guidelines and to develop at Harvard Law School our own policies, better designed to balance the important values at stake.

My fairness concerns with the #MeToo phenomenon include the ready acceptance in many cases of anonymous complaints, and of claims made by women over conflicting claims by men, to terminate careers without any investigation of the facts. Some argue that women who speak out should simply always be believed. Others argue that if some innocent men must be sacrificed to the cause of larger justice, so be it. I find this deeply troubling. I do not contend that mini-trials should always be required before action can be taken. Sometimes the alleged conduct is so egregious, or alleged patterns so suspicious, that suspension is warranted while facts are determined. Sometimes allegations are demonstrably credible by virtue of independent evidence. But where facts are in
doubt or conduct is subject to different interpretations, efforts must be made to investigate what actually happened and how the different parties understood the events.

I am also deeply troubled by over-expansive definitions of wrongful conduct. In the current climate, men are called out for actions ranging from requests for dates and hugs on the one hand to rape and other forced sexual contact on the other, as if all are the same and all warrant termination. I do not believe that all touching by a man in power is the same as touching that is clearly unwanted or the deliberate abuse of power to obtain sexual favors. I do not believe that all romantic and sexual overtures should be banned from the workplace, even between people on different hierarchical levels. Some recent cases involve peremptory dismissal for behavior that may involve nothing more than that. Women are not so weak as to need this kind of protection. Banning all such activity from the workplace would reduce the quality of life for everyone, including women.

The legal definition of sexual harassment in employment and education is a helpful guide to what sexual conduct should be the focus. It is illegal to engage in quid pro quo harassment, namely conditioning an employment or educational benefit on sexual favors. It is illegal also to create a “hostile environment” through unwelcome sexual advances that are severe or pervasive and that limit the victim’s ability to enjoy employment or educational opportunity. Objective standards apply, so the question is whether a reasonable person in the position of the alleged perpetrator or alleged victim would have thought the conduct was sexual harassment, not simply what the alleged victim subjectively felt.

Finally, I am concerned with the cynical exploitation of sexual harassment cases and related scapegoating of individuals. The #MeToo movement has helped demonstrate to the world the toxic level of sex discrimination and sexual misconduct that have characterized work life for too many women in business, entertainment, media, and government. Corporate and political leaders, who must have been at least generally aware of these problems, did little to address them until this moment of public shaming. Now they dismiss alleged perpetrators overnight, often with no regard for the facts but clearly with significant regard for their corporate reputations and electoral strategies.

All this puts real reform at risk. It undermines the legitimacy of action against serious sexual misconduct and abuse of power. It creates the potential for backfire.

*Elizabeth Bartholet ’62 is the Morris Wasserstein Public Interest Professor of Law at Harvard Law School.*

Want to keep up with breaking news? Subscribe to our email newsletter.

The Ice Cream Metaphor