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ABSTRACT

Discussions of sexual misconduct often focus primarily or exclusively on the parties directly involved in sexual behavior. As a result, the discussion generally centers on consent. While consent is critically important, this Article instead focuses on harms to third parties resulting from sexual behavior—regardless of whether that behavior is consensual. Doing so reveals a dynamic that the conversation about sexual misconduct has not yet fully acknowledged: the presence or absence of consent between participants does not determine whether third parties suffer harm. Sexual behavior does not occur in a vacuum. Rather, it occurs in a particular context and often has significant consequences for other individuals beyond the participants in the behavior.

Sexual behavior is problematic when it involves what this Article will refer to as an institutional power disparity: that is, one participant has power over the other as a result of their institutional roles. Institutional power disparities are inherent, for example, in sexual behavior involving a supervisor and their subordinate or a professor and their student.

Such behavior risks significant harm to third parties within the

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institution. Third parties may be injured as a result of sexual favoritism. For example, a worker may be passed over for a promotion in favor of a less qualified worker who is having sex with the boss. Or third parties may suffer harm from a sexualized institutional environment. For example, students may avoid professors who are known for pursuing sexual relationships with students or may find it alienating to be viewed as a professor's prospective sexual partner. And the institution itself may suffer harm when sexual behavior involving an institutional power disparity interferes with worker productivity and morale, or with student learning and intellectual growth.

Harm to third parties justifies regulation of sexual relationships in the context of an institutional power disparity. In some circumstances, such relationships should be prohibited so long as the institutional power disparity remains. In other circumstances, careful regulation can mitigate potential harms to third parties and to the institution itself.

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INTRODUCTION

One night in Cannes, the actress Daryl Hannah began receiving incessant phone calls to her hotel room from producer Harvey Weinstein.¹ When she ignored the ringing phone, Weinstein came to her room and pounded furiously on the door. Terrified that he would sexually assault her, Hannah left through a side door and hid in her makeup artist's room. She recalls: "We actually pushed a dresser in front of the door and just kind of huddled in the room."²

Hannah was not Weinstein's only target: he sexually assaulted, abused, and harassed women for decades.³ A female executive at Weinstein's company explained that he used female assistants as "honeypots" throughout his long history of abusing women. A female assistant "would initially join a meeting along with a woman Weinstein was interested in, but then Weinstein would dismiss them, leaving him alone with the woman."⁴ Many of these female assistants felt trapped and unable to intervene in behavior they found disturbing because they were afraid that they would be unable to work in the industry or that the restrictive nondisclosure agreements they had signed would be enforced against them.⁵

Eugenia,⁶ a sales associate, began having sex with her boss, Alex, with "[t]he ultimate aim [of] [g]etting him to recommend me for a promotion at the end of my first year."⁷ Eugenia was successful: she convinced Alex to

1. Karla Rodriguez, *Annabella Sciorra and Daryl Hannah Detail Harrowing Encounters with Harvey Weinstein*, US WEEKLY (Oct. 28, 2017), <https://www.usmagazine.com/celebrity-news/news/annabella-sciorra-daryl-hannah-say-harvey-weinstein-assaulted-them/> [https://perma.cc/J8YH-YN58].

2. *Id.*

3. See, e.g., Jodi Kantor & Rachel Abrams, *Gwyneth Paltrow, Angelina Jolie and Others Say Weinstein Harassed Them*, N.Y. TIMES (Oct. 10, 2017), <https://www.nytimes.com/2017/10/10/us/gwyneth-paltrow-angelina-jolie-harvey-weinstein.html> [https://perma.cc/EN2Z-7TBP].

4. Ronan Farrow, *From Aggressive Overtures to Sexual Assault: Harvey Weinstein's Accusers Tell Their Stories*, NEW YORKER (Oct. 10, 2017), <https://www.newyorker.com/news/news-desk/from-aggressive-overtures-to-sexual-assault-harvey-weinsteins-accusers-tell-their-stories> [https://perma.cc/2XPE-ZJ9N].

5. *Id.*

6. The names are pseudonyms, and Eugenia's story, while written in the first person, was actually told to a journalist. Melissa Wong, *True Story: "I Schemed My Way Into Having Sex With My Boss to Get a Promotion"*, HER WORLD (Mar. 30, 2017), <http://www.herworld.com/celebs-mensex/mensex/true-story-%E2%80%9Ci-schemed-my-way-having-sex-my-boss-get-promotion%E2%80%9D> [https://perma.cc/M2RK-VKK3].

7. *Id.*

write her a glowing review and ultimately received the promotion. According to Eugenia, she deserved it. Alex “said he’d always believed that I was the best one on his team, anyway, and I knew he wasn’t just saying that because he liked me.”⁸ Curiously absent from her account, however, are Eugenia’s coworkers, who she mentions only as an obstacle to be negotiated: “We agreed to keep our budding relationship under wraps because we didn’t want others in the company to find out, so we stopped lunching together and he stopped giving me rides home after work.”⁹

Boni Mata, a student at the University of California at Berkeley, had a sexual relationship with a professor while she was a student in his class.¹⁰ In her weekly sex column for the campus newspaper, she describes their encounters as fulfilling and erotic.¹¹ On one occasion, “we both looked out onto the street at the unfortunate passers-by who weren’t lovers like us.”¹² Grading, to her, was almost an afterthought: “Yes, he was in charge of my grades, but we both knew I’d have gotten an A regardless.”¹³ Although Mata does not mention her Berkeley classmates in her retelling, the comments following the online version of the article suggest that many were less than confident in Mata’s assessment of her academic abilities and less than enthusiastic about her assessment of her sexual relationship.¹⁴

Daryl Hannah’s makeup artist, Harvey Weinstein’s female assistants, Eugenia’s coworkers, and Boni Mata’s classmates are shadowy, anonymous figures. They are minor characters in accounts of sexual abuse or adventure woven by the participants. Indeed, from reading many accounts of sexual behavior, both consensual and non-consensual, one might think that the two¹⁵ people involved in a particular instance of sexual behavior are the only

8. *Id.*

9. *Id.*

10. Boni Mata, *So, I Slept With My Professor*, DAILY CALIFORNIAN: SEX ON TUESDAY (Dec. 2, 2012), <http://www.dailycal.org/2014/12/02/slept-professor/> [<https://perma.cc/8EJX-CUCN>].

11. *Id.*

12. *Id.*

13. *Id.*

14. One comment on the online article, upvoted over two hundred times, reads: “The only thing that is unfortunate is that you don’t care about how other students feel about the favoritism obviously given to you . . . It’s disgusting and disrespectful to other students who want to be appreciated for their work as well.” Go Bears, Comment to *So, I Slept With My Professor*, DAILY CALIFORNIAN: SEX ON TUESDAY (Dec. 2, 2014, 4:39 PM), <http://www.dailycal.org/2014/12/02/slept-professor/> [<https://perma.cc/8EJX-CUCN>]. Another commented: “I can personally attest to the fact that I have witnessed a prevailing attitude among professors/instructors at UC Berkeley that often made me uncomfortable, where young undergraduate women were considered ‘fair game’ . . . because that one girl slept with them once, and if students object to being hit on they are simply being prudes/politically correct/trying to squash academic freedom.” *Enfantbonvivant*, Comment to *So, I Slept With My Professor*, DAILY CALIFORNIAN: SEX ON TUESDAY (Dec. 4, 2014, 12:28 AM), <http://www.dailycal.org/2014/12/02/slept-professor/> [<https://perma.cc/8EJX-CUCN>].

15. Sexual behavior could involve more than two people, but this Article will focus primarily on

two people in the world. But the third parties I have highlighted here are real people with real lives, ambitions, struggles, and emotions. The sexual behavior of the ostensible protagonists affects them too.

Thus far, much of the conversation about sex that has resulted from the #MeToo movement has focused on consent. Certainly consent is critical to the discussion. Non-consensual sex is uncontroversially wrong.¹⁶ It is and should be criminal and is often illegal in other ways as well.¹⁷ And the question of whether sexual behavior¹⁸ is consensual is certainly relevant to assessing its harms to third parties. The harm to Daryl Hannah's makeup artist is different than the harm to Eugenia's coworkers, for instance, and lack of consent to the behavior in the former situation explains some of the difference. But consent is not a magic bullet. Whether an interaction or relationship is consensual does not determine whether it causes harm to third parties.¹⁹

Expanding the discussion to include third parties reveals a critical dynamic that the #MeToo movement has not yet fully recognized. Acknowledging harms to third parties forces us to acknowledge that sexual behavior does not occur in a vacuum. Rather, it occurs in a particular context and therefore has significant consequences beyond the participants in the behavior.

Sexual behavior, I argue, is inherently problematic when it involves what I will call an institutional power disparity. For purposes of this Article, an institution is a structured and cohesive environment such as a workplace or

behavior that involves two people.

16. The debate about what does or should constitute consent is a contentious one, in which this Article largely does not intervene. See, e.g., Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 443 (2016) ("Notwithstanding a growing awareness of non-consent as the essence of rape, however, the legal meaning of sexual consent remains contested."); Janet Halley, *The Move to Affirmative Consent*, SIGNS (Nov. 10, 2015), <http://signsjournal.org/currents-affirmative-consent/halley> [<https://perma.cc/PJ4D-8BSK>]; Hanna Kozłowska, Opinion, *Yes Means Yes: The Big Consent Debate*, N.Y. TIMES (Oct. 15, 2014, 6:21 AM), <http://op-talk.blogs.nytimes.com/2014/10/15/yes-means-yes-the-bigconsent-debate> [<https://perma.cc/8HWQ-CAT9>].

17. For example, sexual assault in the workplace might give rise both to criminal charges and to an employment discrimination lawsuit under Title VII.

18. Throughout this Article, I use the term "sexual behavior" to capture a wide range of activity, ranging from sexually harassing comments to sexual assault to consensual sexual relationships. My point is not that there is no meaningful difference between these activities. Rather, the point is that in certain situations the difference should not change whether these activities should take place.

19. This does not mean I think consent is over-emphasized in our current legal and social discourse. I am very concerned about the possibility that a powerful faculty member or supervisor may exert undue influence over a student or worker over whom they have considerable authority, and that the resulting sexual may well be non-consensual or coercive. These serious concerns, however, are not the focus of this Article. For purposes of this Article, therefore, I largely bracket such concerns here, although as I discuss periodically throughout the article, a sexualized educational environment also enables a culture that tolerates sexual harassment and other forms of non-consensual sexual interaction initiated by faculty members and involving students.

school.²⁰ An institutional power disparity is a difference in the capacity of parties within an institution to affect one another's fates or circumstances as a result of their respective institutional roles. So sexual behavior involves an institutional power disparity when one individual engages in sexual behavior with another, and the former has power over the latter as a result of the former's institutional role. Institutional power disparities are inherent, for example, in relationships between a supervisor and a subordinate, or between a professor and their student.

I do not claim that every instance of sexual behavior involving an institutional power disparity is non-consensual, although many are.²¹ Rather, the point is that even if such a relationship is consensual, it is still problematic given its harm to third parties and to the institution within which it occurs. The focus on third parties circumvents many common arguments against regulating sexual behavior—for example, that such regulation is paternalistic because it assumes that people cannot make their own decisions,²² or that it infringes on sexual autonomy by interfering with consensual behavior.²³ Anti-paternalism or sexual autonomy are not the only considerations when sexual behavior also affects third parties.

Sexual behavior involving an institutional power disparity results in myriad harms to third parties.²⁴ Within a workplace, when a supervisor engages in a sexual relationship with a subordinate, the subordinate's colleagues often experience tangibly worse working conditions. A server at a restaurant may be asked to stay until closing while a counterpart who is having sex with the manager is allowed to leave, or a law firm associate may be asked to perform relatively menial tasks such as electronic discovery while an associate who is having sex with a partner has to opportunity to draft and argue a dispositive motion. Workers in all environments may suffer diminished opportunities for promotion when competing against a peer who is engaged in a sexual relationship with the person who decides who gets promoted. Likewise, a supervisor's peers may struggle to treat the subordinate fairly while maintaining a relationship with the supervisor. If a law firm associate who is involved in a sexual relationship with a partner

20. In this Article, when I refer to a school, I mean an institution of higher education such as a college or university. Moreover, I focus almost exclusively on workplaces and schools because these are the two institutions that most people encounter in their lifetimes, although this is by no means an exhaustive list of institutions to which my argument applies. Other relevant institutions might include political entities, military divisions, recreational organizations, and cultural facilities.

21. See *infra* notes 74–77 (cataloguing reported instances of professors using their power over students to facilitate sexual abuse).

22. See *infra* text accompanying notes 247–69.

23. See *infra* Section II.B.1.

24. See *infra* Part II.

produces poor work for a different partner, that partner may hesitate to take corrective measures for fear of creating friction with a colleague.

Third-party harms also result from sexual behavior in educational institutions.²⁵ A professor involved in a sexual relationship with a student may intentionally or inadvertently favor that student in grading—a particularly serious problem when classes are graded on a mandatory curve, and one likely to undermine other students' confidence in their grades. Or a professor involved in a sexual relationship with a student may devote professional capital to advancing the student's career by writing undeservedly glowing letters of reference or calling in favors with colleagues—a particular problem for other students when the job market is poor or competition for particular jobs is fierce. Moreover, when a professor engages in a sexual relationship with a student, the professor alienates other students who, perhaps correctly, suspect there may be a price to seeking mentorship from the professor; or who worry, perhaps correctly, that information they disclose to the professor will be passed on to a classmate who is having sex with the professor. The professor's colleagues also may suffer negative consequences. A colleague may face express or implied pressure to give the student favorable treatment—particularly when the colleague is junior or untenured—or may wonder whether giving the student a poor grade will negatively affect their relationship with their colleague. In short, faculty-student sexual relationships often negatively affect the students who aren't having sex with the professor and the faculty members who aren't having sex with their students.

Institutional harms also result from sexual behavior involving institutional power disparities.²⁶ Such relationships sexualize the institution along lines of institutional power, detracting from other institutional goals. When a professor has sex with a student, it sexualizes the educational environment, shifting it from one in which students see themselves as there to learn, to one in which students are forced to see themselves as part of a pool of their professors' prospective sexual partners, and to guard against that possibility if it is unwanted to them. The same is true when a supervisor has sex with a subordinate. Workers should not have to wonder whether their prospects for advancement hinge on their willingness to have sex with the boss. Students should not have to view themselves as involuntary members of their professors' dating pool. Such concerns affect productivity and morale in the workplace, and they affect learning and intellectual growth at school. And other institutional stakeholders lose regard for an institution that ignores the consequences of sexual relationships tainted by

25. *See infra* Section II.A.

26. *See infra* Section II.A.4.

institutional power disparities.

In light of these serious harms to third parties, I argue that sexual behavior involving an institutional power disparity should be addressed by law, regulation, and institutional policy. In some instances, such relationships should be prohibited. In other instances, such relationships should be disclosed and regulated via measures designed to protect the interests of third parties and the integrity of the institution.

This Article offers an account of the harms to third parties to sexual behavior involving institutional power disparities—that is, across institutional contexts and on both sides of the consent line. I draw on the existing vast literature on sexual assault and sexual harassment, some of which focuses on workplaces²⁷ or schools.²⁸ A few researchers have examined the third-party harms that result from sexual harassment.²⁹ Several researchers have considered the problem of “sexual favoritism” in the workplace,³⁰ likely inspired by a number of cases that have addressed the issue.³¹ A few scholars have also written about regulation of consensual faculty-student sexual relationships, although the focus is almost universally on the parties to the relationship, with third parties meriting at most a few paragraphs.³² This Article builds on prior work by demonstrating

27. See, e.g., CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 *STAN. L. REV.* 691 (1997); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683 (1998); Vicki Schultz, *The Sanitized Workplace*, 112 *YALE L.J.* 2061 (2003); David S. Schwartz, *When Is Sex Because of Sex? The Causation Problem in Sexual Harassment Law*, 150 *U. PA. L. REV.* 1697 (2002).

28. See, e.g., BILLIE WRIGHT DZIECH & LINDA WEINER, *THE LECHEROUS PROFESSOR* (2d ed. 1990); *SEXUAL HARASSMENT ON COLLEGE CAMPUSES: ABUSING THE IVORY POWER* (Michele A. Paludi eds., 2d ed. 1996); Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 *UTAH L. REV.* 671 (2018); Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 *TEX. L. REV.* 525 (1987).

29. See, e.g., Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 *YALE L.J. FORUM* 152 (2018).

30. See, e.g., Susan J. Best, *Sexual Favoritism: A Cause of Action Under a Sex-Plus Theory*, 30 *N. ILL. U. L. REV.* 211 (2009); Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 *VT. L. REV.* 551 (2009); Maureen S. Binetti, *Romance in the Workplace: When “Love” Becomes Litigation*, 25 *HOFSTRA LAB. & EMP. L.J.* 153, 154 (2007); Jennifer Bercovici, Note, *The Workplace Romance and Sexual Favoritism: Creating a Dialogue Between Social Science and the Law of Sexual Harassment*, 16 *S. CAL. INTERDISC. L.J.* 183 (2006); Stephen Dacus, Note, *Miller v. Department of Corrections: The Application of Title VII to Consensual, Indirect Employer Conduct*, 59 *OKLA. L. REV.* 833 (2006).

31. See *infra* Part III.B.1.

32. See, e.g., Paul M. Secunda, *Getting to the Nexus of the Matter: A Sliding Scale Approach to Faculty-Student Consensual Relationship Policies in Higher Education*, 55 *SYRACUSE L. REV.* 55 (2004); Richard R. Carlson, *Romantic Relationships Between Professors and Their Students: Morality, Ethics, and Law*, 42 *S. TEX. L. REV.* 493 (2001); Margaret H. Mack, *Regulating Sexual Relationships Between Faculty and Students*, 6 *MICH. J. GENDER & L.* 79 (1999); Caroline Forell, *What's Wrong With Faculty-Student Sex? The Law School Context*, 47 *J. LEGAL EDUC.* 47 (1997); Dan Subotnik, *What's Wrong With Faculty-Student Sex? Response II*, 47 *J. LEGAL EDUC.* 441 (1997). As this Article goes to press, multiple news sources have reported that Paul Secunda—the author of one of the aforementioned

that harms to third parties are similar in many ways from one institution to the next and regardless of whether the sexual behavior is consensual.

Until this point I have discussed the harms of sexual behavior in the context of institutional power disparities from an entirely gender-neutral standpoint. In some ways this is appropriate: such behavior affects other workers, other students, other faculty members, and institutional culture regardless of the genders of the parties involved in the sexual behavior. But the reality is that most sexual behavior in the context of an institutional power disparity involves a powerful man and a subordinate woman.³³ This is so due to historical and ongoing gender inequality, which means that at the higher ranks of nearly every profession there are more men than women, and that the higher ranking participant therefore tends to be a man.³⁴ Correspondingly, the negative consequences for third parties also fall more heavily on women.³⁵ Consider the consequences within colleges and universities. Women students are less likely to seek mentorship from an influential male professor known for soliciting relationships with students, meaning that men are more likely to receive the benefit of interaction with

articles on faculty-student consensual relationships—“has been suspended over allegations he had an inappropriate relationship with a student,” and the matter is still under review by the school that employs him. Bruce Vielmetti, *Marquette Law School Professor Suspended Over Student Relationship*, MILWAUKEE J. SENTINEL (Dec. 27, 2018), <https://www.jsonline.com/story/news/education/2018/12/27/marquette-law-professor-suspended-over-student-relationship/2409358002/> [https://perma.cc/A3JP-RXES]; see also, e.g., Karen Sloan, *Prominent Law Professor Pulled From Teaching Amid Sexual Misconduct Allegations*, LAW.COM (Dec. 27, 2018, 12:56 PM), <https://www.law.com/2018/12/27/prominent-law-prof-pulled-from-teaching-amid-sexual-misconduct-allegations/>; Natallie St. Onge, *Law Professor Suspended for Alleged Relationship with Student*, MARQUETTE WIRE (Jan. 14, 2019), <https://marquettewire.org/4004257/news/law-school-professor-suspended-for-alleged-relationship-with-student/> [https://perma.cc/2Q2N-96AH].

33. See, e.g., Myrtle P. Bell & Mary E. McLaughlin, *Sexual Harassment and Women's Advancement: Issues, Challenges, and Directions*, in *ADVANCING WOMEN'S CAREERS: RESEARCH AND PRACTICE* 83, 89 (Ronald J. Burke & Debra L. Nelson eds., 2002) (explaining that women are more likely to be supervised by men, thereby “making [women] far more likely targets for quid pro quo harassment”). More recently, a crowdsourced survey documenting over 2400 incidents of sexual misconduct in academia (as of February 2018) appears to include mostly sexual behavior involving a more senior man and a less senior woman. The survey does not always identify the gender of the less senior party, so in some instances the less senior party might be a woman, a man, or a person who identifies as some other gender. Karen Kelsky, *Sexual Harassment in the Academy: A Crowdsourced Survey*, <https://docs.google.com/spreadsheets/d/1S9KShDLvU7C-KkgEevYTHXr3F6InTennBsS9yk-8C5M/edit#gid=1530077352> (last retrieved Feb. 17, 2018) [hereinafter *Crowdsourced Survey*]. See also Karen Kelsky, *A Crowdsourced Survey of Sexual Harassment in the Academy*, PROFESSOR IS IN: BLOG (Dec. 1, 2017), <https://theprofessorisin.com/2017/12/01/a-crowdsourced-survey-of-sexual-harassment-in-the-academy/> (explaining and offering context for the *Crowdsourced Survey*).

34. Gary N. Powell, *Workplace Romances Between Senior-Level Executives and Lower-Level Employees: An Issue of Work Disruption and Gender*, 54 HUM. REL. 1519, 1526 (2001).

35. Evidence of this burden can be found in the rise in women-oriented workspaces, whose growth “has been interlinked with [the #MeToo movement].” Michelle R. Smith, “My Happy Place.” *Workspaces for Women Rise in #MeToo Era*, AP NEWS (Jan. 29, 2019), <https://www.apnews.com/8d729d1d51094cb09f55464d09d82a9e> [https://perma.cc/BN4B-7R7G].

and mentorship from that professor.³⁶ And women bear the brunt of a sexualized institutional culture in which professors feel generally at liberty to treat students as prospective sexual partners. In the aggregate, such behavior helps to explain why women are disproportionately unlikely to pursue careers in many academic fields.³⁷ If #MeToo has taught us anything, it is that the harms of sexual harassment, abuse, and assault do not fall equally on men and on women.³⁸ The same is true when we expand our reckoning of these harms to include those to third parties.³⁹

My conclusions will surely strike some as overreaching, perhaps radically so. We prize sexual autonomy in America⁴⁰; why should concerns about third parties ruin the fun for consenting adults? But in fact there are many situations in which we believe that third-party or institutional concerns should override individual sexual desire, at least as an ethical or moral matter if not as a legal one. Most of us agree that a person should not have sex with someone other than their spouse if they are in a monogamous marriage, even if both participants in the extramarital sex consent. Most of us agree that people shouldn't have sex in public places, even if they both consent. Most of us agree that a judge shouldn't have sex with a lawyer who has a case before the judge, even if they both consent. Most of us agree that people shouldn't have sex with their parents or siblings, even if they both consent. Our views about sex under these circumstances is not dictated by the presence or absence of consent. Rather, we think people should refrain from sex in some contexts because that sex has negative consequences for third parties, institutions, or society as a whole.⁴¹ Here, I extend this already-

36. See *supra* note 33 (noting that most of the experiences documented in the Crowdsourcing Spreadsheet involve a more junior woman and a more senior man).

37. See, e.g., Jennifer M. Saul, *Philosophy Has a Sexual Harassment Problem*, SALON (Aug. 16, 2013, 12:45 AM), https://www.salon.com/2013/08/15/philosophy_has_a_sexual_harassment_problem/ [<https://perma.cc/N649-JELC>] (discussing sexual misconduct by senior male professors as one reason that only seventeen percent of full-time philosophy professors are women).

38. For example, women made eight in ten sexual harassment charges to the EEOC between 2005 and 2015. Jocelyn Frye, *Not Just the Rich and Famous*, CENTER FOR AMERICAN PROGRESS, (Nov. 20, 2017 4:59 PM), <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/> (compiling EEOC data).

39. See *infra* Section II.A.3. As I discuss in more detail in Part IV, a serious and legitimate concern is that policies designed to regulate relationships involving an institutional power disparity will be unevenly enforced against disfavored groups, such as racial minorities and same-sex partners. The concern for uneven enforcement, however, does not counsel in favor of no regulation; rather, it militates in favor of stronger measures to ensure that regulation is evenly applied.

40. See, e.g., Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881 (2016) (objecting to "bureaucratic" intrusion pursuant to Title IX into consensual sexual activity).

41. In a number of other situations, there is less consensus, but many people still agree that consenting adults should not engage in sex due to harms to third parties, institutions, or society. For example, many people would agree that consenting adults should not have sex when money is exchanged. One poll found that nearly half of American adults concur that prostitution should be illegal. *Should Prostitution Be Legalized?*, MARIST POLL (May 31, 2016), <http://maristpoll.marist.edu/531-should-prostitution-be-legalized/> [<https://perma.cc/XU34-ZZ5X>].

existing view to another context where compelling considerations involving third parties counsel restraint. Sexual behavior involving an institutional power disparity takes a real toll on third parties. And they, too, matter.

This Article proceeds in four parts. Part I discusses the incidence of and attitudes toward sexual behavior involving institutional power disparities in workplaces and in institutions of higher education. Part II articulates the ways in which sexual relationships involving institutional power disparities harm third parties. This account satisfies critical deficiencies in the existing literature on sexual relationships within institutions and the recent discussion of sexual misconduct prompted by the #MeToo movement. It also provides a rebuttal to those who counsel against any regulation of sexual relationships involving institutional power disparities. Part III considers how existing laws, regulations, and codes of conduct apply to such third-party harms. While existing mechanisms may be used to address some third-party harms, a systemic response is lacking. Part IV argues that in many cases sexual behavior involving institutional power disparities should be prohibited—even when such behavior is consensual—because of the serious harms it causes to third parties and institutions. In other circumstances, mitigating measures are sufficient to protect the interests of third parties and institutional interests.

I. SEX AND INSTITUTIONS

This Part catalogues the incidence of and attitudes toward sexual behavior involving an institutional power disparity. It examines two institutions: workplaces and schools.⁴² As noted in the Introduction, I selected these institutions because they are the ones that most people have contact with at some point in their lives.⁴³ Within both workplaces and schools, sexual behavior involving an institutional power disparity is both common and often viewed as problematic.

A. *Sex at Work*

Consensual sexual relationships between supervisors and their subordinates are common. In a 2013 survey 54% of people said they have

42. As noted, throughout this Article, when I refer to a school, I mean an institution of higher education such as a college or university.

43. Other institutions are likely susceptible to a similar analysis regarding sexual behavior involving an institutional power disparity.

had sex with a colleague; moreover, 13.7% of respondents reported having had sex with their boss, while 35.6% of people said they have had sex with a subordinate.⁴⁴ A 2017 survey put the overall dating figure at 41%, with 15% saying they had dated a supervisor.⁴⁵ Other research has found that “hierarchical” workplace sexual relationships—meaning relationships between workers “at different organizational levels,” are more pervasive than “lateral” sexual relationships—those between workers at the same level.⁴⁶ Regardless of the precise numbers, sexual relationships between supervisors and subordinates occur with some regularity.

Various non-consensual forms of sexual behavior between supervisors and subordinates are also common. Precise statistics on sexual harassment are elusive and depend on the way the problematic behavior is defined. A 2017 *New York Times* survey found that a third of men “said they had done something at work within the past year that would qualify as objectionable behavior or sexual harassment.”⁴⁷ Recent polls find that at least 25% of women, and possibly many more, have experienced sexual harassment at work,⁴⁸ as well as 10% of men.⁴⁹ The incidence of non-consensual behavior persists across industries. It exists in academia.⁵⁰ It exists in construction.⁵¹ Workers at restaurants such as IHOP and Applebees, among others, have reported widespread harassment.⁵² Some research has found that workers in

44. Henry Blodget, *SEX-AT-WORK SURVEY: The Results Are In!*, BUS. INSIDER (May 26, 2013, 11:39 AM), <http://www.businessinsider.com/sex-at-work-survey-results-2013-5?op=1> [<https://perma.cc/US9M-SQ67>].

45. Sarah Sipek, *Caught Up in an Office Romance*, CAREER BUILDER (Feb. 9, 2017), <https://www.careerbuilder.com/advice/caught-up-in-an-office-romance> [<https://perma.cc/8MPV-K58B>].

46. Bercovici, *supra* note 30, at 200–01; *see also* Powell, *supra* note 33, at 1520.

47. Jugal K. Patel et al., *We Asked 615 Men About How They Conduct Themselves at Work*, N.Y. TIMES: THE UPSHOT (Dec. 28, 2017), <https://www.nytimes.com/interactive/2017/12/28/upshot/sexual-harassment-survey-600-men.html> [<https://perma.cc/C3CC-KHSD>].

48. U.S. EQUAL EMP. OPPORTUNITY COMM’N, REPORT OF THE CO-CHAIRS OF THE EEOC SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, at 8 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/upload/report.pdf [<https://perma.cc/2XL9-4X45>] (estimating that anywhere “from 25% to 85% of women report having experienced sexual harassment in the workplace”); ABC News/Washington Post Poll, *Unwanted Sexual Advances: Not Just a Hollywood Story* (Oct. 17, 2017), <https://www.langerresearch.com/wp-content/uploads/1192a1SexualHarassment.pdf> [<https://perma.cc/DLY4-2NHK>] (54% of women report experiencing unwanted sexual advances); Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS/WASHINGTON POST POLL (Nov. 16, 2011), www.langerresearch.com/wp-content/uploads/1130a2WorkplaceHarassment.pdf [<https://perma.cc/RJ26-CRRH>] (25% of women report workplace harassment).

49. Langer, *supra* note 48 (finding that 10% of men experienced sexual harassment).

50. *See, e.g.*, Reshma Jaggi et al., *Sexual Harassment and Discrimination Experiences of Academic Medical Faculty*, 315 J. AM. MED. ASS’N 2120, 2120–21 (2016) (almost one-third of medical academic faculty responding to survey had experienced workplace sexual harassment).

51. NAT’L WOMEN’S LAW CTR., *WOMEN IN CONSTRUCTION: STILL BREAKING GROUND 2*, 8 (2014) (finding that, while women are only 2.6% of construction workers, 88% of them report experiencing harassment).

52. Alexia Fernández Campbell, *More Than 60 Women Have Filed Sexual Harassment*

the gig economy—a platform-based sector including major companies such as Uber, Lyft, Handy, Grubhub, and Postmates—are especially vulnerable to sexual harassment.⁵³ While not every instance of sexual harassment involves a supervisor and a subordinate, the power differential between the two enables harassing behavior.

Sexual behavior between supervisors and subordinates has a consistent place in culture. Many such incidents are treated as a humorous plot twist, with little consideration of their effects on other workers. Consider, for example, *The Office*, in which Michael and his supervisor Jan begin dating, with the ensuing awkward workplace situations serving as a source of comedy.⁵⁴ In *Secretary*, the power dynamic between the male boss and his female assistant is integral to their unusual sexual relationship; no one stops to wonder what it might be like for the paralegal in the small law office, who in one scene is in the next stall as the secretary is masturbating loudly in the bathroom.⁵⁵ And in *The Proposal*, a female boss at a publishing house forces her male assistant to marry her so that she can retain her immigration status, in exchange for which she promises to promote him to an editor position and to publish a book that he supports—with no mention of the people who are not getting promoted to editor or the books that are not getting published.⁵⁶ In short, sexual behavior involving a workplace power disparity is, more often than not, treated as the stuff of romantic comedy, with literally no attention to the harms that third parties to the relationship suffer.

Less frequently, sexual relationships between supervisors and subordinates are treated as problematic. Sometimes the concern is framed as one of sexual harassment: the problem is a relatively simple one of consent.⁵⁷ Relatedly, the concern is sometimes treated as one of liability for the company.⁵⁸ Only rarely does a movie show negative consequences for the third parties in the workplace relating to sexual behavior between a

Complaints Against IHOP, Applebee's Restaurants, VOX (Feb. 7, 2018, 9:30 AM), <https://www.vox.com/policy-and-politics/2018/2/7/16739424/sexual-harassment-complaints-restaurant-ihop-applebees> [https://perma.cc/Y2AW-F7J2].

53. Nathan Heller, *The Gig Economy Is Especially Susceptible to Sexual Harassment*, NEW YORKER, Jan. 25, 2018, <https://www.newyorker.com/culture/cultural-comment/the-gig-economy-is-especially-susceptible-to-sexual-harassment> [https://perma.cc/39CG-BMGH].

54. *The Office: Season 3* (NBC 2007); *The Office: Season 4* (NBC 2008).

55. *SECRETARY* (Lions Gate Films 2002).

56. *THE PROPOSAL* (Touchstone Pictures 2009).

57. See, e.g., *HORRIBLE BOSSES* (New Line Cinema 2011) (a dental assistant experiences loss of morale and fear for his relationship with his fiancée after his boss sexually harasses him).

58. See, e.g., *MICHAEL CRICHTON, DISCLOSURE* (1994) (sexual harassment accusations within the workplace jeopardize a merger).

supervisor and subordinate.⁵⁹

The lighthearted attitude in popular culture toward sexual behavior involving a supervisor and a subordinate does not reflect actual beliefs. Surveys reveal that a significant number of people distinguish between workplace sexual relationships with peers versus with supervisors or subordinates. In one study, 84% of respondents believe they should be allowed to have sex with colleagues, and 52% said sex with colleagues is fine if handled professionally and does not involve a direct reporting relationship.⁶⁰ But attitudes changed substantially when it came to bosses: 64% of people believe that sex between supervisors and subordinates should be prohibited outright.⁶¹ Along similar lines, a 2012 survey found that 64% of people believe that a supervisor should be fired for having sex with a subordinate.⁶²

Discussion of workplace romances often prompt an odd fatalism. One commentator refers to “the fact that workplace romances clearly will exist, regardless of the rules and regulations that may be put in place to discourage them.”⁶³ We might ask why workplace sexual behavior is a foregone conclusion. We expect people to follow other office regulations, such as maintaining confidentiality and refraining from stealing office supplies. What is different about refraining from having sex with coworkers, or, more accurately for present purposes, refraining from having sex with the relatively small subset of one’s coworkers who are either bosses or subordinates? Certainly cultivating an air of inevitability around such behavior will not make it less common.

B. Sex at School

Like relationships between supervisors and subordinates, faculty-student sexual relationships are common. In a survey conducted in 2005 in the United Kingdom, 18% of academics reported having had a sexual relationship with a student.⁶⁴ Of these, 21% said this violated their

59. See, e.g., *SHOWGIRLS* (Carolco Pictures 1995) (other strippers call out their colleague for giving the stage manager a lap dance).

60. Blodget, *supra* note 44.

61. *Id.*

62. Rieva Lesonsky, *Sex at Work Less Likely to Get You Fired Than Taking Company Information: Survey Says*, HUFFINGTON POST, (Apr. 2, 2012, 1:10 AM), https://www.huffpost.com/entry/sex-at-work-less-likely-to-get-you-fired_n_1395459 [<https://perma.cc/X2PL-T4NE>].

63. Binetti, *supra* note 30, at 154.

64. See Hannah Fearn, *Sex and the University*, TIMES HIGHER EDUCATION (May 22, 2008), <http://www.timeshighereducation.com/features/sex-and-the-university/401935.article>. The survey notes that “American universities are much stricter in their institutional policies on sexual or romantic relationships between students and academics than their UK counterparts,” although it is unclear how

institution's policy, 26% said it did not, 41% said they did not know, and 12% said there was no policy.⁶⁵ Sexual harassment is also common. An extensive survey administered by the Association of American Universities (AAU) and Westat at twenty-seven elite public and private research universities found that 44.1% of female graduate students and 29.6% of male graduate students reported sexual harassment.⁶⁶ Of the female graduate students, 22.4% reported that they were harassed by a faculty member.⁶⁷

Like supervisor-subordinate relationships, sexual relationships between faculty and students are normalized in popular culture.⁶⁸ In literature, Bernard Malamud's *A New Life*,⁶⁹ Malcolm Bradbury's *The History Man*,⁷⁰ Philip Roth's *The Ghost Writer*,⁷¹ J.M. Coetzee's *Disgrace*,⁷² and Michael Chabon's *Wonder Boys*⁷³ portray professors who have sexual relationships with students.⁷⁴ David Mamet's play *Oleanna* presents a sexualized interaction between a professor and his female student.⁷⁵ An episode of the iconic and much-loved television series *Friends* is literally titled "The One Where Ross Dates A Student."⁷⁶ And these examples hardly exhaust the genre.⁷⁷ Moreover, in the world of literature and film, such relationships are nearly always presented as involving a sexually available young woman

this might affect the data: perhaps UK faculty are more likely to engage in sexual relationships; perhaps they are simply more likely to admit to them in a survey. In any event, as the other data presented throughout this Article demonstrate, the percentage of US faculty members who have engaged in a sexual relationship with a student is certainly nowhere near zero.

65. *Id.*

66. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 29 (Sept. 21, 2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf. While this Article focuses primarily on the harms of sexual harassment of women, the survey also found that transgender, genderqueer, non-conforming, and gender questioning graduate students were the most likely to report harassment. *Id.*

67. *Id.* at 31.

68. The notion of an older and more worldly teacher educating a young disciple dates to Aristotle. PLATO'S SYMPOSIUM: A TRANSLATION BY SETH BENARDETE (2001). The beloved musical and later film, *My Fair Lady*, in which Henry Higgins educates Eliza Doolittle to meet his specifications, is a more modern example of this genre. MY FAIR LADY (Lerner & Leowe 1956) (musical); MY FAIR LADY (Warner Bros 1964) (film).

69. BERNARD MALAMUD, *A NEW LIFE* (1961).

70. MALCOLM BRADBURY, *THE HISTORY MAN* (1975).

71. PHILIP ROTH, *THE GHOST WRITER* (1979).

72. J.M. COETZEE, *DISGRACE* (1999).

73. MICHAEL CHABON, *WONDER BOYS* (1995).

74. Tim O'Brien's *Tomcat in Love* presents a somewhat more self-aware version—for instance, when the protagonist's female student correctly observes, after he touches her stomach, "I'm not an adult." TIM O'BRIEN, *TOMCAT IN LOVE* 93 (1998).

75. DAVID MAMET, *OLEANNA* (1993).

76. *Friends: The One Where Ross Dates A Student*, FRIENDS (NBC television broadcast Mar. 9, 2000).

77. See also, e.g., SUSAN CHOI, *MY EDUCATION* (2014); JESSICA LOTT, *THE REST OF US* (2014).

student and an older male faculty member to whom she is supposedly attracted, however inexplicably.⁷⁸ Indeed, the faculty-student relationship is a subgenre of film and literature in which the notion of men engaged in sexual relationships with much younger women is presented as completely normal and unproblematic.⁷⁹

Out in the real world, faculty-student relationships have been largely tolerated for decades. Consider the following quote from William Kerrigan, then a professor at Amherst:

I have been the subject of advances from male and female students for twenty-five years. . . . And there is a particular kind of student I have responded to. . . . [T]here is a kind of student I've come across in my career who was working through something that only a professor could help her with. I'm talking about a female student who, for one reason or another, has unnaturally prolonged her virginity. . . .

There have been times when this virginity has been presented to me as something that I, not quite another man, half an authority figure, can handle—a thing whose preciousness I realize. . . . And then things come down to earth, and there often follows disappointment and, on the part of the student, anger. But still, these relationships exist between adults and can be quite beautiful and genuinely transforming.⁸⁰

Some faculty members criticized the sentiments and behavior reflected in Kerrigan's comments,⁸¹ but given the percentage of faculty members—mostly men—who have had sex with their students, his views are best regarded as an extreme on a continuum, not as a shocking outlier. And while sexual relationships between male professors and female students are more common,⁸² they are not the only gender permutation. For example, feminist scholar Jane Gallop has defended her sexual involvement with female

78. See, e.g., *THE SQUID AND THE WHALE* (Samuel Goldwyn Films 2005).

79. See, e.g., *MANHATTAN* (United Artists 1979) (depicting Woody Allen's forty-two-year-old character dating a seventeen-year-old girl played by Mariel Hemingway). For a discussion of the ways in which fiction sometimes bleeds into reality, see also Julie Miller, *Mariel Hemingway Says Woody Allen Tried to Seduce Her When She Was a Teenager*, VANITY FAIR, Mar. 25, 2015, <https://www.vanityfair.com/hollywood/2015/03/woody-allen-mariel-hemingway-manhattan> [<https://perma.cc/9TQC-W9YV>].

80. *New Rules About Sex on Campus*, HARPER'S MAGAZINE, Sept. 1993, at 33, 35–36 (1993).

81. See, e.g., Noel Epstein, *When Professors Swap Good Grades for Sex*, WASH. POST, Sept. 6, 1981, https://www.washingtonpost.com/archive/opinions/1981/09/06/when-professors-swap-good-grades-for-sex/dae0ace9-58e0-4dc8-bdf2-a271c1245d9a/?utm_term=.2f6e1e9238f8 [<https://perma.cc/77JF-XHT6>].

82. See *supra* note 33.

students not only as unharmed, but also as pedagogically valuable.⁸³

More recently, a number of incidents of allegedly non-consensual sexual behavior involving faculty and students have come to light. Blake Wentworth, a professor in the Department of South and Southeast Asian Studies at UC Berkeley, was terminated for sexually harassing and inappropriately touching several students; Wentworth's departure was the latest in a series of six professors found to have violated the school's sexual misconduct policies between 2011 and 2016.⁸⁴ Peter Ludlow, a professor of philosophy, resigned from Northwestern University after investigators found that he had sexually harassed two students.⁸⁵ Rohit Varma was removed as the dean of the medical school at the University of Southern California after the school learned of a large settlement paid to a young researcher over a decade earlier after Varma forced her to sleep in a hotel room with him.⁸⁶ Other incidents, almost uniformly involving male professors and female students, are legion.⁸⁷

The recent #MeToo movement has also prompted an anonymous, crowdsourced spreadsheet listing, at last count, over 2400 instances of non-consensual sexual behavior in academia, many involving professors and students.⁸⁸ And a number of women have also recounted their stories in venues ranging from Title IX and other administrative proceedings⁸⁹ to the popular media.⁹⁰

83. JANE GALLOP, *FEMINIST ACCUSED OF SEXUAL HARASSMENT* (1997).

84. Emily Deruy, *UC Berkeley Fires Professor for Sexually Harassing Four Students*, MERCURY NEWS, May 25, 2017, <https://www.mercurynews.com/2017/05/25/uc-berkeley-professor-fired-for-sexual-harassing-students/> [https://perma.cc/F9GE-BSVC].

85. Ciara McCarthy, *Northwestern Professor Resigns After Sexual Harassment Investigation*, THE GUARDIAN, Nov. 3, 2015, <https://www.theguardian.com/us-news/2015/nov/03/northwestern-professor-peter-ludlow-resigns-sexual-harassment> [https://perma.cc/XDW2-3ES3].

86. Sarah Parvini et al., *USC Medical School Dean Out Amid Revelations of Sexual Harassment Claim, \$135,000 Settlement With Researcher*, L.A. TIMES, Oct. 6, 2017, <http://www.latimes.com/local/lanow/la-me-usc-dean-harassment-20171005-story.html> [https://perma.cc/L7V2-ASET].

87. See, e.g., Kay Lazar, *Berklee President: 11 Faculty Members Have Been Terminated in 13 Years for Sex Assault, Harassment*, BOSTON GLOBE, Nov. 13, 2017, <https://www.bostonglobe.com/metro/2017/11/13/berklee-school-music-president-hold-meeting-monday-sex-harassment-campus/wXBMrQVKSz968DA3OixqMP/story.html> [https://perma.cc/MY3T-TADR] (“Berklee’s student body and faculty is overwhelmingly male, a factor several faculty members said strongly contributes to a sexually abusive culture on campus.”); Mona Gable, *The Hugo Problem*, LA MAGAZINE, Mar. 26, 2014, <http://www.lamag.com/longform/the-hugo-problem/> [https://perma.cc/QPL5-J5RY] (describing Hugo Schwyzer’s highly publicized transgressions, including sexual relationships with numerous students).

88. *Crowdsourced Survey*, *supra* note 33.

89. See, e.g., Julie Wurth, *Accusers: Sanctions Against UI Law Professor Fall Short*, NEWS-GAZETTE, Oct. 19, 2018, <http://www.news-gazette.com/news/local/2018-10-19/accusers-sanctions-against-ui-law-professor-fall-short.html> [https://perma.cc/K3HH-Z8BG]; Nell Gluckman, *What Went Wrong in a University Harassment Investigation—And How Officials Are Trying To Fix It*, CHRON. HIGHER EDUC., Dec. 13, 2018, <https://www.chronicle.com/article/What-Went-Wrong-in-a/245322> [https://perma.cc/9B UW-7ADF].

90. See, e.g., Seo-Young Chu, *Woven: A Refuge for Jae-In Doe: Fugues in the Key of English*

Despite these recent concerns, in our current culture, faculty-student sexual relationships are often regarded as something that just happens, with all the inevitability of the weather.⁹¹ Just a few years ago, an *Above the Law* story stated: “Student-professor relationships are typically frowned upon in academia, but sometimes it’s completely unavoidable.”⁹² Likewise, the now-defunct media outlet *Gawker* responded to Harvard’s ban on sexual relationships between faculty and students by inviting readers to share stories about sleeping with their professors, or sleeping with their students.⁹³ The resulting “top ten” list is treated as a humorous excavation of a minor transgression, perhaps akin to underage drinking—not as a serious problem potentially affecting the well-being of students on campuses nationwide.⁹⁴ And many university administrators agree: as one high-ranking university official puts it, “The availability of partners is a geographical matter; if you are cooped up on a campus, who are you likely to fall into bed with?”⁹⁵ Yet similar to supervisor-supervisee relationships, we should question why many people view faculty-student relationships as inevitable.⁹⁶

II. THIRD-PARTY HARMS

This Part examines the harms to third parties resulting from sexual behavior involving an institutional power disparity. Section II.A provides a detailed account of injuries to third parties and institutions that result from sexual behavior involving an institutional power disparity. The list is not meant to be exhaustive. Nor are the categories neatly divided; they overlap in ways that are sometimes untidy. Rather, the goal is to show that sexual behavior involving an institutional power disparity causes a wide range of significant harms to third parties and institutions themselves.

In Section II.B, the Article refutes three common objections to regulating sexual behavior involving an institutional power disparity. The first

Major, ENTROPY (Nov. 3, 2017), <https://entropymag.org/a-refuge-for-jae-in-doe-fugues-in-the-key-of-english-major/> [<https://perma.cc/N7NR-6WY9>] (describing rape and other sexual abuses by Jay Fliegelman, a then-revered English Professor at Stanford University).

91. See, e.g., Mack, *supra* note 32, at 80 (1999) (“Some universities impose bans in the hopes that sanctions will deter sexual advances. But . . . these bans will not eliminate faculty-student sex, and sexual advances will continue to be a problem for some students.”).

92. Staci Zaretsky, *Law Student Regales Us With Tales of Dirty Sex With Her Professor*, ABOVE THE LAW (Feb. 17, 2015, 12:04 PM), <https://abovethelaw.com/2015/02/law-student-regales-us-with-tales-of-dirty-sex-with-her-professor/> [<https://perma.cc/N8ZK-XGQV>].

93. J.K. Trotter, *The 10 Best Student-Professor Sex Stories, Courtesy of Our Own Readers*, GAWKER (Feb. 16, 2015, 3:00 PM), <http://gawker.com/the-10-best-student-professor-sex-stories-courtesy-of-1686111091> [<https://perma.cc/RJ7W-ZTZX>].

94. *Id.*

95. Fearn, *supra* note 64.

96. *Id.* (quoting one student: “There will always be inter-office relationships—sleeping your way to the top. . . . Why should the education sector be any different?”).

objection is that such relationships are empowering to the individual and beneficial to the institutional environment. The second objection is that desexualizing institutions is undesirable. The third objection is that we should not regulate sexual behavior between consenting adults. These objections may carry weight with respect to some types of sexual behavior: for example, sexual relationships between classmates or employees of the same rank. But these critiques also do not examine sufficiently the harm to third parties that arises from sexual behavior involving an institutional power disparity, and as a result are unconvincing with respect to that subset of sexual behavior.

A. Injuries to Third Parties and Institutions

Sexual relationships in the context of an institutional power disparity cause serious harm to third parties and institutions. Some harms are material: they consist of the loss of a benefit or of an actual detriment. Other harms are affective: they consist of decreased enjoyment or satisfaction in some way relating to the institution. In the aggregate, these harms disproportionately affect women, reinforcing existing gender inequalities. And finally, the institution itself also suffers harm, including economic losses, reputational injury, and less effective implementation of its mission.⁹⁷

1. Material losses

In 1990, Charlotte Perry was a long-time employee of the state of Arkansas.⁹⁸ She applied for a job as an administrative assistant at the Arkansas Board of Review for which, by all accounts, she was well-qualified.⁹⁹ A woman named Gennifer Flowers applied for the same position

97. As commentators have rightly observed, many of these harms are not unique to sexual relationships and might occur in situations involving any close relationship—a friendship, a parent-child relationship—that crosses lines of institutional power. *See, e.g.*, Case, *supra* note 30, at 555 (“If . . . you only hire your friends and you can only make friends with other white Anglo-Saxon Protestant males, your hiring decisions could well be found to violate Title VII.”); Schultz, *The Sanitized Workplace*, *supra* note 27, at 2189 (noting that “supervisors may also develop *nonsexual* attachments that predispose them to favor particular employees”). My position, which is similar to that expressed by Case in her short essay is that a so-called “incest taboo”—regulating both sexual and non-sexual workplace relationships that cause harm to third parties—would be a good thing. This Article focuses on sexual relationships, but I hope that future work will examine favoritism flowing from other personal relationships. In general, I favor regulation of both.

98. Murray Waas, *The Other Woman*, SALON (Sept. 11, 1998, 11:00 PM), https://www.salon.com/1998/09/11/news_a_11/ [<https://perma.cc/B9Q3-GGUY>].

99. *Id.*

and was originally ranked ninth out of eleven applicants. Ultimately, however, Flowers received the job. Events surrounding the incident suggest that the description of the position was rewritten to match Flowers's qualifications because she was involved in a sexual relationship with then-Governor of Arkansas Bill Clinton. Perry filed a complaint, but ultimately she never received any remedy for the unfair treatment she suffered.¹⁰⁰

If the facts alleged are true, Perry's injury was the result of sexual favoritism, meaning that she suffered because a superior preferred their sexual partner. Sexual favoritism often results from sexual relationships involving an institutional power disparity and harms both workers and students. Courts and commentators attest to these harms. In *Broderick v. Ruder*, for example, the court stated that the sexual favoritism that led to the dispute "undermined plaintiff's motivation and work performance and deprived plaintiff, and other . . . female employees, of promotions and job opportunities."¹⁰¹ As a commentator in academia put it: "For me, it was an equity issue. It was simply unfair to other students that one student in a close personal relationship with a professor should have her/his work graded by that professor. . . . I think most people accepted that perspective."¹⁰² Another agreed that "a liaison between an instructor and one of the students in his or her class constitutes an unfairness—not least to the other students, who can't hope to receive due attention when competing with a paramour."¹⁰³

Sometimes the harm resulting from sexual favoritism is readily quantifiable. Consider, for example, a law student enrolled in a class taught by an influential professor who is involved in a sexual relationship with a student in the class—we'll call her Jennifer.¹⁰⁴ The class is relatively small—only twenty-five students—and is graded on a strict curve: both the median and the mean must be a 3.0, or a B. As is the case in many law school classes, exams are graded blindly, but as is also the case in many law classes, grades may include points for participation. The professor awards Jennifer the highest participation grade in the class, which ultimately boosts her overall grade to an A—the highest grade in the class. As a result, every other student moves down the curve. One student receives a B plus instead of an A minus. As a result, that student misses the top ten percent of her class by a tenth of a point and does not graduate as a member of the Order of the Coif, the law school honors society.

100. *Id.*

101. *Broderick v. Ruder*, 685 F. Supp. 1269, 1278 (D.D.C. 1988).

102. Melissa J. Gismondi, *Can I Sleep With My Prof?*, NOW TORONTO (Apr. 5, 2017), <https://nowtoronto.com/lifestyle/class-action/can-i-sleep-with-my-prof/> [<https://perma.cc/959E-5NLE>].

103. Laura Miller, *Lust for Learning*, NEW REPUBLIC, Sept. 7, 2015, <https://newrepublic.com/article/122735/lust-learning-are-professor-student-crushes-inevitable> [<https://perma.cc/9PY8-YTRM>].

104. Jennifer is not a real person, and any similarities between the hypothetical scenarios in the paragraphs that follow and real events are purely coincidental.

In other instances, the harm is qualitative. Consider, for example, the law students who compete with Jennifer for a competitive judicial clerkship following graduation. The influential professor who is involved in a sexual relationship with Jennifer seeks out several colleagues on the faculty and strongly encourages them to write letters of recommendation for her. Then the professor calls the judge—a former colleague at the firm where he practiced prior to academia—and tells her that Jennifer is the best student he has ever had. Although Jennifer has lower grades than many other applicants for the position, the judge ends up hiring her. Although we cannot say with certainty that any of the other students would have received the clerkship had Jennifer not been engaged in a sexual relationship with the professor, the professor's involvement likely influenced the outcome and certainly affected the perceptions of the other students involved.

Relatedly, consider the colleagues the professor seeks out to write letters for Jennifer. Suppose that one of them is not tenured. Even if the faculty member thinks Jennifer is a mediocre student, she may be concerned that denying a senior colleague a request could have a negative effect on her tenure application. Commentators have noted the conflict inherent in grading a professor's "significant other" for the professor's colleagues¹⁰⁵—particularly if the colleague charged with grading the significant other is junior or untenured.

Such harms are concrete. A student who loses out on a grade or a prestigious clerkship loses material career benefits, while a professor who is compelled to write a letter of recommendation to preserve her own professional well-being loses the opportunity to advance the candidacy of a student of her own. These are tangible losses, not "mere" feelings, and as this example demonstrates, they affect any number of third parties to sexual relationships involving an institutional power disparity.

2. *Affective losses*

In light of these tangible harms described in the previous section, it is unsurprising that sexual favoritism also has a negative psychological effect on third parties within the institution. As one commentator explains, "the effect on the morale of other employees (both male and female) of seeing a co-employee get ahead in his or her job by virtue of having sex with the boss defeats the meritocracy that purportedly exists in this country."¹⁰⁶

105. Kevin Kiley, *Relationship Problems*, INSIDE HIGHER ED (Aug. 30, 2011), <https://www.insidehighered.com/news/2011/08/30/relationship-problems> [<https://perma.cc/HLP7-Y978>].

106. Binetti, *supra* note 30, at 160–61; *see also id.* at 163.

Third parties to sexual relationships understandably experience anger, frustration, alienation, and a general loss of enthusiasm for the institution.

Social science evidence reinforces the idea that a sexual relationship involving an institutional power disparity is disruptive because it changes the nature of the interaction that takes place between people in institutional environments.¹⁰⁷ In a normal workplace, interactions take place in what Lisa Mainiero calls the “Task” and “Career” domains: workers put forward their efforts in exchange for pay and career advancement.¹⁰⁸ One can easily draw an analogy to the higher education setting, where students put forth effort in exchange for grades and, ultimately, a degree.

But when individuals engage in a sexual relationship in the context of an institutional power disparity, it introduces the “Personal” or “Sexual” domains into the equation.¹⁰⁹ The presence of sexual relationships communicates to other workers or students that their position in the institution will be affected by their unwillingness or inability to engage in the institution along those domains.¹¹⁰ As a result, the sexual relationship causes disruption of normal institutional functioning.¹¹¹

Quantitative research and anecdotal evidence reinforces that this concern sometimes becomes a reality. Sexual relationships or other sexual behavior that implicate an institutional power dynamic often create a tense environment for third parties. In a 2013 survey of 312 companies, 30% expressed concern for the “lowered morale of co-workers of those involved in the romance.”¹¹² One executive attests to “all the rumor and innuendo” that goes on around a sexual relationship at work.¹¹³ After having seen several sexual relationships among his employees, he explains, “There would be days when a couple weren’t talking to each other, and you could feel the negative energy. You get pulled in.”¹¹⁴ Another executive states that a sexual relationship in the office “is always disruptive.”¹¹⁵ While this could

107. Bercovici, *supra* note 30, at 200–06. This paragraph is indebted to Jennifer Bercovici’s careful research.

108. Lisa A. Mainiero, *A Review and Analysis of Power Dynamics in Organizational Romances*, 11 ACAD. MGMT. REV. 750, 755–56 (1986); *see also* Charles A. Pierce et al., *Attraction in Organizations: A Model of Workplace Romance*, 17 J. ORGANIZATIONAL BEHAV. 5 (1996).

109. Mainiero, *supra* note 108, at 756.

110. *Id.*

111. *Id.*

112. SOC’Y FOR HUM. RES. MGMT, WORKPLACE ROMANCE SURVEY 23, <https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/shrm-workplace-romance-findings.aspx>.

The 30% figure was actually a decline from 44% in 2005, suggesting—consistent with this Article, that individual third party harms have not gained sufficient attention relative to the institution.

113. Ellyn Spragins, *Dangerous Liaisons*, CNN MONEY (Feb. 1, 2004), http://money.cnn.com/magazines/fsb/fsb_archive/2004/02/01/360633/index.htm [<https://perma.cc/G4ML-NMNB>].

114. *Id.*

115. *Id.*

be true for any intra-office relationship, a supervisor-subordinate sexual relationship that is going badly can be more uncomfortable for third parties because of the power dynamics involved.

Indeed, sexual behavior need not rise to the level of a relationship to create a conflicted work environment. After an incident in which former Judge Alex Kozinski repeatedly told Emily Murphy, a clerk for Judge Richard Paez, that she should exercise naked, the clerk reported the incident to Judge Paez, Kozinski's Ninth Circuit colleague.¹¹⁶ Judge Paez was supportive of her reporting the behavior, but since Judge Kozinski—as the chief judge of the circuit—would have been the person to whom the behavior would have been reported, Murphy did not report him.¹¹⁷ Without a doubt the primary harm in this instance is to Murphy, but one can imagine that the incident also created a troubling dilemma for Judge Paez.¹¹⁸ Indeed, the incidence of such dilemmas for third parties seems to have been a hallmark of Judge Kozinski's behavior over the years. Dahlia Lithwick reported a similar incident—in which Kozinski called her and asked her what she was wearing—to the judge for whom she clerked on the Ninth Circuit, who “looked horrified” but did nothing.¹¹⁹ Lithwick explains that Kozinski created a world in which everyone knew what was going on, and everyone was complicit: whether they were victims or bystanders, “those in his circle got dragged along into a world that diminishes and belittles women.”¹²⁰ As she puts it: “We all ended up colluding to pretend that this was all funny or benign, and that, since everyone knew about it, it must be OK.”¹²¹

Moreover, a sexual relationship involving an institutional power disparity inherently sexualizes the work environment in ways that are often damaging to third parties. To be clear, I am not arguing that institutions need to be purged of all sexual behavior. I would argue, for example, that there is nothing inherently damaging about two students dating or having sex with one another, or two associates at a law firm, or two bartenders at the same restaurant.¹²²

116. Matt Zapposky, *Prominent Appeals Court Judge Alex Kozinski Accused of Sexual Misconduct*, WASH. POST, Dec. 8, 2017, https://www.washingtonpost.com/world/national-security/prominent-appeals-court-judge-alex-kozinski-accused-of-sexual-misconduct/2017/12/08/1763e2b8-d913-11e7-a841-2066faf731ef_story.html?utm_term=.20d2daafae75 [<https://perma.cc/Z8PV-UVEV>].

117. *Id.*

118. Dahlia Lithwick, *He Made Us All Victims and Accomplices*, SLATE (Dec. 13, 2017, 3:11 PM), http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/judge_alex_kozinski_made_us_all_victims_and_accomplices.html [<https://perma.cc/99G3-UANK>].

119. *Id.*

120. *Id.*

121. *Id.*

122. *Cf. Schultz, The Sanitized Workplace, supra note 27.*

But in the context of an institutional power disparity, a sexual relationship has different consequences. It implies that there is more to succeeding in an institutional environment than doing good work. It implies that individuals are not viewed solely as workers or students, but also as potential sexual partners. Indeed, it suggests that having sex with a superior may well be *the* way to get ahead. One female bystander describes an event that “[d]id not happen to me but to people around me.”¹²³ She says that a “[l]ab head regarded male students as future colleagues, female students as sexual objects. So no matter the merits, the men were treated to behaviors that would foster their professional careers, while women were objects of use or scorn. Said lab head was banging a student he also supervised.”¹²⁴ Although the student was not directly involved in any of the sexual behavior, the effect on her was profound. She says: “I left the field. Far less talented men have had excellent careers fostered by this individual.”¹²⁵

Sexual relationships in the context of institutional power disparities give rise to conflicts of interest. Third parties such as coworkers or students may worry about information-sharing across institutional power disparities.¹²⁶ Other students, for example, may rightly worry that a professor will hear information about them through a classmate. What if, for example, the classmate discloses an instance of drunken partying or an embarrassing hookup? One woman who had a sexual relationship with a professor confirms this concern. She says: “we would have sex, drink crappy beer, and gossip about people we both knew.”¹²⁷ For many students, higher education is a time for experimentation and self-discovery, and concern that reports of their activities may make their way to a professor may change the institutional dynamic beyond the classroom. Imagine, for instance, a professor and student sitting in bed together while the professor grades papers for his seminar and the student recounts the extracurricular adventures of the student being graded. Or imagine the same professor and student sitting in bed together while the student fills out online course evaluations and the professor regales the student with tales of the colleague being evaluated. When a professor and a student are involved in a sexual

123. *Crowdsourcing Survey*, *supra* note 33, at Dec. 1, 2017 at 21:59:26.

124. *Id.*

125. *Id.*

126. In a 2013 survey of 312 companies, 56% expressed concern about the “Potential for inappropriate sharing of confidential information between those involved in the romance,” SOC’Y FOR HUM. RES. MGMT, *supra* 112, at 23, and 20% said that such inappropriate sharing of information had actually happened within the past five years. SOC’Y FOR RES. MGMT, *supra* 112, at 25.

127. Kelly Barron, *7 Things I Wish I Had Known Before I Slept With My College Professor*, XO JANE (Nov. 30, 2015), <https://www.xojane.com/sex/affair-with-college-professor> [<https://perma.cc/LA2J-WBZB>].

relationship, the professor's colleagues and the student's classmates are concerned about precisely these situations—sometimes justifiably so—with resulting harm to the quality of their experiences within the institution.

Moreover, it is important to remember that academic institutions can also be workplaces, and when professors engage in sexual behavior with students, it has the potential to affect their colleagues. Law professor Michele Goodwin describes an incident that profoundly affected her early career.¹²⁸ Barely three months into a new tenure-track position, following a pie-throwing contest at a law school fundraiser, she “observed a male colleague forcefully grab a student’s arm” and “lick the residue of cream . . . by twisting [her arm] behind her back, and placing his mouth on her as she walked by.”¹²⁹ Goodwin says: “I was mortified and by the expression on the student’s face—she was too. She looked outraged at first, and after realizing it was a professor, helplessness stretched across her face. My former colleague’s behavior was inappropriate and repulsive, stunning for its brazenness and lack of professionalism.”¹³⁰

Goodwin immediately reported the incident to her dean, but for unknown reasons the dean delegated the responsibility of dealing with the harasser to an associate dean, who, as Goodwin explains, “felt conflicted about confronting the offending colleague”—they played cards together on the weekends and their spouses knew one another.¹³¹ “Ultimately, the associate dean felt conflicted and ill equipped to separate his professional responsibilities from his personal relationship.”¹³² The “licker” eventually found out that Goodwin had reported him and unleashed a vitriolic series of weekly, and sometimes daily, all-faculty emails about Goodwin; the emails contained profanity and invective. As Goodwin explains, her conscientious reporting “resulted in ritualistic public torment and retaliation with virtually no reprieve. Not only did I think about leaving my law school, but also about abandoning law teaching altogether.”¹³³ While Goodwin is now a prominent and successful member of the legal academy, one wonders whether others who have spoken up in similar circumstances suffered consequences that made it impossible for them to similarly succeed.

128. Michele Goodwin, *Complicit Bias: Sexual Harassment and Communities that Sustain It*, HUFFINGTON POST (Dec. 11, 2017, 2:18 AM), https://www.huffingtonpost.com/entry/complicit-bias-sexual-harassment-and-communities-that_us_5a2e238de4b0d7c3f262244f [<https://perma.cc/8BTW-LV65>].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* Interestingly, what eventually stopped the harassment was an intervention by a “male colleague—one of the more conservative members of the faculty,” who said he believed Goodwin. *Id.*

Another example of the way sexual behavior involving an institutional power disparity can affect the workplace comes from an assistant professor in the humanities.¹³⁴ She describes a disturbing incident in which a tenured male full professor knocked on her door, bringing with him a female undergraduate student.¹³⁵ He announced that he was going to hug the undergraduate and needed “any woman to witness” it, and, before the professor could say anything, had “full-bear-hugged” the undergraduate student.¹³⁶ The assistant professor stated that this was inappropriate and, “in a joking tone to [defuse] the student’s obvious discomfort,” added that she could not “undo harassment for him by virtue of being a woman.” The tenured professor, “still touching the student, said: ‘But it sure makes this look friendly, doesn’t it?’” The incident made the junior untenured professor unwillingly complicit in an incident of sexual harassment for the student and contributed to a hostile environment for the professor herself. Such harms may be internal and psychological, but they are no less serious for that reason.

3. *Gender inequality*

Thus far I have described the harms that third-party men and women alike experience as the result of sexual behavior involving an institutional power disparity. But as both qualitative and quantitative evidence demonstrates, the sexualization of the work environment has especially damaging consequences for women.

Scholars of feminist legal theory and antidiscrimination law have demonstrated that sexualization of the work environment tends to harm women (and other underrepresented groups) more than men.¹³⁷ As one commentator puts it, “Engaging in widespread sexual favoritism

134. *Crowdsourc* Survey, *supra* note 33, at Dec. 1, 2017, 16:56:40.

135. *Id.*

136. *Id.*

137. See, e.g., CATHARINE MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); KERRY SEAGRAVE, *THE SEXUAL HARASSMENT OF WOMEN IN THE WORKPLACE, 1600 to 1993* (1994); BARBARA GUTER, *SEX AND THE WORKPLACE* 167 (1985) (“A work environment numerically dominated by men will be characterized by a sexual ambience and the expression of male sexuality. . . . When a woman enters such an environment, . . . she becomes the target of much of the ‘floating sexuality’ already present.”); Melissa S. Herbert, *CAMOUFLAGE ISN’T ONLY FOR COMBAT: GENDER, SEXUALITY, AND WOMEN IN THE MILITARY* 64, 122 (1998) (“Whether women are sexually harassed, denied assignments, or prohibited from performing particular jobs . . . The social and institutional arrangements . . . permit women to be viewed as poor substitutes for male soldiers.”); Myrtle P. Bell & Mary E. McLaughlin, *Sexual Harassment and Women’s Advancement: Issues, Challenges, and Directions*, in *ADVANCING WOMEN’S CAREERS: RESEARCH AND PRACTICE* 83, 89 (Ronald J. Burke & Debra L. Nelson eds., 2002) (“Work environments that are sexualized or unprofessional clearly would appear to increase the opportunity for sexual harassment and other harmful behaviors, regardless of the overall sex-ratio of the environment.”).

characterizes women as sexual objects” at work because it “communicate[s] the message that the way for women to get ahead in the workplace is to engage in sexual conduct or that sexual solicitations are a prerequisite to their fair treatment.”¹³⁸ The same is true at school. M. Cynara Stites explains that when women become “aware that sexual relationships have intruded into faculty-student relationships, each woman student may experience conflicts between her gender role as a sexual woman and her student role as a competent student.”¹³⁹ As another researcher explains: “Once a student is propositioned [by a professor], all her future interactions with, and evaluation by, that professor are tainted and suspect, whether a promise or threat was ever made or carried out.”¹⁴⁰

The disparate harms of sexualization are not fictions invented via gender stereotyping. Extensive social science research has shown that women’s intellectual performance suffers when they are sexualized. For example, one study showed that simply being made aware of their bodies by trying on a swimming suit causes women, but not men, to experience more shame about their bodies and to perform less well on a math test.¹⁴¹ Kimberly Yuracko describes four key effects of “the impact of social sexualization on women”:

First, placing women in physically revealing outfits causes them to focus additional energy and attention on their bodies. Second, when women focus additional energy on their bodies, they focus less energy on other tasks, resulting in diminished intellectual performance. Third, women’s self-objectification and subsequent diminished intellectual performance may occur even if women are not in fact being sexually viewed and evaluated by men. Simply by being instructed to wear certain kinds of clothes, women can be made to focus additional energy on their bodies at the expense of other tasks even if no other individual is assessing or even viewing their bodies in the revealing clothing. Finally, self-objectification is harmful for women in ways that it is not for men.¹⁴²

138. Best, *supra* note 30, at 217–18.

139. M. Cynara Stites, *What’s Wrong With Faculty-Student Consensual Sexual Relationships?*, in *SEXUAL HARASSMENT ON COLLEGE CAMPUSES* *supra* note 28, at 131.

140. Phyllis L. Crocker, *An Analysis of University Definitions of Sexual Harassment*, 8 *SIGNS* 696, 704 (1983).

141. Barbara L. Fredrickson et al., *That Swimsuit Becomes You: Sex Differences in Self-Objectification, Restrained Eating, and Math Performance*, 75 *J. PERSONALITY & SOC. PSYCHOL.* 269 (1998). Other research has found a similar decrease in intellectual performance when women experience self-objectification—that is, viewing one’s self, particularly the body, from a third-person perspective. See, e.g., Diane M. Quinn et al., *The Disruptive Effect of Self-Objectification on Performance*, 30 *PSYCHOL. WOMEN Q.* 59 (2006).

142. Kimberly A. Yuracko, *Private Nurses and Playboy Bunnies: Explaining Permissible Sex*

The harms that Yuracko describes arise when those in power sexualize institutional environments such as workplaces and schools. On campus, for example, “When a key academic, who should be a mentor, shows a keen interest in a student’s body, it often sends a signal that their intellect is of secondary importance.”¹⁴³ Research suggests that this message particularly affects women, regardless of whether they are the target of the professor’s sexual attention or merely a bystander to the professor’s attention to others.¹⁴⁴

And even when women’s actual performance does not suffer, a sexualized institutional environment invites others to undermine women’s achievements. In an environment rampant with sexual relationships in the context of institutional power disparities, a woman who receives a good grade in a class or a coveted promotion at work is subject to snide comments, however unwarranted: during my experience as a student and as an employee in various contexts, I have seen many women on the receiving end of comments like “you only got that promotion because the boss thinks you’re cute”; “what did you have to do to get that grade?” In such an environment, women who do well are presumed to have relied on their sexuality, not their intellect or work ethic.¹⁴⁵ As one commentator explains in the academic context: “Even if academic evaluations are kept completely independent of personal involvements, it is likely that there will be an appearance of bias in the eyes of other students.”¹⁴⁶ Importantly, this reaction from peers may occur regardless of whether a woman is actually in a sexual relationship with a boss or professor, or wrongly rumored to be. As one woman recounts:

My postdoc adviser married his PhD student. By the time he was supervising me, he had been divorced. I was constantly accused by colleagues and other[s] in the department of having a relationship with him any time I went to his office or had to travel with him, since he was ‘known to date the women he supervised.’ My adviser never harassed me. Not once. Nor did he ever make any advances toward

Discrimination, 92 CALIF. L. REV. 147, 209 (2004).

143. Fearn, *supra* note 64.

144. *See, e.g.*, Quinn, *supra* note 141, at 62. A different article would be required to explain *why* women are affected differently by sexualization—differences in the way men and women are socialized are likely a large part of the explanation—but the empirical fact relevant to this Article is that, in the aggregate, they *are* socialized differently.

145. *Cf.*, Amy Gallo, *How to Approach an Office Romance (and How Not To)*, HARV. BUS. REV. (Feb. 14, 2019), https://hbr.org/2019/02/how-to-approach-an-office-romance-and-how-not-to?utm_campaign=hbr&utm_medium=social&utm_source=twitter [<https://perma.cc/67ZS-CLY7>] (“Some colleagues may think you’re giving your romantic partner preferential treatment or vice versa.”).

146. Fearn, *supra* note 64; *see also* Stites, *supra* note 139, at 120–23.

me. But, my professional reputation suffered the consequences of his sexual reputation. Dating PhD students when you are [a] professor has long lasting consequences for a large sphere of women.¹⁴⁷

Instances such as this belie the notion that sexual behavior within the context of an institution is merely a matter between two consenting adults. As the graduate student in the previous anecdote demonstrates, the repercussions for third parties can be both prolonged and severe. As Sue Rosenberg Zalk observes: “A popular retort to condemnation of sexual liaisons between faculty and students makes references to the perception that not infrequently it is the female student who is ‘on the make’ and seduces the professor.”¹⁴⁸ Men frequently express anger that women who sleep with their professors have access to an unfair advantage.¹⁴⁹

Alternatively, a sexualized institutional environment may normalize certain kinds of sexual behavior. A number of commentators have noted that when one professor has sex with a student—even if their relationship is consensual—that incident changes the dynamic within the institution.¹⁵⁰ That same professor may feel more empowered to approach other students in the future. Or, if the professor experiences no negative repercussions, it communicates to his colleagues that they are free to engage in the same behavior. A ripple effect occurs, in which a non-trivial number of professors believe it is appropriate to view the students as part of their dating pool, and a non-trivial number of students believe that professors are motivated not only by a desire to teach them, but also by a desire to have sex with them.

Relatedly, a sexualized institutional environment desensitizes members of the institution to various forms of sexualized abuse. Workers who see a supervisor casually engage in sexual relationships with multiple subordinates may view it as license to cross other boundaries.¹⁵¹ They may assume the institution has a more relaxed culture when it comes to sexual harassment; they may feel more entitled to tell inappropriate stories; they may feel empowered to ask for dates aggressively and repeatedly.¹⁵² These

147. *Crowdsourc*e Survey, *supra* note 33, at Jan. 30, 2017, 17:29:39.

148. Sue Rosenberg Zalk, *Men in the Academy: A Psychological Profile of Harassers*, in *SEXUAL HARASSMENT ON COLLEGE CAMPUSES* *supra* note 28, at 92.

149. DZIECH & WEINER, *supra* note 28, at 60–62. Consider the following statement from a college student:

My English prof really likes the women. You don’t have to be a genius to figure that out because he makes it obvious in class. To tell you the truth, what really pisses me off isn’t him getting off on the ladies. We all do that. I don’t like is that they know it and use it to get the grades. How am I going to compete with that?

Id.

150. *See, e.g.*, Stites, *supra* note 139, at 115–33.

151. DZIECH & WEINER, *supra* note 28 at 87.

152. *Id.*

harms do not fall on women alone, but they disproportionately affect women.¹⁵³

Reinforcing hierarchies by tolerating sexual relationships involving an institutional power disparity also harms the professional trajectory of women in workplaces or academic fields where women are underrepresented. One tenure-track faculty member recounts the following incident:

Shortly after I had started my [tenure track] post, I was out for drinks with a few members of the department. The head of department told a story about a professor in the department and a postgraduate student. This prof had touched this student inappropriately, and she had complained. But the HOD [head of department] then said that this student had previously had a (consensual) relationship with another member of faculty, as if to imply that her complaint about inappropriate touching could therefore not be taken seriously. The whole thing was relayed like a big joke about this prof—who is, for good reason, the butt of many departmental jokes—and not like the serious incident it really should have been treated as.¹⁵⁴

The faculty member describes how the incident affected her:

The way this story was told to me made me lose confidence in my HOD. I felt that, if something happened to me, I couldn't trust him to treat it sensitively. I also eventually stopped going to these regular departmental social events, because I felt really uncomfortable with the tone of some of the conversations.¹⁵⁵

The incident certainly exemplifies many of the problematic workplace consequences for individuals that I described in the previous section, but it also reveals something deeper and more structural. When third parties to sexual behavior become distrustful of and alienated from powerful people within their workplaces—something more likely to happen to women, given that many fields are still predominantly male—they often fail to flourish. This, in turn, can affect the likelihood of alienated women faculty members achieving greater power themselves. When a woman such as this faculty member distrusts the head of her department and stops attending departmental social events, it is far less likely that she will become powerful

153. Bell & McLaughlin, *supra* note 138, at 83 (“[A]lthough researchers acknowledge that men may be targets of sexual harassment and that same-sex harassment occurs, sexual harassment is most commonly perpetrated by men against women.”); *see also id.* at 84 (discussing the harms women experience due to harassment).

154. *Crowdsourcing Survey*, *supra* note 33, at Dec. 2, 2017, at 3:51:37.

155. *Id.*

within her department, or even the head of it herself.

4. *Institutional harm*

Institutions are more than just the aggregate of the individuals who work there. Sexual relationships involving an institutional power disparity harm the institution itself. Institutions have purposes. Indeed, we often speak of an institution's "mission." Strong institutions remain true to their missions and succeed in advancing toward their goals.¹⁵⁶ When other interests compete or interfere with an institution's mission, the institution is weakened and becomes less effective at fulfilling its mission, both in absolute terms and in relation to other institutions.

The precise harm varies depending on the nature of the institution. In the wake of "unending clergy abuse revelations,"¹⁵⁷ the Catholic Church demonstrates how sexual behavior can have devastating consequences for institutions.¹⁵⁸ Scandals have cost the church over three billion dollars, and the church's approval ratings have plummeted.¹⁵⁹ Some wonder whether the church will ever fully recover, or even survive.¹⁶⁰

When a workplace is also a for-profit business, sexual behavior involving institutional power disparities can affect one aspect of the institution's mission: the business's profits. One need only examine how companies' reputations suffer after sexual misconduct at the company surfaces. At Uber, for example, after a series of sexual misconduct allegations and other evidence of a sexist company culture, Uber's value dropped ten billion dollars and stock prices fell by fifteen percent.¹⁶¹ One

156. See generally Robert Zemsky et al., *Today's Colleges Must Be Market Smart and Mission Centered*, CHRON. HIGHER EDUC., July 15, 2005, <https://www.chronicle.com/article/Todays-Colleges-Must-Be/35802> [<https://perma.cc/VT58-42E4>].

157. Virginia Alvino Young, *For the Catholic Church, A Year of Unending Clergy Abuse Revelations*, NAT. PUB. RADIO (Dec. 26, 2018, 5:01 AM), <https://www.npr.org/2018/12/26/679493754/for-the-catholic-church-a-year-of-unending-clergy-abuse-revelations> [<https://perma.cc/CRX2-WNXT>].

158. While the primary problem with sexual abuse by clergy is—obviously—that it is morally repugnant, I focus for purposes of this Article on a narrow corner of the fallout from the abuse: the consequences for the institution of the church itself. This focus is not meant to ignore the experience or diminish the pain of survivors of such abuse.

159. PEW RESEARCH CTR., *GROWING SHARE OF U.S. CATHOLICS SAY FRANCIS IS "TOO LIBERAL," "NAÏVE"* (2018), http://www.pewforum.org/2018/03/06/pope-francis-still-highly-regarded-in-u-s-but-signs-of-disenchantment-emerge/pf_03-06-18-pope-00-01/ [<https://perma.cc/TBV9-3MDU>]; Tom Gjelten, *The Clergy Abuse Crisis Has Cost the Catholic Church \$3 Billion*, NAT. PUB. RADIO (Aug. 18, 2018, 5:00 AM), <https://www.npr.org/2018/08/18/639698062/the-clergy-abuse-crisis-has-cost-the-catholic-church-3-billion> [<https://perma.cc/M29V-T6C5>].

160. *Can the Catholic Church Survive Another Sex Abuse Scandal?*, WBUR (Aug. 21, 2018), <https://www.wbur.org/onpoint/2018/08/21/catholic-church-pope-sex-abuse-pennsylvania> [<https://perma.cc/4KTX-4L6E>].

161. Anita Balakrishnan, *Scandals May Have Knocked \$10 Billion Off Uber's Value, a Report Says*, CNBC, (Apr. 25, 2017, 4:03 PM), <https://www.cnbc.com/2017/04/25/uber-stock-price-drops->

commentator said: “[W]hat Uber desperately needs is a reputable leader who can right the ship and begin to dismantle the rule-breaking, sexist culture that grew up around [former CEO] Mr. Kalanick.”¹⁶² While Uber’s troubles were not limited to third-party harms, the company demonstrates how the perception of a business as sexist or frat-like can affect its value in multiple domains, some economic, others oriented toward justice or philanthropy.¹⁶³ Similar financial fallout affects the companies owned by Harvey Weinstein¹⁶⁴ and Steve Wynn.¹⁶⁵ Again, while the abuses by Weinstein and Wynn involve not only third-party effects, such harms magnified the effect of the sexual abuse within the institution and the subsequent public condemnation.¹⁶⁶

Many would argue that the purpose of business institutions is not only to make the largest profit possible. Rather, as scholars of corporate social responsibility have explained, even for-profit corporations have a variety of missions.¹⁶⁷ Many explicitly promote gender equality.¹⁶⁸ Others directly address sexual assault and abuse.¹⁶⁹ When an institution that addresses these worthy aims nonetheless fails to address an institutional culture in which sexual behavior involving an institutional power disparity is rampant, that failure affects the institution’s credibility in carrying out its mission.

With academic institutions, part of the mission is to advance knowledge in the field. Universities also provide broad and deep education for institutional citizens. Under normal circumstances, professors communicate

amid-sexism-investigation-greyballing-and-apple-run-in--the-information.html [https://perma.cc/5DJH-VERP].

162. Laurent Belsie, *Chaos at Uber Reverberates in Industry Known for ‘Frat-Boy’ Culture*, CHRISTIAN SCIENCE MONITOR, (June 14, 2017), <https://www.csmonitor.com/Business/2017/0614/Chaos-at-Uber-reverberates-in-industry-known-for-frat-boy-culture> [https://perma.cc/2GAN-WZ2G].

163. Marina v. N. Whitman, *Corporate America Needs to Get Back to Thinking About More Than Just Profits*, CONVERSATION (Feb. 14, 2018, 6:36 AM), <https://theconversation.com/corporate-america-needs-to-get-back-to-thinking-about-more-than-just-profits-84644> [https://perma.cc/6SDE-3ASJ].

164. Jackie Wattles & Brian Stelter, *Weinstein Company Sale in Jeopardy After New York Attorney General Sues*, CNN MONEY (Feb. 11, 2018, 2:03 AM), <http://money.cnn.com/2018/02/11/media/new-york-attorney-general-harvey-weinsten/index.html> [https://perma.cc/DUX3-MBC3].

165. Chris Isidore, *Steve Wynn Allegations Punish His Company’s Stock*, CNN MONEY (Feb. 6, 2018, 12:01 AM), <http://money.cnn.com/2018/02/06/news/companies/steve-wynn-investors/index.html> [https://perma.cc/9TJX-VBKL].

166. See, e.g., Cantalupo & Kidder, *supra* note 28, at nn.86–106 (collecting data on the cost of sexual harassment to workplaces and educational institutions).

167. See, e.g., Michael R. Siebecker, *A New Discourse Theory of the Firm After Citizens United*, 79 GEO. WASH. L. REV. 161, 165 (2010) (“[C]orporations now make social and political concerns part of their basic business plans.”).

168. See, e.g., Charu Sharma, *10 Companies Prioritize Gender Equality in the Workplace*, HUFFINGTON POST (Jan. 29, 2017, 5:27 PM), https://www.huffingtonpost.com/charu-sharma/10-companies-prioritize-g_b_14482246.html [https://perma.cc/78E4-RPCR].

169. See, e.g., Daniel Hemel & Dorothy S. Lund, *Sexual Harassment and Corporate Law*, 118 COLUM. L. REV. 1583 (2018).

their expertise to their students, better preparing them to function in a diverse society. Sexual relationships between professors and students subvert these goals. As Rebecca Schuman summarizes in discussing the academic context, “It’s not just a matter of two consenting adults’ hearts wanting what they want. . . . [These relationships] also affect the dynamics of departments, entire fields, and the very act of academic mentorship altogether.”¹⁷⁰

In particular, sexual relationships between professors and students affect the development of the next generation of academics. When professors engage in sexual relationships with their students, they alienate students of all genders for a variety of reasons. Some may believe the professor engages in favoritism and lose respect accordingly; others may avoid interacting with the professor because they do not wish the interaction to turn sexual. Moreover, when multiple professors in a particular department engage in sexual relationships with students, the perception may develop that the field is a hunting ground filled with sexual predators, or that engaging in sexual relationships is the only way to succeed in the field.¹⁷¹ In short, by engaging in sexual relationships with students, professors drive potential future contributors away from their fields. Some, for example, have linked the problem of sexual harassment within the field of philosophy with the fact that only seventeen percent of full-time philosophy faculty are women.¹⁷² Indeed, as Schuman notes, concern about faculty-student relationships may have the perverse consequence of encouraging some faculty members to only supervise students of the same sex.¹⁷³

Finally, the gendered harms discussed in Section II.A.3 are *also* institutional harms. Gender equality is an independent good within institutions, both as a matter of equality and as a matter of quality. To these ends, sexual relationships within institutions impede progress toward gender equality. This harms gender equality at both the institutional and social level. Research has demonstrated that institutions where women are well-represented function more effectively and are more profitable: for example, one study of 21,980 publicly traded companies in ninety-one countries found that a profitable firm whose leadership positions were comprised of at least thirty percent women “could expect to add more than one percentage point to its net margin compared with an otherwise similar

170. Rebecca Schuman, *Hands Off Your Grad Students!*, SLATE (July 6, 2014, 11:45 PM), <https://slate.com/human-interest/2014/07/professors-and-advisers-having-sexual-relationships-with-grad-students-hurts-everyone.html> [<https://perma.cc/S4LZ-5Z94>].

171. An informal survey of my own acquaintances suggests that between 10 and 30% of the male faculty at most law schools have openly dated students currently enrolled at the law school.

172. Saul, *supra* note 37.

173. Schuman, *supra* note 170.

firm with no female leaders.”¹⁷⁴ Gender equality is also instrumentally important to many institutional stakeholders.¹⁷⁵ Some companies have recently demanded that their business partners commit to goals relating to gender diversity, as well as other forms of diversity.¹⁷⁶ Sexual relationships involving an institutional power disparity perpetuate and reinforce existing gender dynamics—in part by keeping women from achieving powerful positions in institutions; in part by driving women away from the institutions themselves.

In short, sexual relationships in the context of an institutional power disparity cause serious harms to the institution. Institutions that fail to consider such harms risk compromising their mission. These harms, as well as those I have detailed in the other sections of this Part, amply demonstrate the injuries to third parties and institutions caused by sexual relationships involving an institutional power disparity.

B. Third-Party Harm as a Response to Criticisms

For as long as advocates have attempted to regulate sexual behavior involving an institutional power disparity, opponents have critiqued their efforts. Some claim that sexual behavior within institutions is a source of empowerment for individuals in subordinate positions, particularly women.¹⁷⁷ These critics have worried about the harm to “the best and most meaningful pedagogical relationships” that would allegedly result from proscribing relationships between professors and students.¹⁷⁸

Other opponents of regulation have expressed concern about the effects of a wholly desexualized institutional environment.¹⁷⁹ Sexual behavior itself

174. Marcus Noland, Tyler Moran & Barbara Kotschwar, *Is Gender Diversity Profitable? Evidence from a Global Survey* (Peterson Inst. for Int’l Econ., Working Paper No. 16-3, Feb. 2016) at 1, 8; see also Alison M. Konrad & Vicki W. Kramer, *How Many Women Do Boards Need?*, HARV. BUS. REV. (Dec. 2006) (“A clear shift occurs when boards have three or more women.”).

175. See, e.g., About, THIRTY PERCENT COALITION, <https://www.30percentcoalition.org/who-we-are> [<https://perma.cc/9ASN-QLGZ>] (describing organizational mission to increase gender diversity on corporate boards).

176. See, e.g., Ellen Rosen, *Facebook Pushes Outside Law Firms to Become More Diverse*, N.Y. TIMES, Apr. 2, 2017, <https://www.nytimes.com/2017/04/02/business/dealbook/facebook-pushes-outside-law-firms-to-become-more-diverse.html> [<https://perma.cc/GK36-EFQ8>]; Debra Cassens Weiss, *HP General Counsel Tells Law Firms to Meet Diversity Mandate or Forfeit Up to 10% of Fees*, ABA J., Feb. 15, 2017, http://www.abajournal.com/news/article/hp_general_counsel_tells_law_firms_to_meet_diversity_mandate_or_forfeit_up [<https://perma.cc/U4CP-NMBA>]; Mark A. Cohen, *Corporate Departments Are Taking the Lead in Creating a More Diverse Legal Industry*, FORBES, Mar. 27, 2017, <https://www.forbes.com/sites/markcohen/2017/03/27/corporate-departments-are-taking-the-lead-in-creating-a-more-diverse-legal-industry/#60951fa049f9> [<https://perma.cc/3K7E-AVLP>].

177. See generally GALLOP, *supra* note 83.

178. Fearn, *supra* note 64 (quoting GALLOP, *supra* note 83).

179. See, e.g., Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1794–

is not the problem, these critics argue. Rather, the problem arises when sexual behavior within an institution results in inequality.

Yet another strand of opposition has come from those who worry that regulation will result in over-regulation of private and consensual sexual behavior. Such over-regulation, critics argue, infringes on sexual autonomy. Some such critics have decried “sexual paranoia” on campus.¹⁸⁰ A related incarnation of the critique is often framed as the argument that the #MeToo movement has gone too far.¹⁸¹

Yet defenders of sexual behavior involving an institutional power disparity focus exclusively or almost exclusively on the parties to the sexual behavior. As a result, they fail to engage serious harms to third parties and institutions documented in Section II.A. I will demonstrate in this section that the failure to consider third-party harm renders these critiques inapplicable or unconvincing.

1. Empowerment arguments

Some defend sexual behavior involving an institutional power disparity as empowering, liberating, and professionally enhancing. One such proponent, Jane Gallop, openly acted on this belief in her role as a professor until two students accused her of sexual harassment.¹⁸² The university found that she violated its consensual relationship policy with respect to one of the students, who alleged a range of behavior culminating in a public kiss at a lesbian bar during a conference.¹⁸³

In a book written in the aftermath of these proceedings Gallop argues that sexual behavior involving an institutional power disparity is not only unobjectionable, but also an affirmative good. She claims, first, that such relationships are empowering for students. Her arguments are rooted in her own experiences. She discloses that, while a student, she had sex with two of her male professors.¹⁸⁴ She says: “To be honest, I think I wanted to get them into bed in order to make them more human, more vulnerable. These two had enormous power over me: I don’t mean their institutional position

95 (1997).

180. See, e.g., LAURA KIPNIS, UNWANTED ADVANCES: SEXUAL PARANOIA COMES TO CAMPUS (2017).

181. See, e.g., Bari Weiss, *Aziz Ansari Is Guilty. Of Not Being a Mind Reader.*, N.Y. TIMES, Jan. 15, 2018 <https://www.nytimes.com/2018/01/15/opinion/aziz-ansari-babe-sexual-harassment.html>; [<https://perma.cc/ES76-XRHZ>]; Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/> [<https://perma.cc/3BW9-B7CP>].

182. GALLOP, *supra* note 83, at 1, 10, 81–101.

183. *Id.* at 77–80.

184. *Id.* at 41.

but their intellectual force. . . . I wanted . . . to feel my own power in relation to them.”¹⁸⁵ With these goals in mind, Gallop found the ensuing sexual experiences satisfying. “Screwing these guys definitely did not keep me from taking myself seriously as a student . . . Seducing them made me feel kind of cocky and that allowed me to presume I had something worth saying.”¹⁸⁶ While she does not think her positive experience is universal, she also does not believe herself an outlier: “Although I am aware that not all such liaisons are so empowering for the student, I also know that my experience was far from unique. Lots of other smart, ambitious young women, many of them likewise feminist academics today, have felt powerful because they seduced their teachers.”¹⁸⁷ Gallop concludes: “I balk at the idea that teacher-student sex is synonymous with harassment. I remember the feminist student I was, what I wanted and what I didn’t want, and I remember that it was precisely my sense of knowing what I did and didn’t want that made me feel strong.”¹⁸⁸

Moreover, Gallop argues that sexuality enhances pedagogy and is perhaps even essential to it. Gallop links the numerous sexual relationships she has had over the years with students enrolled in her classes to her pedagogy: “Telling teachers and students that we must not engage each other sexually ultimately tells us that we must limit ourselves to the confines of some restricted professional transaction, that we *should not treat each other as human beings*.”¹⁸⁹ If she were required to limit her interactions with students that crossed into sexual territory, “I would be forced to turn away precisely those students most eager to work with me.”¹⁹⁰ She concludes: “If schools decide to prohibit not only sex but ‘amorous relations’ between teacher and student, the ‘consensual amorous relation’ that will be banned from our campuses might just be teaching itself.”¹⁹¹ In short, Gallop sees benefits to “tricky,” “charged” personal relationships with students.¹⁹² And Gallop’s views extend both to institutions of higher education as places of education and as places of work: “A good conference is likely to be an eroticized workplace.”¹⁹³

I have no reason to doubt that Gallop enjoyed her experiences with her

185. *Id.* at 42.

186. *Id.* at 42.

187. *Id.* at 43.

188. *Id.* at 39.

189. *Id.* at 51. Indeed, Gallop’s close interactions with students are apparently not only sexual. She says: “Some of my best friends are students.” *Id.* at 53.

190. *Id.* at 56.

191. *Id.* at 57. According to Gallop, even the kiss with the student that led to the sexual harassment complaint had a pedagogical function: as Gallop says, “I thought of the kiss as very much part of the conference, a sort of advance commentary on her paper the next day.” *Id.* at 91.

192. *Id.* at 54–55.

193. *Id.* at 83.

own professors; we already know that some students enjoy such relationships because some faculty-student sexual relationships culminate in happy marriages—or, at least, relatively long-lasting marriages. But even if the student in some faculty-student sexual relationships enjoys intellectual and psychological benefits, that does not require embracing such relationships as a general principle. The question, rather, is whether the benefits to the small subset of students who engage in consensual sexual behavior with faculty and benefit from it outweigh the harms of such relationships to all the other students, to other third parties, and to institutions. Even assuming for the sake of argument that some women may be empowered by engaging in sexual behavior involving an institutional power dynamic, or that sexual behavior enhances some pedagogy,¹⁹⁴ this argument overlooks evidence demonstrating that the overall consequences for women are negative when the calculus takes account of third parties.¹⁹⁵ While Gallop describes benefits resulting from her own experience and the experiences of a handful of others, she does no comparative analysis to explain how those benefits outweigh the serious harms I have catalogued in Section II.A. The purported benefits to linking sexuality and pedagogy that Gallop enumerates thus fail to address the many harms to third parties that result from sexual behavior involving professors and students, range from sexual favoritism to reduced trust between students and professors to the distraction of a sexualized environment.¹⁹⁶

Ultimately, Gallop's arguments simply fail to engage the third-party harms I have catalogued in Section II.A. She has literally nothing to say about the other students in the classes she taught while she was engaged in a sexual relationship with one of their classmates. Moreover, while Gallop says she is confident in her ability to grade her student sexual partners objectively, research offers reason to be skeptical. We are rarely the best judges of our own susceptibility to bias.¹⁹⁷

When Gallop does allude to third parties, her comments, perhaps

194. My own seven years in college and law school, coupled with my decade of experience in the legal academy, leads me to disagree strongly with the assertion that introducing sexuality into one's pedagogy *ever* enhances it. Proving this absolute, however, is unnecessary to my argument here.

195. *See supra* Section II.A.3.

196. *See supra* Part II.A. Moreover, Gallop's own account suggests that her pedagogy might be less effective than she herself perceives. Her student evaluations say that she is "authoritarian," GALLOP, *supra* note 83, at 20, and "abuse[s] her power." *Id.* at 21. While student evaluations are not always the best overall measure of pedagogical success, *see generally* Kristina M. C. Mitchell & Jonathan Martin, *Gender Bias in Student Evaluations*, 51 PS: POL. SCI. & POL. 648 (2018), her students' comments echo concerns about sexual relationships involving an institutional power disparity.

197. *See, e.g.*, Katherine Hansen et al., *People Claim Objectivity After Knowingly Using Biased Strategies*, 40 PERSONALITY & SOC. PSYCHOL. BULL. 691, 691 (2014) ("[N]ot only did participants' sense of personal objectivity survive using a biased strategy, it grew stronger.").

inadvertently, reveal the very harms I have raised in this Article. She mentions a joke she told at a conference—“graduate students are my sexual preference”—and acknowledges that the joke fell flat. Further, she later learned that students saw her differently after her comment, which caused some students (perhaps unsurprisingly) to think she was trying to sleep with them.¹⁹⁸ She also references third parties while discussing the kiss with her graduate student,¹⁹⁹ but focuses entirely on the utility of the third parties to her, rather than acknowledging the effect of her behavior on them.²⁰⁰ She says that the kiss was performative, and the whole point was that it took place in front of other people.²⁰¹ But she does not consider the fact that some of the third parties might have been unwilling to be sexualized; that they might have been concerned about the effect on their careers of a refusal to participate in sexual behavior; that they might have been concerned about possible favoritism toward the student she kissed; that they might have been concerned about the atmosphere at the conference; that they might have been worried about how her “performance” affected the reputation of her colleagues or her institution.²⁰² Third parties regularly express all of these concerns about sexual behavior between faculty and students, and Gallop’s refusal to engage these concerns as a possible objection to the benefits she sees is a refusal to acknowledge that sexual behavior between faculty and students has the tangible, material consequences for third parties that I have articulated at length in Section II.A.

Few other than Gallop have gone so far as to argue that sexual behavior in the context of an institutional power disparity is affirmatively good. Catherine Hakim defends sexuality in institutional environments, particularly in the workplace, arguing that what she calls “erotic capital”—one’s sexual charm²⁰³—“exposes one aspect of life where women undoubtedly have an advantage over men.”²⁰⁴ She argues that “radical feminism has gone down a dead-end by adopting . . . ideas that belittle women’s allure”²⁰⁵ She explains that such “erotic capital” provides an advantage in the workplace:

In white collar jobs, the ability to be an agreeable colleague, easy to talk to, charming and friendly, cheerful and cooperative, is a great

198. *Id.* at 86–87.

199. *Id.* at 89–91.

200. *Id.* at 90–92.

201. *Id.*

202. *See supra* Section II.A.

203. CATHERINE HAKIM, *EROTIC CAPITAL* 1–2 (2011).

204. *Id.* at 6.

205. *Id.* at 3.

asset. These skills are especially important for managers and supervisors, people dealing with clients and negotiations. Such talents merge into the social skills that make someone an attractive person in private life and can include the ability to flirt in a relaxed, nonthreatening way, without crossing the line into sexual harassment.²⁰⁶

Some of what Hakim describes is normal collegial behavior. But some of it—the allegedly “relaxed, non-threatening” flirting, for example—may well not be. What feels relaxed and non-threatening to the boss may feel very different to a subordinate. Hakim does not explicitly advocate that people should have sex with their colleagues, whether more or less powerful. But she does argue that indiscriminately sexualizing the work environment—regardless of who does it, and to whom—is a good thing.²⁰⁷

Again, my concern lies with the third parties and institutions who suffer from sexual behavior in the context of an institutional power disparity. These third parties would suffer collateral damage if people began to do what Hakim ostensibly thinks they should do. Women who for whatever reason do not want to use their sexuality—or “erotic capital”—to advance in the workplace would be faced with an unappealing decision. Either they would have to put aside their personal preferences about how to deploy their own sexuality or else they would face possible damage to their career.²⁰⁸ Moreover, even though Hakim does not explicitly acknowledge third parties, her belief that women can gain an advantage by using their sexuality implies harm to third parties. After all, for sleeping to the top to be effective, the person doing the sleeping must be getting an advantage over someone.

Not every instance of sexual behavior in the workplace or university causes harm. But in order to evaluate the harm of a *regime* that allows such behavior, we cannot focus only on the participants in the behavior. Rather, such behavior sets a standard that creates both costs and benefits. To evaluate such behavior rationally, we need to consider the effect of this sexualization on third parties and institution. Focusing solely on the way

206. *Id.* at 172.

207. *Id.* Although my focus, again, is on third parties to sexual behavior involving an institutional power disparity, it is worth noting that sexual behavior within institutions does not seem to have remedied the profound sexual inequality in workplaces and academic institutions. As Erin Ryan puts it, “All that sleeping toward the top, and yet, still so few women up there at the top.” Erin Gloria Ryan, *How #MeToo Exposes the Myth of Sleeping Your Way to the Top*, DAILY BEAST (Dec. 29, 2017, 5:00 AM), <https://www.thedailybeast.com/how-metoo-exposes-the-myth-of-sleeping-your-way-to-the-top> [https://perma.cc/9YL6-5R4G].

208. I and other scholars have discussed the double bind that outgroup members face in the workplace and in other institutions. See, e.g., Nancy Leong, *Identity Entrepreneurs*, 104 CALIF. L. REV. 1333, 1346–67 (2016).

sexual behavior may empower or advantage its participants fails to engage these other important issues.

2. *Desexualization arguments*

Another critique of regulation of sexual behavior involving an institutional power disparity is that desexualizing institutions is a net loss. Vicki Schultz has articulated the general concerns associated with “desexualizing” or “sanitizing” the workplace in a seminal pair of articles.²⁰⁹ Schultz argues that proponents of strong measures to combat sexual harassment in the workplace wrongly emphasize sexuality as inherently problematic rather than focusing on the structural and other institutional barriers that actually create and reinforce gender hierarchy in the workplace.²¹⁰ For example, she explains, “courts have tended to single out sexual advances and other conduct of a sexual nature for disapproval, and have tended to exonerate even serious patterns of sexist misconduct that could not be easily characterized as sexually motivated.”²¹¹ She worries that an unusual coalition of judges, feminists, and managers²¹² are wrongly preoccupied with eliminating all traces of sexuality from the workplace, “even benign forms of sexual conduct that are not linked to sex discrimination on the job.”²¹³ Instead, Schultz argues, reformers should focus on dismantling the various factors that give rise to inequality in the first place, such as underrepresentation of women in some professions or segregation of women within particular work environments.²¹⁴ Such conditions, she argues, cause much more harm than a few sexual jokes or remarks.²¹⁵

Moreover, purging sexuality from the workplace actually harms workers’ well-being. Schultz writes: “Workplace sexuality isn’t solely a source of danger and disruption—it’s also a source of vitality, creativity, and power. For many people, the sexual energy that work generates will be one of the most valued aspects of their work lives—one we should not

209. Schultz, *The Sanitized Workplace*, *supra* note 27, at 2136–63; Schultz, *Reconceptualizing Sexual Harassment*, *supra* note 27. For related critiques of a desexualized workplace, see, for example, Anna C. Camp, *Cutting Cupid Out of the Workplace: The Capacity of Employees’ Constitutional Privacy Rights to Constrain Employers’ Attempts to Limit Off-Duty Intimate Associations*, 32 HASTINGS COMM. & ENT. L.J. 427, 430–31 (2010); Sharon Rabin-Margalioth, *Love at Work*, 13 DUKE J. GENDER L. & POL’Y 237, 252–53 (2006).

210. Schultz, *The Sanitized Workplace*, *supra* note 27, at 2067.

211. *Id.* at 2078.

212. *Id.* at 2089.

213. *Id.* at 2087.

214. *Id.* at 2141–44.

215. *Id.* at 2145–61.

sacrifice lightly.”²¹⁶

Schultz’s research is largely convincing. She offers compelling support for the claim that courts often focus on sexuality when they should be focusing on sex *discrimination*.²¹⁷ She is also persuasive that eradicating all sexual expression in the workplace is neither necessary nor desirable.²¹⁸ Some sexual behavior in the workplace (or, extrapolating from Schultz’s work, in other institutions) is harmless and even beneficial: for example, in most instances consensual sexual relationships *between peers* need not be regulated, such as relationships between two associates at a law firm, or between classmates at a university. And Schultz correctly observes that many *non*-consensual workplace sexual relationships are already addressed by Title VII law,²¹⁹ although existing law is often too narrow in scope and presents practical obstacles to plaintiffs’ recovery.²²⁰

Schultz’s research addresses the workplace in general: she does not focus specifically on the considerable effect on third parties that results from sexual behavior involving an institutional power disparity. This Article therefore aims to show that Schultz’s generally compelling reservations about desexualizing the workplace should not apply to the specific subset of sexual behavior within workplaces and other institutions that involves a power disparity between the participants.

As I explained in Part II.A, this subset of workplace sexual behavior harms third parties and reinforces workplace inequality. Relationships between bosses and subordinates—even if fully consensual and enjoyable for the participants—raise many third-party concerns. They risk favoritism, disrupt the workplace dynamic, disparately sexualize female workers, and compromise the institutional mission.

Concerns about desexualization of the workplace focus almost exclusively on the consent of the parties involved. When it comes to sexual behavior involving an institutional power disparity, then, this analysis does not take account of situations that affect third parties and institutions themselves. For example, Schultz is concerned that some companies design policies “to ensure that even fully consensual interactions not directed at the complainant do not offend a third party”²²¹ When such consensual sexual behavior involves an institutional power disparity, however, the concern for third parties is considerably greater. Even if conduct is

216. *Id.* at 2166.

217. *Id.* at 2078.

218. *Id.* at 2139–52.

219. *Id.* at 2084–85.

220. The many shortcomings of current Title VII doctrine and the various practical obstacles for plaintiffs are beyond the scope of this Article.

221. Schultz, *The Sanitized Workplace*, *supra* note 27, at 2102.

consensual and enjoyable for its participants, it may still be harmful to others. For example, a relationship between a partner and an associate at a law firm could disadvantage and alienate other associates who are not sexually involved with partners.²²² Similarly, a professor dating a current student may spark concerns about favoritism in grading—particularly in environments such as law schools that adhere to a strict curve—or create an atmosphere of intimidation for untenured or non-tenure-track professors who have to grade a tenured colleague’s sexual partner.

Some critics of desexualization fear that employers will over-regulate. Schultz, for instance, notes that “many feminists extended their arguments for prohibiting sexual harassment more broadly to condemn a wide range of sexual conduct, even consensual conduct that would not meet the legal definition of harassment.”²²³ But the legal definition of harassment should be built around our understanding of problematic workplace conduct, not the other way around. Thus feminist efforts to prohibit “consensual conduct that would not meet the legal definition of harassment” and employers who “censor individual employees’ conduct well before the legal threshold is met” may actually be engaging in efforts to shift the regulation of employee sexual behavior to the normatively correct place.²²⁴ If the law currently prohibits certain behavior, that does not mean that all other behavior is unproblematic. In particular, it does not mean that sexual behavior involving an institutional power disparity is unproblematic.

A number of critics even suggest that companies *must* allow workplace relationships as the only realistic alternative to unhappy singleness or celibacy for employees who work particularly long hours: “As a practical matter, these people may have to find potential partners through their employment. If prohibitions against workplace dating become universal, many people may find it difficult if not impossible to find marriage partners or to secure other long-term or short-term sexual relationships.”²²⁵ Others have made a similar argument in the context of university professors.²²⁶ Many proponents of such arguments are talking about workplace dating in general, not about sexual behavior involving an institutional power

222. See *supra* Section II.A.

223. Schultz, *The Sanitized Workplace*, *supra* note 27, at 2082–83.

224. Schultz, *The Sanitized Workplace*, *supra* note 27, at 2083, 2086.

225. *Id.* at 2166; see also *McCavitt v. Swiss Reinsurance Amer. Corp.*, 237 F.3d 166, 169–70 (2001) (McLaughlin, J., concurring) (“This is compellingly so in today’s society, where ostracizing anyone associated with one’s office from the acceptable dating pool would doom the majority of the population to the life of a Trappist monk.”).

226. See, e.g., Carlson, *supra* note 32, at 504 (“Schools often demand very much of the lives of their professors, especially those who have not yet achieved tenure. For some if the school is off limits to their social lives, they have very little social life at all.”).

disparity. As a result, institutions that implement policies prohibiting only the latter behavior seem like an odd target for this complaint. If the concern really is that people are so busy working that they literally cannot have sex unless they have sex with the people they supervise or teach, capitalism itself seems a better target—not regulation of the narrow set of relationships most likely to cause harm to third parties.²²⁷

Many desexualization critics do not address possible harms to third parties. With typical thoughtfulness, Schultz does consider this concern, and frames the consequences for third parties as a mixed bag:

In terms of larger organizational effects, employees report that workplace romance can create excitement among the work group, enhance communication and cooperation, enhance teamwork, simulate [sic] creativity, and create a happier work environment. On the negative side, employees report that romance may take time away from work, increase gossip, and create concerns about favoritism among coworkers.²²⁸

Schultz also acknowledges the concerns inherent in institutional power disparities. At one point she observes that “most experts believe supervisor-subordinate relationships present the greatest risk.”²²⁹ Similarly, she attests to the “serious concern” that “if organizations do not have rules against dating and sexual relationships between supervisors and employees, there will be nothing to prevent supervisors from exercising personal favoritism toward employees with whom they are romantically involved” while noting that the issue is not confined to dating relationships and that supervisors “may also develop *nonsexual* attachments that predispose them to favor particular employees.”²³⁰ Mary Anne Case has highlighted a similar concern and proposed a general “anti-nepotism” policy that would include both sexual and non-sexual favoritism.²³¹ While this Article does not address non-sexual favoritism, the point for present purposes that there are distinctive problems with sexual relationships I am concerned about here—

227. The proliferation of dating apps such as Tinder and Grindr that has occurred since Schultz’s article was published in 2003 might also provide some comfort to those who believe that workplace sexual behavior is the only bulwark against a lifetime of loneliness. Commentators have noted that such apps and other online dating platforms provide an easier way of meeting potential romantic and sexual partners. *See, e.g.*, Russell K. Robinson, *Structural Dimensions of Romantic Preferences*, 76 FORDHAM L. REV. 2787, 2791–92 (2008) (discussing dating websites such as Match.com).

228. Schultz, *The Sanitized Workplace*, *supra* note 27, at 2186–87 & n.480.

229. *Id.* at 2109.

230. *Id.* at 2189. I discuss the claim that sexual favoritism is no worse than other kinds of favoritism *infra* in Part IV.

231. Mary Anne Case, *A Few Words in Favor of Cultivating an Incest Taboo in the Workplace*, 33 VT. L. REV. 551 (2009); *see also* Naomi Schoenbaum, *Towards a Law of Coworkers*, 68 ALA. L. REV. 605, 626 (2017); Laura Rosenbury, *Working Relationships*, 35 WASH. U. J. L. & POL’Y 117, 138–41 (2011).

specifically, those involving an institutional power disparity.

Ultimately, the work of Schultz and other scholars who warn against proscribing sexuality in the workplace and other institutions is largely or perhaps even entirely reconcilable with workplace policies that regulate sexual behavior involving an institutional power disparity. Schultz's concern, for example, lies with gender inequality in the workplace, not with sexuality *qua* sexuality. Based on the evidence discussed in Part II.A, sexual behavior involving an institutional power disparity produces such gender inequality and should therefore be subject to regulation. Although it does not include a comprehensive discussion of third-party harms, Schultz's work is not inherently antithetical to a legal regime that countenances such harms.²³² In short, I think we can have it both ways: a workplace or school can create space for participants to engage in sexual behavior, with the benefits Schultz describes, without requiring it to tolerate sexual relationships involving an institutional power disparity and the myriad problems such relationships create for third parties.

3. *Regulatory arguments*

A final objection to regulation of sexual behavior involving an institutional power disparity is that regulation of intimate lives is inherently problematic. One strand of this objection argues that regulation of consensual sexual behavior is problematic because it intrudes on individual liberty in the intimate sphere of sexual behavior. Another strand criticizes regulation on the ground that it infantilizes women and ultimately perpetuates gender inequality.

The first strand of critics argue that regulation of sexual behavior sweeps too broadly. In their article, "The Sex Bureaucracy,"²³³ Jacob Gersen and Jeannie Suk protest the over-regulation of sexual behavior.²³⁴ They argue

232. Other scholars have argued in the university context that limiting sexual behavior in the workplace harms the work environment. Jane Gallop, as described in the previous section, views her pedagogy as intrinsically sexual. *See supra* Section II.B.1 Like Schultz, she protests the conflation of sexual behavior and sexual harassment, objecting to a culture in which "sexual harassment is defined as the introduction of sex into professional relations." GALLOP, *supra* note 83, at 11. Gallop decries "this new sense of harassment operating in the academy today—which includes all teacher-student sexual relations, regardless of the student's desires." *Id.* at 34. Ultimately, however, Gallop's argument attends to third parties even less than does Schultz's critique. When Gallop mentions "the student's desire," she means the desire of the student having sex with the professor. *Id.* There is no discuss of what *other* students might or might not desire. For Gallop and her like-minded colleagues, consent is the beginning and end of the inquiry. *Id.* at 34.

233. Gersen & Suk, *supra* note 40.

234. Other scholars have also offered important critiques of institutional over-regulation of sexual behavior as a general matter. *See, e.g.,* Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573 (2016).

that regulation of sexual discrimination and sexual violence have expanded to the point that they encompass “ordinary sexual behavior,” which they define as “voluntary adult sexual conduct that does not harm others.”²³⁵ Gersen and Suk use higher education as a case study, although they emphasize that the “sex bureaucracy” extends to other institutions, such as primary and secondary schools and the military.²³⁶

Gersen and Suk do not explicitly discuss the subset of sexual behavior that involves an institutional power disparity, such as relationships between professors and students. Rather, they focus on regulation of sexual behavior between students—an important topic beyond the scope of this Article. My analysis therefore does not necessarily run counter to Gersen and Suk’s views, but rather uses their helpful framing of anti-regulatory arguments to demonstrate why such arguments should not apply to sexual behavior involving an institutional power disparity.

Arguments against regulation of consensual sexual behavior often do not analyze the way in which institutional power disparity affects third parties. Gersen and Suk compellingly identify a number of flaws in the way the Title IX process is implemented.²³⁷ They also argue that we should not regulate “voluntary adult sex *that does not harm others*”²³⁸—emphasis mine—without elaborating on how we tell whether sex harms others or what we should do if it does. These third-party concerns are paramount in sexual behavior involving an institutional power disparity—my primary concern in this Article—yet anti-regulatory arguments offer little guidance for how to determine whether voluntary sex does or does not harm others.

Without discussing third-party harms, we cannot address two important tensions inherent in the argument against regulation. One is that the government already regulates or prohibits sexual activity between consenting adults in a wide range of circumstances: when the sex involves close relatives;²³⁹ when the sex involves certain professional relationships such as a judge and an attorney appearing before the judge;²⁴⁰ when the sex

235. Gersen & Suk, *supra* note 40, at 885.

236. *Id.* at 884 & n.7.

237. *Id.* at 891–924.

238. *Id.* at 885. Gersen and Suk briefly discuss third parties only in one arena, and not one related to this Article. They express skepticism at schools’ efforts to encourage bystanders to report sexual behavior *before* it is problematic—for example, a friend who is blacked out during a night of heavy drinking, but who is not, for instance, being taken to a private place. Gersen & Suk, *supra* note 40, at 916–18. The concern for excessive intervention in innocuous behavior is not in tension with a concern for real third-party harms. *Id.* at 916–18.

239. See generally Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501 (1998).

240. See MODEL CODE OF JUDICIAL CONDUCT r. 3.1 (AM. BAR ASS’N 2011); MODEL RULES OF PROF’L CONDUCT R. 1.8 (AM. BAR ASS’N 2016).

occurs in public;²⁴¹ when the sex occurs between military members of different rank;²⁴² when the sex occurs between a prison guard and a prisoner;²⁴³ when sex involves an exchange of money.²⁴⁴ In each of these instances, at least part of the reason for governmental intervention is likely the risk of harm to third parties or institutions.²⁴⁵

Moreover, the government already intervenes in consensual adult sexual interactions in countless ways even where it does not prohibit that activity. Sex education in public schools instills beliefs and practices that people carry with them into their consensual sexual interactions as adults.²⁴⁶ Insurance coverage of birth control affects the circumstances and consequences of consensual sex.²⁴⁷ Divorce laws that take into account sexual behavior such as adultery likewise regulate consensual adult sexual interactions.²⁴⁸ Criminal laws that regulate prostitution even where it is legal,²⁴⁹ zoning laws that regulate strip clubs and adult stores that sell books or sex toys,²⁵⁰ public decency laws that regulate what clothing is required in public,²⁵¹ and laws regulating the availability of pornography on the

241. See, e.g., FLA. STAT. § 800.03 (2018) (prohibiting exposure of “one’s sexual organs in public . . . in a vulgar or indecent manner” and classifying offense as a first degree misdemeanor).

242. See, e.g., Army Reg. 600-20 ¶ 4-14(c) (2006).

243. See, e.g., 18 U.S.C. §§ 2241, 2243, & 2244 (2017) (prohibiting all sexual contact between federal prison guards and prisoners); see also, e.g., Kim Shayo Buchanan, *Impunity: Sexual Abuse in Women’s Prisons*, 42 HARV. C.R.-C.L. L. REV. 45, 46 & n.6 (2007) (collecting information about state prohibitions on sexual contact between guards and prisoners).

244. Prostitution is illegal in every state, with certain exceptions in Nevada. Danielle Auguston & Alyssa George, *Prostitution and Sex Work*, 16 GEO. J. GENDER & L. 229, 232–33 & n.15 (2015) (collecting state statutes).

245. While it is beyond the scope of this Article to undertake a close examination of the purpose underlying each of these statutes, the prohibition on sex between close relatives exemplifies the concern for third-party harms that often motivates governmental regulation of sexual relationships. Many states appear to be guarding against the possibility of children with developmental disorders by tailoring the prohibition to unions that might result in children. See, e.g., Ariz. Stat. 25-101(B) (prohibiting marriages between first cousins unless both are over age sixty-five or unless one of the cousins is unable to reproduce); Ill. Stat. 750 5/212 (prohibiting marriages between first cousins unless both are over age fifty or one of the cousins is unable to reproduce); Wis. Stat. § 765.03(1) (prohibiting marriages between first cousins unless the woman is over age fifty-five or one party is unable to reproduce). While this Article does not weigh in on the validity of these concerns or on cousin marriage in general, such statutes reveal that concern for potential harm to third parties—children who may be born with developmental disorders; the state that may bear responsibility for educating and providing medical care for such children—motivates regulation of sexual behavior and is unremarkable for doing so.

246. See *State Policies on Sex Education in Schools*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Dec. 21, 2016), <http://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx> [https://perma.cc/CJC9-ZZBA].

247. See, e.g., *Birth Control Benefits*, HEALTHCARE.GOV, <https://www.healthcare.gov/coverage/birth-control-benefits/> [https://perma.cc/L979-HL88] (last visited Feb. 2, 2019).

248. See DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 420–29 (2d ed. 2009).

249. See Auguston & George, *supra* note 244.

250. See, e.g., *City of Los Angeles v. Alameda Books*, 535 U.S. 425 (2002) (articulating test for First Amendment scrutiny of zoning laws).

251. See, e.g., Jeffrey C. Narvil, *Revealing the Bare Uncertainties of Indecent Exposure*, 29

Internet²⁵² all intervene in consensual adult sexual behavior. The list could go on for quite a while.

Moreover, all of these interventions take place at least in part because of a concern for third parties, and most of these interventions have been around for a long time. My point is not that all or any of these laws is normatively justified, but rather that the bare fact that the government or other entities regulate consensual sexual behavior is not new or anomalous. And without discussion of harms to third parties, we cannot evaluate any particular instance of regulation, including, specific to this Article, regulation of sexual behavior involving an institutional power disparity.

Some scholars have echoed the concern for regulation, but with particular concern that the paternalism inherent in such regulation infantilizes and ultimately harms women.²⁵³ A recent proponent of this view is Laura Kipnis, who does not see sexual behavior involving faculty and students as harmful—or, to be more precise, she does not see it as inherently more harmful than any other sexual behavior.²⁵⁴ She recalls her own experiences with professors during college, explaining, “When I was in college, hooking up with professors was more or less part of the curriculum.”²⁵⁵ She writes:

The gulf between students and faculty wasn’t a shark-filled moat; a misstep wasn’t fatal. We partied together, drank and got high together, slept together. The teachers may have been older and more accomplished, but you didn’t feel they could take advantage of you because of it. How would they?²⁵⁶

Kipnis describes the ban on consensual faculty-student relationships at Northwestern University, where she teaches, as “irritating.”²⁵⁷ “It’s been barely a year since the Great Prohibition took effect in my own workplace. Before that, students and professors could date whomever we wanted; the next day we were off limits to one another”²⁵⁸ She adds that “the residues of the wild old days are everywhere,” referring to several couples on her campus comprised of a professor and a former student, as well as

COLUM. J. L. & SOC. PROBS. 85, 86 n.8 (1995) (surveying public nudity laws).

252. *Miller v. California*, 413 U.S. 15 (1973) (delineating obscenity standard).

253. Mack, *supra* note 32, at 85–88; Sherry Young, *Getting to Yes: The Case Against Banning Consensual Relationships in Higher Education*, 4 AM. U. J. GENDER SOC. POL’Y & L. 269 (1996).

254. KIPNIS, UNWANTED ADVANCES, *supra* note 180.

255. Laura Kipnis, *Sexual Paranoia Strikes Academe*, CHRON. HIGHER EDUC., (Feb. 27, 2015), <https://www.chronicle.com/article/Sexual-Paranoia-Strikes/190351> [<https://perma.cc/K7Y6-C76J>]; *see also* KIPNIS, UNWANTED ADVANCES, *supra* note 180, at 13.

256. Kipnis, *Sexual Paranoia*, *supra* note 255.

257. KIPNIS, UNWANTED ADVANCES, *supra* note 180, at 155.

258. Laura Kipnis, *Sexual Paranoia*, *supra* note 255.

“the legions who’ve dated a graduate student or two in their day—plenty of female professors in that category, too—in fact, I’m one of them.”²⁵⁹

Moreover, Kipnis objects to what she describes as the vulnerability and paranoia of students who object to various forms of sexual behavior on campus (some involving institutional power disparities and some not). Kipnis seems to have the mistaken impression that no one except her has pointed out what she describes as the self-perceived vulnerability of many college students and especially women. She says: “The feminism I identified with as a student stressed independence and resilience. In the intervening years, the climate of sanctimony about student vulnerability has grown too thick to penetrate; *no one dares question it* lest you’re labeled antifeminist. Or worse, a sex criminal.”²⁶⁰ Kipnis’s claim that “no one dares question” the supposed climate of deference to student vulnerability seems at best exaggerated. After all, there she is questioning it in the *The Chronicle of Higher Education*, and quite a large number of other people have similarly dared to question.²⁶¹

Kipnis then suggests that giving too much credence to student vulnerability is harmful, even when those students are engaged in sexual relationships with their professors. She asks:

[W]hat do we expect will become of students, successfully cocooned from uncomfortable feelings, once they leave the sanctuary of academe for the boorish badlands of real life? What becomes of students so committed to their own vulnerability, conditioned to imagine they have no agency, and protected from unequal power arrangements in romantic life?²⁶²

Kipnis’s argument about encouraging agency resonates when she uses it to propose such practical measures as self-defense classes and unlearning

259. *Id.*

260. *Id.* (emphasis added).

261. A highly incomplete list would include the following materials. *See, e.g.*, Bradley Campbell & Jason Manning, *Microaggression and Moral Cultures*, 13 *COMP. SOC.* 692 (2014); Bradley Campbell & Jason Manning, *The New Millennial ‘Morality’: Highly Sensitive and Easily Offended*, *TIME* (Nov. 17, 2015), <http://time.com/4115439/student-protests-microaggressions/> [<https://perma.cc/M8JC-VAZ> N]; Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, *ATLANTIC* (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/the-coddling-of-the-american-mind/399356/> [<https://perma.cc/Q443-USDG>]; Caitlin Flanagan, *That’s Not Funny!*, *ATLANTIC* (Sept. 2015), <https://www.theatlantic.com/magazine/archive/2015/09/thats-not-funny/399335/> [<https://perma.cc/75J> U-HTYV]; Edward Schlosser, *I’m a Liberal Professor, and My Liberal Students Terrify Me*, *VOX* (June 3, 2015, 8:00 AM), <https://www.vox.com/2015/6/3/8706323/college-professor-afraid> [<https://perma.cc/3USG-P2V2>]; Letter from John Ellison, Dean of Students, University of Chicago, to University of Chicago Class of 2020 (Aug. 24, 2016) (available at http://www.intellectualltakeout.org/sites/ito/files/acceptance_letter.jpg [<https://perma.cc/9PU8-L4M8>]).

262. Kipnis, *Sexual Paranoia*, *supra* note 255.

socialized feminine passivity.²⁶³ But to the extent that she takes issue with feelings she views as wrong or unjustified, the critique is less persuasive. She says of women: “we typically also *feel* ourselves to be far more vulnerable to sexual danger than we are—and I can think of no better way to subjugate women than to convince us that assault is around every corner.”²⁶⁴

But a close reading of Kipnis’s work reveals a view that some people’s feelings matter more than others, as well as a view that her own feelings are an uncontroversially correct way of viewing the world. She critiques professors and students who discourage certain forms of sexual behavior as “ideologues of feelings,”²⁶⁵ and disparages the notion that “what counts as rape is whatever the victims *feel* counts as rape.”²⁶⁶ Yet she also credits the *feelings* of several men involved in sexual assault proceedings. She sympathetically portrays a student expelled from college for sexual misconduct who “assumes he’ll never get into another school and is adamant he’ll never return to the previous one, even if he could. His life is wrecked, he *feels*.”²⁶⁷ (Emphasis mine.) She likewise credits Peter Ludlow’s emotional decision to resign rather than continue facing sexual assault proceedings against him, as well as his decision to move to Mexico to save money because “he’d pretty much lost everything at that point.”²⁶⁸ By Kipnis’s own standards, this seems an odd characterization of an adult man’s decision to voluntarily resign a tenured position—after all, Ludlow resigned because he *felt* he had lost everything, not that he actually had, given that no final decision had been rendered against him.

Kipnis also credits her own feelings throughout her book. In arguing that faculty-student relationships are unproblematic, for example: “[y]ou didn’t *feel* your teachers were remote, all-powerful beings—they were messy, opinionated, depressed, monumentally flawed.”²⁶⁹ (Again, emphasis mine.) She likewise credits, without self-examination, her own decision not to read emails about what she writes, including those from colleagues;²⁷⁰ her belief that a professor cannot possibly force a student to drink;²⁷¹ and most of all her own feelings about the Title IX process as the result of complaints made

263. KIPNIS, UNWANTED ADVANCES, *supra* note 180, at 213–20.

264. *Id.* at 12.

265. *Id.* at 26.

266. *Id.* at 202.

267. *Id.* at 16 (emphasis added).

268. *Id.* at 31.

269. *Id.* at 10 (emphasis added).

270. *Id.* at 83, 129–30.

271. *Id.* at 53 (“I simply didn’t believe in a reality in which a professor can force a student to drink.”).

against her,²⁷² which she describes as an “inquisition.”²⁷³

The point is not that Kipnis’s feelings are *wrong*.²⁷⁴ The point is that an anti-paternalist argument must hinge on more than a subjective belief that some feelings are more justifiable than others. In short, the sexual vulnerability that Kipnis identifies as endemic in institutions of higher education these days cannot be dismissed simply because it involves feelings with which Kipnis does not personally identify.²⁷⁵ Making good policy about sexual behavior involving an institutional power disparity requires examining the empirical realities of the institutions involved. If we are to introduce feelings into the equation—and I think we should do so honestly and openly—then we should look at everyone’s feelings, including those of third parties.

The need for empirical examination not tethered exclusively to any particular group’s feelings brings us full circle. Such an examination requires consideration of not only the people involved in sexual behavior, but also the consequences for the bystanders to that behavior and the institutions within which the behavior occurs. Sexual behavior involving an institutional power disparity harms them too. And the failure to consider third party and institutional harms renders these critiques unpersuasive. The remainder of the Article, then, will discuss the landscape of legal, regulatory, and institutional responses to third-party harms arising from sexual behavior involving an institutional power disparity.

III. CURRENT REGULATION

This Part surveys the legal mechanisms relating to the third-party harms of sexual behavior involving an institutional power disparity. It concludes that some third-party effects are addressed piecemeal by various laws, regulations, and institutional codes, but that none of these legal instruments address third-party harms in a comprehensive way.

A. *Criminal and Tort Law*

Many would like to think of institutions such as workplaces and schools

272. *Id.* at 142–44.

273. Laura Kipnis, *My Title IX Inquisition*, CHRON. HIGHER EDUC. (May 29, 2015), <https://www.chronicle.com/article/My-Title-IX-Inquisition/230489> [<https://perma.cc/2H9J-MBEV>].

274. Indeed, I have a great deal of sympathy for someone forced to undergo a Title IX investigation based solely on something she wrote. But the fact that her feelings are understandable does not make them either empirically correct or incorrect.

275. Dawn Rhodes, *Northwestern Student Sues Prof Over ‘Unwanted Advances’ Book*, CHI. TRIBUNE (May 17, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-northwestern-student-sues-professor-book-20170517-story.html> [<https://perma.cc/23NZ-CHQM>].

as beyond the realm of sexual assault. The problems there, some would prefer to believe, are more subtle and nuanced: off-color jokes, overly persistent invitations to date, perhaps standing too close to someone.

But many of the stories that have arisen from #MeToo are startlingly violent. Many incidents involving Harvey Weinstein involve sexual assault, for example.²⁷⁶ Some evidence suggests that the picture may be even more disturbing in blue-collar workplaces. For example, a recent article reported that eighty percent of agricultural workers have been sexually assaulted or know someone who has.²⁷⁷

In the most extreme instances, third parties to sexual relationships may be able to press charges for criminal conduct that involves them. Daryl Hannah's make-up artist, for example, might have been the victim of menacing or harassment by Harvey Weinstein.²⁷⁸ Likewise, other workers or students who attempt to shield their colleagues or classmates from a powerful person's sexual advances may themselves become victims of crimes. Criminal law does not seem to be the best fit for most third-party situations, but in extreme situations it serves as one possibility.

As with criminal law, tort law may provide a remedy in a relatively small set of extreme situations. Consider a worker who listens and watches as a boss sexually harasses a colleague day after day. If the harassment is sufficiently serious or egregious, in some states, the colleague might be able to bring a claim of intentional infliction of emotional distress.

Whatever remedies tort law might provide for a third party to a claim of intentional infliction of emotional distress, it also comes with difficulties. Most workers and students, for example, cannot pay for a lawyer up front, and might struggle to find someone to represent them on contingency given the unlikelihood of large damage awards in most cases. Still, like criminal law, tort law may provide a fit in some circumstances.

B. Antidiscrimination Law

Possible sources of liability stemming from antidiscrimination law include Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Each one provides some opportunity to

276. *Harvey Weinstein Scandal: Who Has Accused Him of What?*, BBC NEWS (Jan. 10, 2019), <http://www.bbc.com/news/entertainment-arts-41580010> [<https://perma.cc/7XDR-CJQL>].

277. Ariel Ramchandani, *There's a Sexual Harassment Epidemic on America's Farms*, ATLANTIC (Jan. 29, 2018), <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/> [<https://perma.cc/QE5U-7KDJ>].

278. Since the events took place in France, American criminal law would not apply. But say that the event took place, as did many of Weinstein's similar abuses, in New York. In New York, depending on the precise facts, knocking on someone's hotel room door repeatedly and furiously, might qualify as second-degree menacing, N.Y. Code § 120.14, or as first or second degree harassment under N.Y. Code § 240.25 or § 240.26.

address the third-party harms caused by sexual behavior involving an institutional power disparity, yet each one also includes significant weaknesses.

1. Title VII

Some third-party claims arising from sexual behavior involving an institutional power disparity are actionable under Title VII. That statute makes it unlawful for an employer “to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²⁷⁹ To establish a prima facie case for discrimination under Title VII, a plaintiff must establish four well-known elements: (1) membership in a protected class; (2) qualification for a job (or promotion, etc.) for which the employer was seeking applicants; (3) employer’s rejection of the plaintiff despite their qualifications; and (4) other applicants with the same or lesser qualifications were hired (promoted, etc.) instead of the applicant.²⁸⁰

Claims of sexual harassment also fall under Title VII. In *Meritor Savings Bank v. Vinson*,²⁸¹ the Supreme Court adopted guidelines promulgated by the EEOC in recognizing two forms of sexual harassment: quid pro quo harassment, meaning that some aspect of employment is predicated on participation in sexual conduct; and hostile work environment harassment, when sexual conduct “has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive work environment.”²⁸²

Title VII has been used to address some third-party harms resulting from sexual behavior involving an institutional power disparity. Some courts have recognized that sexual favoritism can constitute a form of hostile environment claim.²⁸³ But this is so only when instances of sexual favoritism are widespread in a workplace.

The California Supreme Court’s decision in *Miller v. Department of Corrections* illustrates the level of conduct that is sufficient for a court to conclude that sexual favoritism is “widespread.”²⁸⁴ The plaintiffs, Edna

279. 42 U.S.C. § 2000e-2(a)(1) (1994).

280. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

281. 477 U.S. 57 (1986).

282. *Id.* at 65.

283. See, e.g., *Broderick v. Ruder*, 685 F. Supp. 1269, 1277 (D.D.C. 1988).

284. *Miller v. Dep’t of Corrections*, 115 P.3d 77, 90 (Cal. 2005). *Miller* was actually brought under California’s Fair Employment and Housing Act, Gov’t Code §§ 12900–96, not under Title VII. The statutes have some differences—for example, FEHA protects more classes of people than does Title

Miller and Frances Mackey, filed suit against the California Department of Corrections alleging sexual harassment and discrimination.²⁸⁵ While Miller and Mackey were employed at the Valley State Prison for Women (VSPW), the chief deputy prison warden, Lewis Kuykendall, engaged in well-known sexual relationships with three subordinate female employees.²⁸⁶ The plaintiffs alleged that Kuykendall favored his sexual partners in a number of ways: he had them transferred to the VSPW from the previous facility where he worked; one reported to him rather than to her immediate supervisor; another received a promotion over Miller.²⁸⁷ For their part, Kuykendall's female sexual partners bragged about their power over Miller as a result of their relationships.²⁸⁸ In various permutations, they also retaliated against Miller by undermining her authority, requiring her to perform unpleasant work, criticizing her work, and threatening to retaliate further when Miller brought various complaints to Kuykendall.²⁸⁹ Eventually Internal Affairs was involved after the workplace was deemed "out of control."²⁹⁰ The *Miller* court concluded that, under these circumstances, sexual favoritism was so widespread that it created an actionable hostile work environment. It concluded that "an employee may establish an actionable claim of sexual harassment . . . by demonstrating that widespread sexual favoritism was severe or pervasive enough to alter his or her working conditions and create a hostile work environment."²⁹¹ It also indicated that widespread sexual favoritism could sustain a claim of quid pro quo harassment if it created a reasonable belief that a supervisor would only promote employees who engaged in sexual relationships with them.²⁹²

Miller is largely an outlier, perhaps due to its unusual facts. Other courts, however, have held in favor of a Title VII plaintiff whose claim is based on sexual favoritism.²⁹³ In *Broderick v. Ruder*, for example, the United States District Court for the District of Columbia held that sexual relationships between two of the plaintiff's supervisors and their secretaries, as well as

VII, and FEHA covers smaller employers—but none of the differences are relevant for the analysis in this Article. See, e.g., Thomas J. Grey, Comment, *Individual Supervisor Liability in Employment Claims in California*, 37 SANTA CLARA L. REV. 517, 526 (1999) ("The California Fair Housing and Employment Act . . . provides essentially the same remedial protection from employment discrimination as does Title VII.")

285. *Miller*, 115 P.3d at 80.

286. *Id.* at 81.

287. *Id.* at 81–83.

288. *Id.* at 81–82.

289. *Id.* at 83–84.

290. *Id.* at 84.

291. *Id.* at 90.

292. *Id.* at 89.

293. See Bercovici, *supra* note 30 (collecting cases).

promotion of a staff attorney to whom another supervisor was attracted, established a sexual environment that was “so pervasive” that it could establish Title VII liability.²⁹⁴

In a number of other cases, however, courts held that favoring a sexual partner did not contribute to a hostile work environment. As the Seventh Circuit has stated: “Title VII does not, however, prevent employers from favoring employees because of personal relationships. Whether the employer grants employment perks to an employee because she is a protégé, an old friend, a close relative or a love interest, that special treatment is permissible as long as it is not based on an impermissible classification”²⁹⁵ A number of other courts have reached similar conclusions.²⁹⁶ The line, therefore, currently lies between sexual favoritism that is “widespread” and sexual favoritism that is not.

Title VII also applies in the higher education setting because, for many people, institutions of higher education *are* workplaces. Although much of the focus on sexual behavior within institutions of higher education lies on professor-student relationships and their effect on other students, there is no question that the effects of such relationships extend beyond students and include other professors, staff, and other members of the academic community. Recall, for example, the retaliation against Michele Goodwin attempting to seek a remedy against a tenured colleague who licked a student, or the junior professor whose senior colleague forced her to witness him hug a student as an implied defense against sexual harassment.²⁹⁷ Goodwin’s experience likely would be sufficiently severe to sustain a hostile environment claim under Title VII, while the single incident of hugging likely would not, but one can see how the aggregation of several similar such incidents might do so. Third-party harms resulting from sexual behavior involving an institutional power dynamic extend to the university as a workplace and can result in Title VII liability there under current doctrine.

2. Title IX

294. Broderick v. Ruder, 685 F. Supp. 1269, 1278 (D.D.C. 1988).

295. Schobert v. Ill. Dept. of Transp., 304 F.3d 725, 733 (7th Cir. 2002).

296. See, e.g., Drinkwater v. Union Carbide Corp., 904 F.2d 853 (3d Cir. 1990) (rejecting hostile environment sexual harassment claim based on sexual relationship between supervisor and subordinate); Miller v. Aluminum Co. of Am., 679 F. Supp. 495 (W.D. Pa. 1988), aff’d, 856 F.2d 184 (3d Cir. 1988) (without opinion); DeCintio v. Westchester Cty. Med. Ctr., 807 F.2d 304 (2d Cir. 1986) (holding that existence of sexual relationship between employer and person hired did not constitute sexual harassment under Title VII).

297. See *supra* Section II.A.2.

Title IX prohibits sex discrimination in institutions of higher education that receive federal funding.²⁹⁸ It allows individuals who have suffered adverse consequences as the result of a school's non-compliance with the federal mandate against sex discrimination to file suit. As a result, the law prohibits sexual harassment—because sexual harassment is a form of sex discrimination—as well as sexual assault and other forms of non-consensual sexual contact.²⁹⁹ Title IX does not, however prohibit consensual relationships between faculty members and students. Applying Title IX in situations involving consent has proven difficult: for example, a professor might perceive a student to be consenting—perhaps even affirmatively and enthusiastically—yet later learn that the student felt coerced into participation in sexual behavior.³⁰⁰ Courts have held that the same standards for sex discrimination, quid pro quo harassment, and hostile environment apply in the Title VII context as in the Title IX context. Presumably that means that the same standards would apply with respect to third-party claims of sexual favoritism, although to my knowledge such a claim has not yet been brought against a school. Carrying the parallel to its logical extension, a department in which multiple professors are engaged in sexual relationships with students might support a *Miller*-style claim, but under Title IX instead of Title VII. Given the frequency of professor-student relationships and the manner in which they affect the classroom and academic environment,³⁰¹ the environment may be ripe for a Title IX claim.

C. Regulations

The Equal Employment Opportunity Commission (EEOC) plays a role in determining the way the law treats sexual harassment within the workplace as an institution. This also affects academia to the extent that academic institutions are workplaces. Moreover, the norms communicated by the EEOC affect broader social thinking about sexual behavior within institutions and can influence the way sexual behavior involving a power disparity is treated in academia.

The EEOC has taken a limited but influential role in shaping the development of sexual harassment law as it relates to third parties. In 1999, the EEOC issued a policy statement stating that sexual favoritism, standing alone, is insufficient to sustain a Title VII claim. The Policy Statement said: “An isolated instance of favoritism towards a ‘paramour’ (or a spouse, or a

298. 20 U.S.C. §§ 1681–88 (2017).

299. See *Franklin v. Gwinnett Cty. Pub. Sch.* 503 U.S. 60, 75 (1992).

300. See Carlson, *supra* note 32, at 497–500; see also Secunda, *supra* note 32, at 60.

301. See *supra* Section II.A.

friend) may be unfair, but does not discriminate against women or men in violation of Title VII, since both are disadvantaged for reasons other than their genders.”³⁰²

Although EEOC policy statements are not binding, a number of courts have relied on this guidance, including both decisions denying third-party plaintiff’s claims under Title VII³⁰³ and decisions allowing recovery in such instances.³⁰⁴ In both types of cases, courts have hewed closely to the Policy Statement. In particular, the California Supreme Court relied on the Policy Statement in holding for the plaintiffs in *Miller*, the seminal case on liability for sexual favoritism.³⁰⁵ Advisory or not, the Policy Statement has unquestionably shaped doctrine.

Finally, other regulations, such as those promulgated by the Department of Education Office for Civil Rights in order to implement Title IX, may influence the way that workplace laws are implemented where the workplace in question is a school.³⁰⁶ They may also affect the limitations placed on some forms of faculty-student relationships.³⁰⁷

D. Institutional Policies

Workplaces and schools have established a wide array of policies pertaining to supervisor-subordinate relationships and faculty-student relationships and the haphazard manner in which such policies are enforced.³⁰⁸ Both in the workplace and in institutions of higher education, the policies vary considerably in scope and enforcement.

1. Workplace codes

A little over a third of employers have adopted policies regulating consensual relationships among employees.³⁰⁹ In 2013, the Society for Human Resource Management surveyed 555 companies, finding that 36%

302. OFFICE OF LEGAL COUNSEL, U.S. EQUAL EMP. OPPORTUNITY COMM’N, NOTICE NO. N-915-048, POLICY GUIDANCE ON EMPLOYER LIABILITY UNDER TITLE VII FOR SEXUAL FAVORITISM (1990).

303. *See, e.g.*, *Taken v. Okla. Corp. Comm’n*, 125 F.3d 1366 (10th Cir. 1997); *Becerra v. Dalton*, 94 F.3d 145 (4th Cir. 1996); *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344 (7th Cir. 1995); *Keenan v. Allan*, 889 F. Supp. 1320 (E.D. Wa. 1995); *Thomson v. Olson*, 866 F. Supp. 1267 (D.N.D. 1994).

304. *Miller v. Dep’t of Corrections*, 115 P.3d 77 (Cal. 2005).

305. *Id.*

306. *See, e.g.*, *Cantalupo & Kidder*, *supra* note 28.

307. *Id.*

308. *Secunda*, *supra* note 32, at 58–66.

309. SOC’Y FOR HUM. RES. MGMT, *supra* 112, at 2.

of companies had a written policy and 6% had a verbal policy regarding consensual relationships.³¹⁰ This figure more than doubled from 2005, when only 25% of companies had such a policy.³¹¹ As of the publication of this Article, I know of no quantitative research about such policies in the post-#MeToo era, but from anecdotes I suspect that such policies have increased in number and restrictiveness.

Nearly every workplace that had a policy prohibited relationships between supervisors and subordinates.³¹² Forty-five percent also prohibited relationships between people of significantly different rank, even if neither is in the other's chain of command, which is also a notable increase from 16% in 2005.³¹³ Where relationships between workers of different rank are not prohibited, employers often adopt what is known as a "discouragement" policy—one that does not actually prohibit such relationships or prescribe consequences for them, but rather points out some of the possible negative consequences and notes that the company prefers that workers refrain from such relationship.³¹⁴

Commentators have discussed the best way to draft policies relating to consensual sexual relationships within workplaces. Some see a host of legal and practical problems and worry that the contracts invade privacy and will not prevent abuse.³¹⁵ Others are more optimistic.³¹⁶ Regardless, most agree that when a policy prohibits certain relationships, the responsibility for the relationship should lie with the supervisor or more senior person.³¹⁷ In corporate America, the penalty for violating a company policy on intra-office relationships can be severe—in 2017, for example, venture capital company Greylock asked for and received its COO's resignation after investigating what it ultimately found to be an "inappropriate" relationship, even though some outlets reported that the relationship was consensual.³¹⁸

310. SOC'Y FOR HUM. RES. MGMT, *supra* 112, at 11.

311. SOC'Y FOR HUM. RES. MGMT, *supra* 112, at 2.

312. *Id.*

313. *Id.*

314. Helena P. Amaral, *Workplace Romance and Fraternization Policies* 13 (Univ. R.I. Dig. Commons Seminar Research Paper Series, Paper No. 7, 2006) (describing discouragement policies).

315. Binetti, *supra* note 29, at 167–70; *see also* Ian J. Silverbrand, *Workplace Romance and the Economic Duress of Love Contract Policies*, 54 VILL. L. REV. 155 (2009) (arguing that so-called "love contracts" create conditions of "economic duress" for employees).

316. *See, e.g.*, Alison J. Chen & Jonathan A. Sambur, *Are Consensual Relationship Agreements a Solution to Sexual Harassment in the Workplace?*, 17 HOFSTRA L. & EMP. L.J. 165, 193–94 (1999) ("Consensual Relationship Agreements are not a panacea to the current state of affairs in sexual harassment law. However . . . when taken as a whole, [they] do serve to protect the signatories from sexual harassment.")

317. Binetti, *supra* note 29, at 166–67.

318. Dan Primack, *Greylock COO Out Due to 'Inappropriate' Relationship*, AXIOS (Aug. 2, 2017), <https://www.axios.com/greylock-coo-out-due-to-inappropriate-relationship-1513304626-a94045a4-92c7-4b46-9ee3-082ed23dc513.html> [<https://perma.cc/HW87-ADUN>]; *see also* Wilkie, *supra* note

A number of companies' internal relationship policies have recently received public scrutiny. Uber, for example, was widely criticized for a "frat house" memo³¹⁹ sent by former CEO Travis Kalanick to Uber employees before a company trip to Florida, which included the statement:

Do not have sex with another employee UNLESS a) you have asked that person for that privilege and they have responded with an emphatic 'YES! I will have sex with you' AND b) the two (or more) of you do not work in the same chain of command.³²⁰

The memo went on: "Yes, that means that Travis will be celibate on this trip. #CEOLife #FML."³²¹ Setting aside the tone of the memo, two features stand out. First, the memo appears to communicate a company policy prohibiting sexual relationships involving people who supervise one another. And second, although the memo is not exactly a model of sensitivity and political correctness, the standard it sets out appears to be one of affirmative consent—that is, Uber requires more than merely non-criminal behavior.

Facebook and Google have also ventured into new territory in employee regulation by adopting a one-invitation policy with respect to dating.³²² If someone asks a coworker for a date and is turned down—including facially ambiguous responses like "I'm busy"—the companies prohibit them from asking again.³²³ In general, many companies have begun to develop more assertive policies in the wake of the revelations prompted by #MeToo. While human resource experts have long advised companies to discourage relationships involving supervisors and subordinates,³²⁴ more recently many

310 (finding that repercussions for violations include transferring one employee to a different department (34%); sending the couple to relationship counseling (32%); drawing up a formal reprimand (21%); firing the offending workers (20%); removing a worker from a supervisory position (12%); and suspending the employees (8%)).

319. Kara Swisher & Johana Bhuiyan, *Uber CEO Kalanick Advised Employees on Sex Rules for a Company Celebration in 2013 'Miami Letter,'* RECODE (June 8, 2017, 5:52 PM), <https://www.recode.net/2017/6/8/15765514/2013-miami-letter-uber-ceo-kalanick-employees-sex-rules-company-celebration> [<https://perma.cc/29BE-Q9SK>].

320. *Id.*

321. Samuel Gibbs, *Leaked Uber Memo Throws New Spotlight on Frat-House Culture*, GUARDIAN, June 9, 2017, <https://www.theguardian.com/technology/2017/jun/09/leaked-uber-sex-memo-frat-house-culture-sexism-ceo-travis-kalanick>. [<https://perma.cc/QR7F-EMT8>]. "FML" is Internet shorthand for "Fuck My Life."

322. Yoree Koh & Rachel Feintzeig, *Can You Still Date a Coworker? Well, It's Complicated*, WALL ST. J. (Feb. 6, 2018), <https://www.wsj.com/articles/can-you-still-date-a-co-worker-well-its-complicated-1517913001>.

323. *Id.*

324. *See, e.g.*, Gallo, *supra* note 145, (quoting multiple experts to support the proposition that "It is a bad idea to get involved with anybody who is in your chain of command—up or down"; adding that "if that's something you'd like to consider," you should "take action immediately to transfer to a new

of them have gone further. One attorney who represents employers has begun to advise that they “put strict rules in place barring managers from dating anyone further down in the organization, with firing as a potential consequence”; according to him, every company has taken him up on this advice.³²⁵ In sum, #MeToo has prompted many workplaces to acknowledge that the status quo simply is not working for their company as an institution. Such workplaces have considered new approaches as a result.

2. School codes

On campus, codes governing sexual relationships among members of the school community fall along a spectrum.³²⁶ As with workplaces, one broad division is between “prohibition policies,”³²⁷ which ban all sexual relationships, and “discouragement policies,”³²⁸ which enumerate the problems with such relationships but stop short of prohibiting them. These policies are further complicated by the many statuses of individuals within a university, including undergraduate students, graduate students, post-doctoral students, adjunct professors, long term contract professors, untenured tenure-track professors, tenured professors, administrators, and various staff.

The Association of American University Professors (AAUP) advises against sexual relationships between students and faculty members but does not say colleges and universities should prohibit them. It says: “In their relationships with students, members of the faculty are expected to be aware of their professional responsibilities and to avoid apparent or actual conflict of interest, favoritism, or bias. When a sexual relationship exists, effective steps should be taken to ensure unbiased evaluation or supervision of the student.”³²⁹ The AAUP’s primary concerns appear to be with conflicts of interest and favoritism—concerns that resonate with concerns about harm to third parties, although they do not exhaust the list of third-party harms.

Some schools have implemented a total ban on sexual relationships between professors and undergraduates.³³⁰ Harvard, for example, falls into

boss or reassign your direct report to another team”)(internal quotations marks omitted).

325. *Id.*

326. Stites, *supra* note 139, at 154–62.

327. *Id.* at 155–57.

328. *Id.* at 158–60.

329. AM. ASS’N OF UNIV. PROFESSORS, STATEMENT ON CONSENSUAL RELATIONSHIPS BETWEEN FACULTY AND STUDENTS, Policy Reports and Documents 149 (June 1995), <https://cpb-us-e1.wpmucdn.com/blogs.cornell.edu/dist/3/6798/files/2017/08/AAUP-Statement-on-Consensual-Relations-between-Faculty-and-Students-2n3iia8.pdf> [<https://perma.cc/4Y29-KHJM>].

330. In writing this section, I examined the policies of the top twenty universities, liberal arts colleges, law schools, and business schools according to the *U.S. News and World Report Rankings* and

this category,³³¹ as do Yale,³³² University of Chicago,³³³ MIT,³³⁴ and Princeton.³³⁵ As a typical example, Princeton's policy states: "Faculty members are prohibited from initiating or engaging in romantic or sexual behavior with undergraduate students at Princeton University. Faculty members are also prohibited from requesting or accepting sexual favors from undergraduate students at Princeton University."³³⁶ The Princeton policy goes further in some ways than other policies prohibiting sexual relationships between professors and students by also prohibiting all sexual relationships in the context of a direct supervisory relationship, regardless of whether the supervisor is a professor and whether the student is an undergraduate or graduate student.³³⁷

Other schools limit the ban to situations in which the professor has direct supervisory authority over the student. Columbia's policy, for example, prohibits professors from engaging in sexual relationships with students over whom they exercise supervisory authority, but does not ban sexual

include a range of policies here. Because these schools are not necessarily representative, and because even very similar policies differ in various nuances, I ultimately opted not to categorize these policies in a way that would imply quantitative analysis.

331. *Sexual and Gender-Based Harassment Policy and Procedures for the Faculty of Arts and Sciences Harvard University*, HARVARD UNIV. (Jan. 13, 2016), https://www.fas.harvard.edu/files/fas/files/fas_sexual_and_gender-based_harassment_policy_and_procedures-1-13-16.pdf [<https://perma.cc/849G-CAVA>] ("No . . . Faculty member shall request or accept sexual favors from, or initiate or engage in a romantic or sexual relationship with, any undergraduate student at Harvard College.").

332. *Teacher-Student Consensual Relations Policy*, YALE UNIV., <https://uwc.yale.edu/policies-procedures/teacher-student-consensual-relations-policy> [<https://perma.cc/KER5-QSX8>] (last visited Jan. 25, 2019) ("Therefore, no teacher shall have a sexual or amorous relationship with any undergraduate student, regardless of whether the teacher currently exercises or expects to have any pedagogical or supervisory responsibilities over that student.").

333. *Policy on Harassment, Discrimination, and Sexual Misconduct*, UNIV. OF CHICAGO, <https://studentmanual.uchicago.edu/page/policy-harassment-discrimination-and-sexual-misconduct> [<https://perma.cc/Y3W4-8ENS>] (last visited Jan. 25, 2019) ("[T]his policy prohibits sexual and/or romantic relationships between academic appointees and undergraduates at the University regardless of whether an instructional, mentoring, research, or other University of Chicago-based relationship exists or may reasonably be expected to exist in the future.").

334. *9.5 Consensual Sexual or Romantic Relationships in the Workplace or Academic Environment*, MASS. INST. OF TECH., <https://policies.mit.edu/policies-procedures/90-relations-and-responsibilities-within-mit-community/95-consensual-sexual-or> (last updated Jan. 19, 2018) ("All faculty, academic instructional staff, other employees, and other non-student members of the MIT community are prohibited from having a sexual or romantic relationship with any undergraduate student in the MIT community.").

335. *Consensual Relations With Students*, PRINCETON UNIV., <https://dof.princeton.edu/policies-procedure/policies/consensual-relations-students> [<https://perma.cc/K88V-M6LB>] (last visited Jan. 25, 2019).

336. *Id.*

337. *Id.* ("[No] faculty member, researcher, graduate student, visiting student, or undergraduate course assistant shall initiate or engage in a romantic or sexual behavior with any student, including a graduate student or [doctoral] student, who is enrolled in a course taught by that individual or otherwise subject to that individual's academic supervision or evaluation.").

relationships altogether, even between professors and undergraduates.³³⁸

Still other schools have developed so-called “discouragement policies.” Princeton, for example, adopts a species of discouragement policy with respect to any relationships between faculty and non-undergraduates involving a power disparity, noting: “Beyond [prohibited sexual relationships with undergraduates and direct supervisees], all romantic or sexual relationships between individuals of different University status require heightened awareness.”³³⁹ The policy goes on to emphasize concerns about power dynamics and favoritism, and concludes:

Even when both parties have consented at the outset to a romantic or sexual relationship, the person in the position of greater authority, by virtue of his or her special responsibility and role in the core educational mission of the University, bears responsibility for any adverse professional consequences that arise.³⁴⁰

By placing the responsibility for the relationship on the senior person, Princeton provides an additional disincentive to engage in a sexual relationship involving an institutional power disparity.

IV. ACKNOWLEDGING THIRD PARTIES

The previous Part surveyed the existing legal, regulatory, and institutional mechanisms that regulate sexual behavior involving an institutional power disparity. In this Part, I discuss three ways current mechanisms should be improved in order to better address third-party harms within institutions. First, Title VII law should recognize that both sexual favoritism and sexualization of a workplace environment, or some combination of the two, can sustain a hostile environment claim for third parties. Second, institutions should prohibit sexual relationships involving an institutional power disparity when those relationships are likely to harm third parties and the institution itself. Within workplaces, the prohibition should include relationships between supervisors and subordinates. Within institutions of higher education, it should include all relationships between professors and undergraduates. It should also include relationships between professors and graduate students within their department. Third, both workplaces and universities should require a brief and minimally intrusive

338. Office of Equal Opportunity and Affirmative Action, *Consensual Romantic and Sexual Relationship Policy Between Faculty and Students*, COLUMBIA UNIV., https://eoa.columbia.edu/files/eoaa/content/Consensual%20Relationship%20Policy%20100215.Final__0.pdf [https://perma.cc/EH7C-8LBP] (last visited Jan. 25, 2019) (prohibiting an instructor from engaging in a “consensual romantic or sexual relationship with a student over whom he or she exercises academic or professional authority”).

339. PRINCETON UNIV., *supra* note 327.

340. *Id.*

disclosure of any sexual relationship involving an institutional power disparity that does not fall into one of the previous categories.

This Part is not meant to be comprehensive or to solve every question. Institutions vary to such a degree that there is unlikely to be any one-size-fits-all solution. My aim, rather, is to sketch an overall approach that can be adapted to particular situations. In future work I will articulate a regulatory framework with more specificity.³⁴¹ More generally, I hope to demonstrate concretely how the general principle of acknowledging third-party harm can and should inform law and policy.

Finally, I wish to acknowledge an important concern, which I share, that attempts to regulate sexual behavior involving an institutional power disparity will result in disparate enforcement of laws and policies against non-white and LGBTQ people, among other disfavored outgroups.³⁴² Scholars have documented that such disparate enforcement is a problem in many areas of law, including antidiscrimination law. But the fact that a regulation might be disparately enforced is not a reason to do away with the regulation; it is a reason to work toward evenhanded enforcement.³⁴³

Moreover, individuals who are non-white or LGBTQ are often more vulnerable to negative third-party consequences. As frequent institutional outsiders, such individuals may be more likely to lose out when others receive sexual favoritism; to suffer unique harms related to sexualization; and to find particularly alienating institutions where sexual relationships involving institutional power disparities are widespread and unchecked. Regulatory mechanisms designed to mitigate the harms of sexual behavior involving an institutional power disparity will help them too.

A. Antidiscrimination Law

Third parties should be able to recover for a violation of Title VII under

341. See Nancy Leong & Shannon Warren, *Beyond Consent: Regulating Sexual Behavior Within Institutions* (Feb. 1, 2019) (unpublished manuscript) (on file with author).

342. See generally Gersen & Suk, *supra* note 40.

343. The argument that we shouldn't have a particular law or policy because it will have a disparate impact on minorities is deployed with unfortunate frequency by people whose actual opposition is to the law or policy itself and who show interest in minorities only when it serves as a useful rhetorical device. See, e.g., Caitlin Flanagan, *The Humiliation of Aziz Ansari*, ATLANTIC (Jan. 14, 2018), <https://www.theatlantic.com/entertainment/archive/2018/01/the-humiliation-of-aziz-ansari/550541/> (lamenting the "hit squad of privileged young white women" who have "open[ed] fire on brown-skinned men"). This article is the first and only instance I and my research assistants have found of Flanagan expressing concern for a racial disparity, and it presumes, without evidence, that Ansari's accuser is white. One wonders whether her concern might be less with "brown-skinned men" and more with what she sees as #MeToo gone too far. I have explored the widespread phenomenon of white people leveraging non-white racial identity for their own purposes in other work. See, e.g., Nancy Leong, *Racial Capitalism*, 126 HARV. L. REV. 2151 (2013).

either a quid pro quo or hostile environment theory when they suffer harm as the result of being a third party to a relationship, regardless of whether that relationship is consensual. As Susan Best has stated: “If an employee is injured as a third-party by a sexual relationship, that employee’s right to a remedy should not rest on the consensual nature of said sexual relationship.”³⁴⁴ Informed by a fuller understanding of the harms that third parties suffer, courts should expand current avenues for recovery in two ways.

First, courts should adopt a more realistic standard, informed by social science and concrete examples, for determining what counts as harm sufficient to sustain a Title VII hostile environment claim.³⁴⁵ Most of the cases in which courts have allowed recovery are quite extreme, generally involving multiple sexual relationships between supervisors and subordinates.³⁴⁶ The test should instead inquire whether the sexual relationship within the institution creates a hostile environment for a reasonable person, under all the circumstances, given the full catalog of third-party harms. Under such a test, a single sexual relationship between a supervisor and subordinate—regardless of whether that relationship was consensual—should permit recovery.

Second, courts should permit recovery based even on a single incident of favoritism for a sexual partner. Here, plaintiffs have uniformly failed to recover, even when the harm was significant, such as a failure to receive a substantial promotion.³⁴⁷ As research has demonstrated, even a single instance of favoritism may cause a third party to believe that the only way to advance at work is to engage in a sexual relationship with a supervisor.³⁴⁸ Harm from such favoritism thus extends beyond the refusal to receive a promotion. It includes consequences such as diminished workplace happiness and autonomy.³⁴⁹ It also includes very concrete consequences such as having to be supervised by an individual less qualified than oneself.³⁵⁰ Courts should therefore depart from cases premised upon decades-old EEOC guidance and expand opportunities for recovery based on a single instance of favoritism where such favoritism significantly affects the working environment.

These twin aims can be accomplished without radical deviation from current Title VII law. As we gain a better empirical understanding of the

344. Best, *supra* note 29, at 226.

345. See generally Bercovici, *supra* note 30.

346. See, e.g., Miller v. Dep’t of Corrections, 115 P.3d 77, 80 (Cal. 2005); Broderick v. Ruder, 685 F. Supp. 1269, 1278 (D.D.C. 1988).

347. See *supra* Section III.C.

348. Bercovici, *supra* note 30, at 212.

349. See *supra* Section II.A.2.

350. See *supra* Section II.A.1.

world, judges' thinking and courts' holdings generally shift in line with that understanding. The #MeToo movement, for all its messiness, has brought about a much fuller understanding of sexual assault, abuse, and harassment both within and beyond institutions. Courts can build upon that knowledge to accurately take account of third-party harms.

B. Institutional Prohibition

Workplaces and educational institutions should clearly prohibit sexual behavior involving an institutional power disparity when such behavior inherently harms third parties and the institution. In the workplace, such harm occurs when a relationship involves a supervisor and subordinate. In the higher education setting, such harm occurs when a relationship involves a professor and any undergraduate student, or a professor and any graduate student within the professor's department.³⁵¹ The harms that can arise in these scenarios are, as I have documented, serious and pervasive, and as a result justify total prohibition of sexual behavior involving such an institutional power disparity.³⁵²

The costs to such regulation are not overwhelming. Some might protest that banning relationships between supervisors and subordinates, or professors and students, causes a specific harm—that is, preventing two people from forming a relationship who are perfect for each other. But even if we uncritically indulge, for a moment, the notion that there is such a thing as a single perfect match, then it would seem that the perfect match would be so precious that one or both of the parties involved should be willing to alter their status—or simply wait a little while—so as to avoid the conflict with their institutional environment. Perhaps one prospective partner can transfer to a different department. Perhaps a professor and a student can manage to keep their relationship purely professional for a few extra months until the student graduates. Perhaps the professor can even resign their post:

351. Graduate programs in different fields vary considerably, and I do not claim to understand the dynamics of every program. As to my own field, my view is that law schools should prohibit law professors from engaging in sexual behavior of any kind with any student seeking a juris doctorate degree. While similar concerns frequently apply to students seeking an LLM or JSD, I do not attempt to generalize about those programs here because such programs differ markedly among schools.

352. Such policies should exempt sexual relationships that preceded the institutional power disparity: for example, when a professor's spouse decides to go back to school to finish an undergraduate degree. The exemption is appropriate because the relationship communicates an entirely different message to the institutional community: for example, it does not communicate that professors view the undergraduate student body as a pool of prospective dating partners because the relationship preceded the student-spouse's enrollment. Such relationships should instead be subject to the disclosure provisions discussed in Section IV.C: for example, such relationships still present concerns relating to sexual favoritism, which counsel against situations in which a professor evaluates his or her spouse.

people have given up much more than a tenured professorship for true love.³⁵³ People cannot reasonably expect to make literally no personal sacrifices to remain in good standing with the institutions with which they voluntarily affiliate, and certain forms of restraint are justifiable when necessary to avoid harm to third parties and the institution itself.

Others might protest that banning relationships between supervisors and subordinates, or professors and students, causes a more general harm—that is, it so limits the dating pools of people who spend much of their lives within their institutions that, if people are limited in who they can date within the institution, they may not be able to date at all.³⁵⁴ First, this protest overstates my actual proposal: people can still date within their workplace, for example, just not within their chain of command. Second, the claim that a prohibition on supervisor-subordinate dating amounts to a total prohibition on dating given the demands of the modern workplace is at best empirically questionable. With the number of dating websites and apps on the market, one might argue that it is easier to date—or find casual sex—than ever before, and that the Internet has made it possible to connect with people far beyond one’s ordinary milieu, let alone one’s workplace.³⁵⁵ Concerns that prohibitions on dating a subset of people within one’s institution amount to a prohibition on dating are unfounded.

C. Institutional Disclosure

When two members of an institution who are not prohibited from dating due to one of the circumstances described in Section IV.B. initiate a sexual relationship involving an institutional power disparity, institutions should require them to disclose that relationship to an appropriate entity within the institution. Although the relationship may not pose any actual or apparent conflicts at the time of disclosure, the relationships should be documented in order for the institution to take appropriate measures to avoid future conflicts that cause harm to third parties or to the institution itself.

In order to protect the privacy interests of the parties involved, the disclosure should be minimally intrusive. Institutions differ too much to attempt to draft a universal policy, but a number of scholars and human

353. For example, in 1936 Edward VIII gave up the English throne in order to marry Bessie Wallis Warfield Simpson, a twice-divorced American. Indeed, Edward’s explanation for his abdication sounds in respect for the institution and acknowledgment that his sexual relationships might damage it: “I did not value the crown so lightly that I gave it away hastily I valued it so deeply that I surrendered it, rather than risk any impairment of its prestige.” Reuters, *The Duke of Windsor Dies at 77*, N.Y. TIMES, May 28, 1972, at 1.

354. See *supra* Section II.B.2

355. See, e.g., Robinson, *supra* note 223, at 2791–92.

resources professionals have offered helpful guidance for institutions on drafting an appropriate policy.³⁵⁶ In general, such policies should require disclosure of no more than the minimum amount of information necessary—that is, that a sexual relationship exists, and its date of inception—to allow management of any conflicts that might arise. Institutions should also have discretion to mandate penalties for non-disclosure; different situations within different institutions likely warrant different penalties. But a disclosure policy should have sufficient consequences that people will take it seriously: under some circumstances, termination is likely an appropriate consequence.

Opponents may argue that even the disclosure is too onerous for a relationship involving consenting adults. But in many other instances, we require professionals to disclose conflicts of interest as part of their job. Academic grant applications require applicants to disclose conflicts ranging from financial conflicts to mentorship conflicts to personal relationships.³⁵⁷ Pursuant to various ethical rules, law firms routinely run conflict checks before accepting clients.³⁵⁸ Federal statute requires that judges keep lists of affiliations that require them to recuse themselves from cases.³⁵⁹ These conflict disclosures are viewed as unremarkable. They are a necessary part of professionalizing the workplace. Disclosing sexual relationships might feel more personal in some instances, but it addresses a conflict that is no less serious.

Some have criticized policies that intervene in supervisor-subordinate relationships on the ground that they have a disparate impact on women. That is, changing the employment relationship more frequently involves moving the subordinate than the supervisor, and this can derail women's careers. This is a real concern that may be descriptively accurate in some workplaces—indeed, future research could profitably investigate this issue. But if such a disparity exists, the solution is not to tolerate behavior corrosive to workplace functioning, in many instances inhibiting the careers of *other* women in the process. Instead, the way to improve women's career prospects is to improve overall workplace conditions for women. Institutions should attempt to manage conflicts in ways that do not result in harm to third parties *or*, in the aggregate, women employees. The goals are

356. See, e.g., Christine Gerdes, *The Case for University Consensual Relationship Policies*, 49 WAYNE L. REV. 1031, 1048–49 (2004).

357. See, e.g., National Institutes of Health, Grants and Funding, *Financial Conflict of Interest*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://grants.nih.gov/grants/policy/coi/index.htm> [<https://perma.cc/D3RV-86XT>] (last visited Jan. 25, 2019) (listing extensive regulations governing disclosure of various conflicts of interest).

358. Cf. MODEL RULES OF PROF'L CONDUCT R. 1.7 (AM. BAR ASS'N, 2016).

359. 28 U.S.C. § 455 (listing situations in which federal judges must recuse themselves from adjudicating a dispute).

complementary, not mutually exclusive—or, at least, they don't have to be.

CONCLUSION

Sexual behavior involving an institutional power disparity has negative consequences both for third parties within the institution and for the institution itself. For years, such behavior has been tolerated when it is consensual, even though the consequences for third parties are often severe and long lasting. Moreover, institutional stakeholders often underestimate the harm of non-consensual sexual behavior due to insufficient attention paid to the harms that third parties suffer. This Article strives to make third parties part of the conversation. After all, some sexual behavior harms them too.