#TimesUp On Individual Litigation Reform: Combatting Sexual Harassment Through Employee-Driven Action and Private Regulation

NATALIE DUGAN*

In 2017, the New York Times *published a story that exposed severe sexual misconduct on the part of Harvey Weinstein, an American film producer. The revelation of Weinstein's conduct proved to be a watershed moment for the public's comprehension of sexual harassment and violence in the workplace. Movements like the #MeToo and TimesUp initiatives quickly gained substantial momentum, reflecting a newfound and widespread commitment to combatting this form of misconduct.*

This Note, however, aims to illuminate the barriers to progress those movements, and others, will face in their attempts to eradicate sexual harassment and violence in the broader workplace context, beyond the scope of Hollywood. The narrow focus on overt sexual misconduct, along with a general failure to circumvent the pre-existing shortcomings of the U.S. court system in addition to the various disadvantages of pursuing individual litigation, have the potential to prevent such movements from achieving lasting change. As such, this Note offers an alternative framework for combatting sexual misconduct in the workplace, through the implementation of employee-driven groups modeled after The Fair Food Program. Moreover, this Note offers possible means through which government intervention might facilitate cooperation between corporations and said employee-driven groups.

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* Notes Editor, Colum. J.L. & Soc. Probs., 2019–2020. J.D. Candidate 2020, Columbia Law School. The author is deeply grateful to Professor Mark Barenberg for his guidance and insight, and to the staff of the *Columbia Journal of Law and Social Problems* for all of their hard work and helpful comments.

I. INTRODUCTION

In early October 2017, the *New York Times* published a bombshell report alleging severe sexual misconduct by American film producer Harvey Weinstein, closely followed by a *New Yorker* article also alleging additional instances of harassment and rape by Weinstein.[1] In the wake of the damaging news coverage, over eighty women in the film industry came forward and accused Weinstein of sexual misconduct thereafter.[2] Weinstein subsequently resigned from the board of his company; the production of one of his films was suspended; and his membership to a number of prestigious film organizations was revoked.[3] More than six months after the scandal first broke, Weinstein was indicted in New York City in May 2018, on charges of rape and criminal sexual acts.[4] Since then, in what has been termed the "Weinstein Effect,"[5] over 350 other high-profile members of the film industry have been accused of sexual harassment or rape.[6]

The Weinstein scandal proved to be a watershed moment for public and collective recognition of sexual assault and harassment in not only the film industry, but also the workplace broadly. The movements sparked by the nation's reckoning of professional harassment have come to include the #MeToo movement, the TimesUp Legal Defense Fund, and legislative pushes to abolish both non-disclosure agreements in sexual harassment settlements and mandatory arbitration agreements that relegate harassment claims to the hands of private arbitration companies. This Note principally argues that the solutions proposed by many of the current efforts to eradicate sexual harassment are inadequate, and that instead, a private regulatory scheme created and executed by workers themselves would prove more successful.

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1. *See Harvey Weinstein Timeline: How the Scandal Unfolded*, BBC (May 24, 2019), https://www.bbc.com/news/entertainment-arts-41594672 [https://perma.cc/4P7X-ULUW].

2. Sandra Gonzales et al., *The Year Since the Weinstein Scandal First Rocked Hollywood*, CNN (Oct. 4, 2018), https://www.cnn.com/2018/04/05/entertainment/weinstein-timeline/index.html [https://perma.cc/6N7X-R8X6].

3. *See Harvey Weinstein Timeline*, *supra* note 1.

4. *Id.*

5. Brian Stelter, *The Weinstein Effect: Harvey Weinstein Scandal Sparks Movement in Hollywood and Beyond*, CNN BUSINESS (Oct. 20, 2017), https://money.cnn.com/2017/10/20/media/weinstein-effect-harvey-weinstein/index.html [https://perma.cc/V7GF-AJ7A].

6. Tim Baysinger, *#MeToo by the Numbers: 379 High-Profile People Accused Since Harvey Weinstein*, WRAP (June 26, 2018), https://www.thewrap.com/metoo-by-the-numbers-379-high-profile-people-accused-since-harvey-weinstein [https://perma.cc/UV3P-BLSX].

Part II of this Note briefly reviews the tenets and goals of the aforementioned movements that followed in the wake of the Weinstein scandal as well as these movements' demonstrable successes, if any. Part III then discusses the barriers to success these movements have faced before critiquing these movements' narrow focus on overtly sexual misconduct and investigating how excluding non-sexual forms of misconduct will hamper impactful change. Additionally, Part III also analyzes these movements' failure to adequately address the pre-existing shortcomings of the U.S. court system as an arena for combatting sexual harassment in the workplace, highlighting unfavorable judicial precedent as it relates to employment class actions and corporate liability.

Next, Part IV of this Note argues that employee-driven groups, such as the Fair Food Program, which is an organization created to combat human rights abuses in the Florida tomato industry, can offer an effective, alternative means of preventing sexual harassment. Specifically, Part IV discusses the ways in which employee-driven groups can effectively combat the prospect of professional retaliation, address broad patterns of harassment, and hold corporations accountable in ways that existing solutions cannot.

This Note concludes in Part V by offering possible means of government intervention that might facilitate cooperation between corporations and employee-driven groups. Drawing on corporate social responsibility tactics that have enabled the creation of private, regulatory bodies comparable to the Fair Food Program, Part V offers a number of avenues through which government intervention might aid the implementation of an employee-driven group aimed at reducing harassment. Given the severity and frequency of workplace sexual harassment, as illuminated by the Weinstein scandal, alternative solutions, as well as any subsequent government intervention required to implement those solutions, are of critical importance.

II. HARVEY WEINSTEIN, SEXUAL MISCONDUCT, AND THE COLLECTIVE UPRISING THAT FOLLOWED

This Part of the Note briefly reviews a number of movements that arose in the wake of the Weinstein scandal and assesses the measurable success these movements have had thus far. First, Part II.A examines the #MeToo movement, which began as a

Twitter hashtag to encourage victims of sexual violence to share their stories online, and the TimesUp movement, which ultimately culminated in a legal defense fund that aimed to provide victims legal representation. Parts II.B and II.C in turn examine the other movements that have encouraged the abolition of nondisclosure agreements and the abolition of mandatory arbitration agreements, respectively.

A. THE #METOO AND TIMESUP MOVEMENTS

The public revelation of Weinstein's widespread and decades-long misconduct catalyzed a number of sexual harassment movements. As Tom Hanks predicted in a BBC interview, "[Weinstein's] last name will become an identifying moniker for a state of being for which there was a before and an after."[7] The first major public response to the Weinstein scandal was the #MeToo movement on Twitter, which gained traction after actress Alyssa Milano encouraged Twitter users to share their own experiences with sexual harassment and assault on the platform.[8] Within twenty-four hours of Milano's Tweet, she received over 500,000 responses.[9] And, within a year, the hashtag was reportedly used in over eighteen million Tweets.[10]

In addition to #MeToo's viral presence on Twitter, the TimesUp movement proved to be another major response to the public revelation of Weinstein's misconduct. The genesis of TimesUp began in the Fall of 2017, when a group of women working in the entertainment industry met with the hope of addressing the "widespread abuse and misbehavior at the hands of pow-

7. *See Harvey Weinstein Timeline*, *supra* note 1.

8. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J. FORUM. 22, 36 (2018). The #MeToo movement originally began in 2006 as an effort to bring attention to sexual violence perpetrated against women, particularly women of color, but gained renewed attention after Milano's Tweet following the Weinstein scandal. *See id.*; *see also History & Vision*, ME TOO, https://metoomvmt.org/about/#history [https://perma.cc/KRB7-RRD2] (last visited Oct. 28, 2019). The movement's website describes its work as "helping those who need it to find entry points for individual healing and galvanizing a broad base of survivors to disrupt the systems that allow for the global proliferation of sexual violence." *Id.*

9. *Measuring the #MeToo Backlash*, ECONOMIST (Oct. 20, 2018), https://www.economist.com/united-states/2018/10/20/measuring-the-metoo-backlash [https://perma.cc/TC69-BYTC].

10. *Id.*

erful men."[11] The meeting ultimately resulted in the formation of the Time's Up Legal Defense Fund administered by the National Women's Law Center's Legal Network for Gender and Equity to connect victims of sexual harassment with attorneys.[12] The organization has aimed to use the defense fund to establish safe and fair conditions for women not only in the entertainment industry, but also across all industries, including the agriculture and service industries.[13] Led by Michelle Obama's former Chief of Staff, Tina Tchen, the defense fund raised over $20 million dollars in two months, demonstrating promise for the movement's proposed goals.[14]

Since their rise to public prominence, the #MeToo and TimesUp movements appear to have had some tangible, positive impacts. For example, the Equal Employment Opportunity Commission (EEOC), a federal agency broadly tasked with enforcing civil rights laws in the workplace, has stated that, for the first time in nearly a decade, the number of sexual harassment complaints that workers filed with the agency rose in the year following the Weinstein scandal and its aftermath.[15] One scholar, acknowledging the moving testimonies victims gave in the case concerning Larry Nassar,[16] also credited the #MeToo movement

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11. *History*, TIMESUP, https://www.timesupnow.com/history [https://perma.cc/KN3B-QBV6] (last visited Oct. 17, 2019).

12. Cara Buckley, *Powerful Hollywood Women Unveil Anti-Harassment Action Plan*, N.Y. TIMES (Jan. 1, 2018) https://www.nytimes.com/2018/01/01/movies/times-up-hollywood-women-sexual-harassment.html [https://perma.cc/6AYB-SCNE]. The organization released a letter titled, "Dear Sisters," which publicly advocated not only for "better treatment on movie sets," but also better workplace environments "for farmworkers, housekeepers, wait staff and home health aides." Emily Heil, *Hollywood Women Launch Anti-Harassment Campaign Aimed at Helping Blue-Collar Workers, Too*, WASH. POST (Jan. 2, 2018), https://www.washingtonpost.com/news/reliable-source/wp/2018/01/02/hollywood-women-launch-anti-harassment-campaign-aimed-at-helping-blue-collar-workers-too [https://perma.cc/G3HT-RM55].

13. *See* Heil, *supra* note 12.

14. Anita Busch, *Time's Up: First 60 Days $21M Raised, 1700 Women Come Forth from Over 60 Industries*, DEADLINE (Mar. 1, 2018), https://deadline.com/2018/03/times-up-first-60-days-21-million-dollar-raised-1700-women-over-60-industries-1202307795 [https://perma.cc/2CT4-G956].

15. Daniel Wiessner, *U.S. Agency Saw Sharp Rise in Sexual Harassment Complaints After #MeToo*, REUTERS (Oct. 4, 2018), https://www.reuters.com/article/us-usa-harassment/u-s-agency-saw-sharp-rise-in-sexual-harassment-complaints-after-metoo-idUSKCN1ME2LG [https://perma.cc/9T7V-XGWK].

16. Larry Nassar is a U.S. national gymnastics team doctor who sexually abused over three hundred athletes. *See* Sophie Gilbert, *A New Film Reveals How Larry Nassar Benefited from a Culture of Silence*, ATLANTIC (May 2, 2019), https://www.theatlantic.com/entertainment/archive/2019/05/new-film-exposes-how-larry-nassar-was-able-abuse/588571 [https://perma.cc/RK6G-EQ3E].

for a changing legal landscape, stating: "This type of sentencing hearing in a sexual assault case, with over 150 victims . . . is without precedent. It speaks to . . . the growing social climate that values victim testimony in sexual abuse cases, and enables victims to . . . share their stories and participate in the legal process."[17] Additionally, some have credited the #MeToo movement for comedian Bill Cosby's conviction for sexual assault, noting that the verdict against Cosby suggests that jurors are sympathetic to a victim's reasons for waiting to come forward or file a complaint long after an incident of sexual violence occurred.[18]

Similarly, the TimesUp movement credits their defense fund with connecting over 3400 women and men, two-thirds of which "identify as low-wage workers," to legal resources.[19] Given the momentum of the movement and the public's growing attentiveness to the cause, the organization has been able to recruit over 800 attorneys to participate in the program, including some of the country's "top attorneys."[20] And, while public recognition of the #MeToo and TimesUp movements grew, other activists also advocated for the abolition of non-disclosure agreements and mandatory arbitration agreements.

B. ABOLITION OF NON-DISCLOSURE AGREEMENTS

A third notable response to the Weinstein scandal is the legislative action aimed at abolishing, or restricting, the use of non-disclosure agreements (NDAs) in employment contracts and sexual harassment settlements.[21] The predominant rationale behind the abolition of NDAs in this context is the idea that, without public recognition of the accused's conduct, the prevalence of sexual harassment will not diminish.[22]

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17. Ross Kramer & Suzanne Jaffe Bloom, *Cosby's Conviction And How #MeToo Is Affecting Legal Cases*, LAW360 (Apr. 26, 2018), https://www.law360.com/articles/1037890/cosby-s-conviction-and-how-metoo-is-affecting-legal-cases [https://perma.cc/33JZ-VHUP].

18. *See id.*

19. *Legal Defense Fund*, TIMESUP, https://www.timesupnow.com/times_up_legal_defense_fund [https://perma.cc/U328-S9T3] (last visited Oct. 17, 2019).

20. *Id.*

21. *See, e.g.*, Jonathan Ence, *"I Like You When You Are Silent": The Future of NDAs and Mandatory Arbitration in the Era of #MeToo*, 2019 J. DISP. RESOL. 165, 166 (2019).

22. *Id.* ("It became blatantly clear that NDAs had not only restricted survivors from sharing their story cathartically, but that they had also given abusive men a path to legally harass women while simultaneously holding onto positions of power.").

In fact, after the Weinstein scandal broke, a group of staff members from his own company wrote an open letter asking their employer to release them from their NDAs so that they might disclose to the public their experiences and "the origins of what happened . . . and how."[23] Expressing their disapproval of confidentiality clauses as they relate to harassment in the workplace, Weinstein's staff members continued that although they were aware they worked "for a man with an infamous temper," they did not know their employer was "a serial sexual predator," arguing then that "non-disclosure agreements only perpetuate this culture of silence."[24] Weinstein's employees, and others in favor of the abolition of NDAs, believe that if those responsible for the perpetration of sexual misconduct are exposed, the public, made aware of the accused's transgressions, might thereafter take action to prevent the misconduct from occurring again.[25]

A number of state legislatures have since taken action to reform NDAs as they relate to sexual harassment settlement agreements. For example, in April 2018, the New York Legislature passed a bill prohibiting the use of NDAs in any settlement of a sexual harassment claim, unless confidentiality is requested by the complainant.[26] In other words, the accused cannot propose confidentiality as a term of the agreement. And, if the victim chooses to pursue confidentiality as a settlement term, he or she has twenty-one days to review those terms, and then another seven days, after all parties have signed, to revoke the agreement.[27]

Other states have abolished preemptive NDAs outlined in employment contracts. For example, the New Jersey Senate enacted a law that would abolish NDAs not only in the sexual harassment context, but in all harassment contexts, stating: "a provision in

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23. *See Harvey Weinstein Timeline*, *supra* note 1; *Statement from the Members of the Weinstein Company Staff*, NEW YORKER (Oct. 19, 2017), https://www.newyorker.com/news/news-desk/statement-from-members-of-the-weinstein-company-staff [https://perma.cc/K73E-M6ME].

24. *Id.*

25. *See, e.g.*, Sara Ganim & Sunlen Serfaty, *Why Some Victims of Sexual Harassment Can't Speak Out*, CNN: POLITICS (Nov. 24, 2017), https://www.cnn.com/2017/11/24/politics/non-disclosure-agreements-sexual-harassment [https://perma.cc/G392-2KJR].

26. S. 7507-C, Gen. Assemb., 202d Sess. (N.Y. 2018); *see* Robert Whitman et al., *In a Nod to the #MeToo Movement, New York Legislature Passes Comprehensive Anti-Sexual Harassment Legislation*, LEXOLOGY (Apr. 5, 2018), https://www.lexology.com/library/detail.aspx?g=b7226e4d-853e-42c0-96b2-4b5222d0fc71 [https://perma.cc/M39S-PXYM].

27. S. 7507-C, Gen. Assemb., 202d Sess. (N.Y. 2018).

any employment contract that waives any substantive or procedural right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable."[28] Similarly, a proposed bill in Washington would prohibit NDAs as conditions of employment in the context of sexual harassment or assault in the workplace.[29] That is, the bill would prevent employers from requiring their incoming employees to sign prospective NDAs, should those employees ever raise sexual harassment allegations. However, the bill does not preclude NDAs from settlement negotiations after the alleged conduct has already occurred.[30]

California has also made legislative pushes on the NDA front, proposing a bill titled the Stand Together Against Non-Disclosures Act (STAND Act), which would prohibit confidentiality clauses in any settlements related to civil actions involving sexual assault and harassment as well as discrimination based on sex.[31] This act would significantly expand California's existing abolition of NDAs in settlements involving acts that would constitute a felony sex offense or childhood sex abuse.[32] Under the STAND Act, any NDA agreed to under the aforementioned circumstances would be deemed void as against public policy.[33]

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28. S.A. 121, 218th Leg., Reg. Sess. (N.J. 2018) (emphasis added); *Legislative Alert: New Jersey on A Fast Track to Ban Waivers of, and NDAs Relating to, Employment Discrimination, Harassment and Retaliation Claims*, NAT'L L. REV. (June 12, 2018), https://www.natlawreview.com/article/legislative-alert-new-jersey-fast-track-to-ban-waivers-and-ndas-relating-to [https://perma.cc/TW4R-H5QS].

29. S.B. 5996, 65th Leg., Reg. Sess. (Wash. 2018); *No More Secrets: States Introduce Legislation to Preclude Confidentiality Provisions in Settlement Agreements Involving Harassment Allegations*, NAT'L LAW REVIEW (Feb. 12, 2018), https://www.natlawreview.com/article/no-more-secrets-states-introduce-legislation-to-preclude-confidentiality-provisions [https://perma.cc/PD6F-6H4H].

30. *See* S.B. 5996, 65th Leg., Reg. Sess. (Wash. 2018).

31. S.B. 820, 2017–2018 Leg., Reg. Sess. (Cal. 2018); Ramit Mizrahi, *Sexual Harassment Law After #MeToo: Looking to California as a Model*, 128 YALE L.J. FORUM 121, 140–41(2018).

32. *See* S.B. 820, 2017–2018 Leg., Reg. Sess. (Cal. 2018).

33. *Id.* The notion that NDAs are, or should be, unlawful as against public policy is a stance that courts have also expressed in the past as it relates to disclosures made to the EEOC. *See, e.g.*, EEOC v. Astra USA, 94 F.3d 738, 741 (1st Cir. 1996) (The First Circuit deemed a confidentiality provision in a sexual harassment settlement between the employer and its employees, prohibiting the disclosure of information to the EEOC, to be void as against public policy. The court reasoned that the public's interest in encouraging communication with the EEOC greatly outweighed the "minimal" positive impact the non-assistance clause had on settlement communications.); EEOC v. Morgan Stanley & Co., No. 01CIV8421RMBRLE, 2002 WL 31108179 (S.D.N.Y. Sept. 20, 2002) (concluding that a confidentiality clause prohibiting disclosure to the EEOC regarding a gender discrimination settlement violated public policy because it "clearly could have a clear chilling impact

However, while a number of scholars support a move to limit the use of NDAs in the employment context, advocating for both state and federal opposition, there are still many others who oppose their elimination.[34] The tenets of their argument hold that although NDAs might protect perpetrators of sexual misconduct, they can also protect victims from reputational harm and professional retaliation.[35] Put otherwise, "[p]rivate settlements protect victims from all the painful ugliness that comes with litigation in the public eye."[36] If not protected by NDAs, defendants or the accused in sexual assault cases can "come after victims hard, smearing their reputations by casting them in whatever negative light they can, often accusing them of promiscuity, gold-digging, and flat-out lying."[37] Therefore, when considering the flip side of the NDA elimination argument, it is possible that even when legislative pushes to abolish NDAs are successful, their eradication may have negative consequences for the victims those legislatures sought to protect and empower.

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on claimants"); Saini v. Int'l Game Tech., 434 F. Supp. 2d 913, 921 (D. Nev. 2006) (distinguishing NDAs in the sexual harassment context from those in the trade secret context, stating that "[w]hile there is certainly a public interest at stake in uncovering the sale of defective products, we find that public policy is not as high a priority as enforcement of sexual harassment law by the EEOC, at least when, as here, the defect at issue is not a threat to the safety or economic well-being of the public at large"). NDAs and confidentiality provisions have also been voided on public policy grounds in contexts other than harassment or discrimination. *See, e.g.*, Cariveau v. Halferty, 99 Cal. Rptr. 2d 417, 424 (Cal. Ct. App. 2000) (The court held that a confidentiality clause in a settlement between a securities dealer and her client, where the client could not thereafter disclose the dealer's misconduct to regulatory authorities, was void as against public policy. The court stated that "[t]he public policy expressed and implied from the securities laws and regulations outweighs the general interest in settling disputes without litigation. To permit [the securities dealer]'s violations of rules and shield them from administrative review in an agreement to silence wrongdoing would undermine the public's confidence in the integrity of securities oversight.").

34. Vicki Schultz et al., *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018), https://www.stanfordlawreview.org/online/open-statement-on-sexual-harassment-from-employment-discrimination-law-scholars [https://perma.cc/72NE-8R4A].

35. Stanley D. Bernstein & Stephanie M. Beige, *NDAs Can Help Harassment Victims*, WALL ST. J. (Aug. 12, 2018), https://www.wsj.com/articles/ndas-arent-all-bad-for-harassment-victims-1534110226 [https://perma.cc/2LB8-UXFE]; Erin Carden, *The Fate of NDAs in the #MeToo Era*, PEN AM. (May 18, 2018), https://pen.org/the-fate-of-ndas-in-the-metoo-era [https://perma.cc/SPT8-56EJ]; Areva Martin, *How NDAs Help Some Victims Come Forward Against Abuse*, TIME (Nov. 28, 2017), http://time.com/5039246/sexual-harassment-nda [https://perma.cc/99KH-6983].

36. Martin, *supra* note 35.

37. *Id.*

C. ABOLITION OF MANDATORY ARBITRATION AGREEMENTS

Following in line with the proposed argument of NDA abolition is the effort to eradicate the use of employment contracts where an employee preemptively agrees to resolve a sexual harassment complaint through binding arbitration, instead of through the court system.[38] Employees who sign these agreements, whose claims are consequently relegated to arbitration, are statistically proven to be less likely to win their cases than if they were in court.[39] According to one empirical study of reports filed by the American Arbitration Association, employee-win rates in arbitrated proceedings was approximately 21.4%, compared to 33–36% in federal discrimination trials and 50–60% in state court trials.[40] And, if these employees do win their cases, they tend to see smaller sums in settlement payments.[41] These unfavorable statistics can likely be explained in part by the fact that employers typically choose the private arbitration firm that will hear the case, and compensate the arbitrators who will preside over the claim, presenting obvious conflicts of interest.[42] In this view, arbitrators are said to "twist" or "outright disregard" the law in order to deliverable favorable verdicts to employers.[43]

Legislatures, scholars, and activists alike are disturbed by this forfeiture of the right to a courtroom, particularly in discrimination and harassment contexts, and have called for more scrutiny of the practice. A section of the California Arbitration Act, for example, requires that private arbitration companies release quarterly reports that disclose information regarding their cases.[44] Women's law associations at law schools, including Yale and Stanford, have engaged with this ongoing debate, releasing a

38. Although the push for ending mandatory arbitration garnered more attention after the Weinstein scandal, efforts to monitor these kinds of agreements are not new. California, for example, added a section to the California Arbitration Act in 2002, requiring that arbitration companies release quarterly reports detailing consumer arbitrations. CAL. CIV. PROC. CODE § 1281.96(a).

39. *See* Alexander J. S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMP. LEGAL STUD. 1, 1 (2011).

40. *Id.* at 35.

41. *Id.* at 1.

42. *See* Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a 'Privatization of the Justice System'*, N.Y. TIMES (Nov. 1, 2018), https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html [https://perma.cc/4CFT-K9DE].

43. *Id.*

44. *See* Mizrahi, *supra* note 31, at 136.

statement that they would no longer accept funding from, or pursue employment opportunities with, law firms that mandate arbitration for sexual harassment and discrimination claims.[45] Similarly, Harvard law students launched a campaign known as #DumpKirkland, encouraging students to reject a prominent law firm's recruiting efforts, which ultimately pressured the firm into voiding mandatory arbitration contracts for associates.[46] Other legal scholars have also called on Congress to allow any party seeking Title VII relief to file their claim in federal or state courts regardless of mandatory arbitration agreements, and to amend the Federal Arbitration Act such that it overturns any court decision holding otherwise.[47]

Therefore, it is clear that the Weinstein scandal has served as a catalyst to four social-uprising campaigns aimed at diminishing sexual harassment: #MeToo, the Times Up Legal Defense Fund, a movement calling for the abolishment of NDAs, and a similar movement to eliminate mandatory arbitration agreements. Each initiative attempts to tackle the pervasiveness of sexual assault and harassment in distinct ways, with some seeing limited success.

III. BARRIERS TO PROGRESS FOR #METOO, TIMESUP, AND EFFORTS TO ERADICATE NDAS AND MANDATORY ARBITRATION

Despite the recent public recognition of sexual harassment's prevalence in the workplace, the impact of the initiatives detailed above will be thwarted by a number of barriers. Part III.A argues that the first of these barriers is the failure to adequately address both the threat of retaliation, and retaliation itself, that victims can often experience professionally and personally after coming

45. 2018–2019 Board of Yale Law Women et al., *Joint Statement from Law Women's Associations Regarding Mandatory Arbitration Agreements* (Dec. 3, 2018), https://docs.google.com/document/d/1nSU-LIf9AxXoKY1p8DSD_g7sn0TMXQFsvHv7uL2NlBs/edit# [https://perma.cc/A9E2-PA5C] (last visited Nov. 22, 2019). Following the statement's traction, Harvard Law School published the results of a survey answered by some major law firms with the names of those firms with mandatory arbitration clauses, including Cooley LLP and Williams & Connolly LLP. *See* People's Parity Project, *Employer Survey Regarding Arbitration Agreements Results*, http://www.pipelineparityproject.org/coercivecontracts/#survey [https://perma.cc/L4WV-76UQ] (last visited Oct. 17, 2019).

46. *See Joint Statement from Law Women's Associations Regarding Mandatory Arbitration Agreements*, *supra* note 45.

47. Schultz, *supra* note 34.

forward with allegations of discrimination and harassment. Part III.B then examines the narrow focus some of these initiatives have on overt sexual harassment, neglecting the more subtle, but equally pervasive, forms of harassment. Finally, Part III.C critiques the markedly unfavorable Supreme Court precedent regarding employer liability, and examines the judicially constructed conception of organizational innocence.

A. RETALIATION AND THE PSYCHOLOGICAL TOLLS OF COMING FORWARD

Although a heightened awareness of sexual harassment and a cultural move towards listening to victims and their stories may encourage women to come forward with formal allegations of misconduct, the likelihood of professional and personal retaliation remains overwhelming.[48] A 2003 study found that seventy-five percent of employees who spoke out against workplace mistreatment faced some form of retaliation, and other studies have demonstrated that sexual harassment complaints are often met with hostility towards the victim.[49] Authors of an analysis sampling approximately 1800 employment civil rights cases filed in federal court from 1988 to 2003 (referred to hereinafter as the Berrey Study) stated that "after [an] employee's complaint became known to others in the organization (especially if it was revealed that the worker was defining the problem as possible discrimination), things moved quickly. Employees told us they were told not to go forward, warned of negative consequences, and [were] often terminated."[50]

While the Weinstein Effect may have played a role in successfully encouraging employers to promptly fire perpetrators of harassment, victims still tend to experience retaliatory consequences in the interim. For example, even when harassers are fired swift-

48. The Weinstein scandal itself revealed details of the retaliation female assistants tasked with hiding his sexual encounters faced; when his female assistants did speak out about his abuse, they were berated and harassed until they felt compelled to leave. *Id.* at 36.

49. *See* Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8:4 J. OCCUPATIONAL HEALTH PSYCHOL. 247, 255 (2003); Mindy Bergman et al., *The (Un)Reasonableness of Reporting: Antecedents and Consequences of Reporting Sexual Harassment*, 87(2) J. APPLIED PSYCHOLOGY 230 (2002).

50. ELLEN BERREY ET AL., RIGHTS ON TRIAL: HOW WORKPLACE DISCRIMINATION LAW PERPETUATES INEQUALITY 93 (2017).

ly, those who come forward may have already "left careers they loved."[51] Likewise, many women face retaliation even for actions that fall short of formally filing a lawsuit or an internal complaint for investigation. For example, the *New York Times* chronicled the experience of a restaurant server who was fired as soon as her boss learned she was merely planning to file a lawsuit.[52]

Furthermore, when those who come forward with allegations of harassment do face retaliation, there is often little recourse available to them. Most plaintiff lawyers work on a contingency-fee basis, and as such, many attorneys will decline to represent victims where alleged retaliation is subtle or seems difficult to prove.[53] Although a plaintiff can file a claim with the EEOC, or a state equivalent, to request the organization's representation, the odds that such an agency will take the case are low.[54]

A study conducted by the Center for Public Integrity, which analyzed eight years of EEOC complaint data, concluded that each year the EEOC and its state and local partner agencies close more than 100,000 job discrimination cases.[55] Yet, in the study's review of the 2017 fiscal year, the EEOC filed only 199 workplace discrimination lawsuits on behalf of workers.[56] California's EEOC equivalent, the Department of Fair Employment and Housing, investigated almost five thousand complaints, settled roughly one-fifth of those complaints, and filed only thirty-one lawsuits in court.[57] Critics explain that these unfavorable statistics are likely the consequence of the EEOC's declining budget

51. Schultz, *supra* note 8, at 26.

52. Jodi Kantor, *#MeToo Called for an Overhaul. Are Workplaces Really Changing?*, N.Y. TIMES (Mar. 23, 2018), https://www.nytimes.com/2018/03/23/us/sexual-harassment-workplace-response.html [https://perma.cc/53ZZ-PUPX].

53. Mizrahi, *supra* note 31, at 137–38.

54. *Id.* at 137–38.

55. Maryam Jameel & Joe Yerardi, *Despite Legal Protections, Most Workers Who Face Discrimination Are on Their Own*, CTR. FOR PUB. INTEGRITY (Feb. 28, 2019), https://publicintegrity.org/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases [https://perma.cc/5A3J-JL8G]. The EEOC can close a complainant's case for a number of reasons, including, for example, if it determines that the facts alleged fail to state a claim under those statutes enforced by the EEOC, or if the EEOC upon its own investigation is unable to conclude that the relevant statute has been violated. *See* U.S. EQUAL EMP. OPPORTUNITY COMM'N, DISMISSAL AND NOTICE OF RIGHTS FORM (2009), https://www.eeoc.gov/eeoc/foia/forms/upload/form_161.pdf [https://perma.cc/DX85-CYYM].

56. Jameel & Yerardi, *supra* note 55.

57. Mizrahi, *supra* note 31, at 138.

and staff despite an increase in the American labor force.[58] Others have criticized the EEOC "as a toothless tiger," largely because the agency is said to "lack[ ] independent power to sanction violations of the employment discrimination laws or to promulgate regulations under Title VII."[59] Further, while the EEOC *can* issue guidelines, the organization itself lacks the necessary authority to enforce their own guidelines and implement sanctions for guideline violations.[60]

Additionally, once a victim files a formal complaint and engages in the adversarial process, many plaintiffs experience what they feel is a "personal attack," manifesting in being shunned or even lied about by former coworkers.[61] While some claims filed with the EEOC reach settlements plaintiffs are satisfied with, when a plaintiff formally commences the adversarial process, "the employer is no longer interested in the welfare of an employee, but is concerned with minimizing damage to the organization."[62] It then follows that even if defendants, namely employers being sued for discrimination, are presented with evidence that a victim's claims about discrimination are true, they still tend to denigrate those coming forward.[63]

Similarly, many victims who come forward and formally enter the adversarial process often suffer serious "personal cost[s]."[64] Describing these costs, the authors of the Berrey Study state: "[M]any plaintiffs experienced joblessness, depression, alcoholism, and divorce as a result of the experience of litigation. Many more concluded that they were not treated fairly in the legal process."[65]

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58. Jameel & Yerardi, *supra* note 55 ("The EEOC has a smaller budget today than it did in 1980, adjusted for inflation, and 42 percent less staff. At the same time, the country's labor force increased about 50 percent, to 160 million.").

59. Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 550 (2001).

60. *Id.*

61. BERREY ET AL., *supra* note 50, at 176.

62. *Id.* at 264.

63. *Id.*

64. *Id.* at 266.

65. *Id.* Victims are not the only employees who face trauma at the hands of retaliatory and harassing behavior in the workplace. A 2016 EEOC study of harassment in the workplace reported that male and female employees who witness sexual harassment or "incivility" directed at female coworkers experienced lower psychological and physical well-being. *See* Chai R. Feldblum & Victoria A. Lipnic, U.S. EQUAL EMP. OPPORTUNITY COMM'N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE 21 (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [https://perma.cc/2JLV-WJEY]. The Weinstein scandal itself demonstrated the trauma that coworkers who

Despite what seems to be a cultural shift encouraging women to come forward, the retaliatory actions and psychological trauma that victims may face upon alleging misconduct are ever present. However, retaliation and its consequences are not a concern directly addressed by the #MeToo movement, the TimesUp Legal defense fund, or the legislative efforts to eradicate confidentiality clauses and mandatory arbitration. As such, notwithstanding the apparent empowerment of victims to come forward, "those who speak up are [not] much safer today than they were before the movements took hold, in situations where a decision maker harbors retaliatory animus."[66] Moreover, in addition to neglecting the retaliatory consequences victims are likely to face, these movements also focus too narrowly on overtly sexual misconduct.

B. A FOCUS ON OVERT SEXUAL MISCONDUCT AND THE NEGLECT OF MORE PERVASIVE FORMS OF HARASSMENT

A narrow emphasis on gendered harassment that is explicitly sexual in nature may also prevent recent movements from having substantial impact. Sexual harassment can impact employees through a number of nonsexual means, as it is "more about upholding gendered status and identity than it is about expressing sexual desire or sexuality . . . it is typically a telltale sign of broader patterns of discrimination and inequality."[67] In other words, sexual harassment in the workplace is not limited to sexual assault, violence, or other forms of explicit misconduct; instead, it often manifests as "hostile behavior . . . patronizing treatment, personal ridicule, social ostracism, exclusion or marginalization, denial of information, and work sabotage."[68]

Despite this broad and varied spectrum of the forms harassment can take, a cursory review of the #MeToo movement and its corresponding Tweets demonstrates a disproportionate focus on instances that involve patently sexual forms of harassment.[69]

witness harassment can experience. Those coworkers were depicted as "complicit coconspirators," rather than as victims themselves, so much so that they felt they needed to release a statement exonerating themselves. Schultz, *supra* note 8, at 44.

66. Mizrahi, *supra* note 31, at 137–38.

67. Schultz et al., *supra* note 34, at 19.

68. Schultz, *supra* note 8, at 33–34.

69. Professor Vicki Schultz explains that "it seems clear that most of the ensuing #MeToo posts focused on specifically sexual forms of harassment and abuse, including sexual assault, and not on broader patterns of sexism and discrimination. Most of the Tweets that were most frequently retweeted in the first month, for example, referenced

Even as the details of the Weinstein scandal became public, those forms of nonsexual harassment experienced by his employees seemed to garner considerably less attention.[70] And to emphasize only this form of harassment, one that is in reality less prevalent than nonsexual forms of harassment, is to ignore the broader patterns of inequality that sustain its prevalence.[71]

Nonsexual forms of harassment as well as explicitly sexual forms of harassment do not function in isolation; the former, like the proliferation of belittling stereotypes, can foster environments where those overt acts of sexual harassment occur.[72] In a national study of sex discrimination cases, surveyed plaintiffs reported experiencing gender-based stereotypes, including the characterizing of women as hysterical, inferior, and sexual objects, with "hysterical" being the most referenced.[73] Of those plaintiffs, a significant majority reported having also experienced forms of explicit sexual harassment, such as sexual advances.[74] The interplay between arguably subtle stereotypes and overt sexual acts demonstrates the contextual complexity of harassment in the workplace — one that cannot be adequately resolved through addressing explicitly sexual misconduct alone.

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sexual misconduct. Data visualizations of Tweets in that period feature words like 'sexual,' 'sexually,' 'rape,' 'survivor,' 'violence,' 'assault,' 'predator,' 'abuse,' 'exploitation' — all words associated with explicitly sexual forms of misconduct — and names like 'weinstein,' 'harvey,' 'billoreilly,' 'trump,' 'louisck,' 'roymoorechildmolester' — all people accused of this type of conduct." *Id*.

70. Weinstein's female employees were demeaned in a number of nonsexual ways, i.e. being screamed at and insulted with gender-based obscenities and stereotypes. *Id.* at 36 ("Weinstein yelled that they should leave and make babies since that was all they were good for.").

71. *Id.*

72. BERREY ET AL., *supra* note 50, at 236.

73. *Id.* Broadly, *Rights on Trial* is the analysis of "a quantitative dataset consist[ing] of detailed coding of a random sample of 1788 [employment discrimination] cases filed in federal court from 1988 to 2003." *Id.* at 54. The study also included an "interview phase," which was structured in a way where they "sampl[ed] plaintiffs from the four major types of discrimination cross-classified by outcome, and, if successful in finding the plaintiff, we interviewed other participants in the case. Through this straightforward process of random sampling, we uncovered extraordinary stories." *Id.* at 278. The data collected concerning gender-based stereotypes was "[d]raw[n] from the thirteen sex discrimination cases in [the]interview sample, examin[ing] the eight cases in which the plaintiffs (all women) spoke in detail about sex discrimination and sexual harassment." *Id.* at 236.

74. *Id.* at 236.

C. NEGLECTING BROADER PATTERNS OF INEQUALITY

It can be argued that none of the aforementioned movements adequately address the fact that the U.S. federal court system itself, with its unwillingness to approve employment class actions and extend liability to corporations, prevents victims and litigants from combatting sexual harassment as a broader pattern of inequality. Because sexual harassment and discrimination is best understood and attacked in the aggregate, such inability to approach the problem in this way is a substantial barrier to success.[75]

A review of court documents from Supreme Court cases revealed that perpetrators tend to be depicted as individuals acting alone, while organizational structures are ignored.[76] More specifically, that same inquiry revealed that although more complete, broader stories of inequality are discernible from court records, the record also suggests that these stories were not "heard by judges."[77] Indeed, Professor Tristan K. Green concluded that harassment movements must direct their attention to stories and experiences that extend beyond isolated incidents.[78]

Similarly, class action litigation, which would seem to be a natural means of focusing on harassment in the aggregate, is notably difficult to pursue in the world of employment discrimination. In the landmark case *Walmart v. Dukes*, the Supreme Court held that a nationwide class action, alleging that Walmart's discretionary promotion and pay policies constituted Title VII gender discrimination, did not meet class certification requirements.[79] Despite being presented with a staggering amount of aggregate data demonstrating the pay and position inequity along gender lines throughout the nation's many stores, the Court held that the class did not satisfy the requisite commonali-

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75. *See, e.g.*, Sturm, *supra* note 59, at 460 ("Exclusion is frequently difficult to trace directly to intentional, discrete actions of particular actors, and may sometimes be visible only in the aggregate."); BERREY ET AL., *supra* note 50, at 236.

76. *See* Tristin K. Green, *Was Sexual Harassment Law A Mistake? The Stories We Tell*, 128 YALE L.J. FORUM 152, 153 (2018) ("Over time, the Court has created a harassment law that focuses inquiry on individual wrongdoers and their targeted victims and away from broader harms and sources of harassment and discrimination at work.").

77. *Id.* at 154.

78. *Id.* at 167 ("Those reforms must be aimed at better acknowledging that stories of harassment often go well beyond isolated individuals to include others in the workplace and the environments of work shaped by organizational leaders.").

79. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 343–44, 359–60 (2011).

ty for certification.[80] Even before *Walmart v. Dukes*, class actions were very rarely pursued by plaintiffs, and almost never survived certification.[81] Thus, although statistics suggest that collective action cases are the best avenue for successfully combatting employers' capacity to "recast inherently legal issues as individual problems or personality conflicts," successful certification is unlikely.[82]

Moreover, the Supreme Court further thwarted the possibility of class action lawsuits when it upheld mandatory arbitration agreements that entirely prohibit class actions that allege violations of employment rights under the Fair Labor Standards Act.[83] Employment discrimination law scholars have noted that this judicial unwillingness to treat harassment in the aggregate, "as a product of broader workplace structures and environments," reduces the possibility of justice for harmed employees and prevents enforcement agencies from "obtaining meaningful reforms."[84] With this recent Supreme Court precedent rejecting a move toward approaching harassment as a larger pattern, the law as it stands now continues to reward plaintiffs for narrowing their stories to the isolated, binary narrative of victim and harasser.[85]

Although courts might be able to address broader contexts of inequity through rigorous employer liability standards, organizations are, in practice, largely able to avoid accountability for hostile and discriminatory work environments. Evaluating "organizational innocence" in the context of employment discrimination, Professor Green explains that courts continue to see those who

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80. *Id.* at 349–59. Note that the *Dukes* decision was not a narrow ruling restricted to gender discrimination in the workplace, but rather established a new precedent for class action certification. *Id.* at 342.

81. BERREY ET AL., *supra* note 50, at 58. Ninety-seven percent of the employment civil rights cases between 1988 and 2003 studied by the authors did not pursue class action, and only two percent of cases were successfully certified. *Id.* at 58.

82. *Id.* Note, however, that while the EEOC is not subject to the certification limitations imposed by *Walmart*, class actions filed with the EEOC, at least between 1988 and 2003, were exceedingly rare. *Id.* at 58.

83. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018).

84. Schultz et al., *supra* note 34, at 108.

85. While Supreme Court precedent regarding class action and broad patterns of discrimination do not present favorable circumstances for plaintiffs, many victims of workplace harassment do not have access to individual litigation opportunities either. *See id.* (explaining that federal antidiscrimination laws do not cover those working for small businesses, unpaid interns, or those involved in employer relationships like investors, or members of boards of directors, and that short statutes of limitations prevent legal redress for many).

harass employees as "rogue" individuals, acting out of accord with the organization's efforts and interests.[86] Organizations are therefore able to largely narrow their efforts to remedial action, implementing internal complaint systems and responding to discrete incidents of misconduct with appropriate discipline.[87] For example, some organizations even decline computerized programs that might help to efficiently collect information about discrimination in the workplace for fear that if required to disclose such data, plaintiffs will build a better a case for themselves.[88]

Furthermore, employer liability in the sexual harassment context is also held to a lower standard than other forms of discrimination.[89] For other discrimination claims, employers are held strictly liable for supervisors who take discriminatory employment action, whether or not the employer knew or had reason to know of a supervisor's misconduct.[90] This kind of vicarious liability encourages organizations to take preventative action, which can entail internal audits of organizational practices and culture instead of simply taking remedial action to punish individual harassers.[91]

The Supreme Court cases of *Burlington Industries, Inc. v. Ellerth* and *Faragher v. City of Boca Raton*, however, limited this conception of strict employer liability for sexual harassment claims, by holding employers responsible only when the harassment culminates in a "concrete employment decision, such as firing or demotion."[92] And, if the harassment does not result in this

86. TRISTIN K. GREEN, DISCRIMINATION LAUNDERING: THE RISE OF ORGANIZATIONAL INNOCENCE AND THE CRISIS OF EQUAL OPPORTUNITY LAW 101 (2017).

87. *Id.*

88. *See* Sturm, *supra* note 59, at 476.

89. *See* Schultz et al., *supra* note 34, at 94–95; GREEN, *supra* note 86, at 101.

90. *See* Schultz et al., *supra* note 34, at 94–95 (citing Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 780, 791–92, 807–08 (1998)).

91. Schultz et al., *supra* note 34, at 97–98.

92. *Id.* (citing *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08). In *Ellerth*, the Court evaluated whether an employer could be held liable for one employee's harassment of another, which included repetitive and offensive comments and gestures, along with sexual advances. *Ellerth*, 524 U.S. at 747, 753. The *Ellerth* Court ultimately held that "[w]hen no tangible employment action is taken, a defendant may raise an affirmative defense to liability." *Id.* at 765. The defense requires that the employer demonstrate it exercised reasonable care to prevent the sexual harassment, and that the plaintiff unreasonably failed to avoid harm. *Id.* In *Faragher*, the Court similarly limited the strict employer liability standard by holding that employers' liability is subject to a showing that the employer exercised reasonable care to prevent the harassment, and that the plaintiff failed take available corrective action. *Faragher*, 524 U.S. at 807–08.

kind of employment action, a harassment victim is required to file an internal complaint before pursuing formal legal action.[93]

The U.S. court system's resistance to contextualizing sexual harassment in the aggregate, through both its focus on isolated incidents of misconduct and reticence to hold employers accountable for organizational discrimination, leaves victims with unfavorable chances of success or satisfaction when pursuing relief through litigation. In fact, the odds of success are already poor when alleging any kind of employment civil rights violation.

According to the aforementioned Berrey Study, which reviewed over 1500 federal cases where plaintiffs alleged this kind of misconduct, almost twenty percent were dismissed.[94] Plaintiffs lost on summary judgement in eighteen percent of filings reviewed, and of those plaintiffs who made it to court, success in trial represented only two percent of the federal filings overall.[95] And, even where plaintiffs do reach a settlement with their employers, they are left unsatisfied — a feeling the Berrey Study attributed to the fact that "employment discrimination litigation is a system dominated by individual cases bringing claims of disparate treatment, rather than cases that attack policies that have a widespread disparate impact on protected groups."[96]

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93. Schultz et al., *supra* note 34, at 97–98 (citing *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807–08). Sexual harassment claims not only face a harsher standard for vicarious employment liability as compared to other forms of discrimination, but they also face a higher standard for proving the conduct is legally sanctionable. Plaintiffs alleging hostile work environments must prove that the alleged conduct was sufficiently "severe or pervasive," which has proved to be a difficult standard for victims to meet. *Id*. (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993–2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 500–01 (2009)).

94. BERREY ET AL., *supra* note 50, at 61.

95. *Id.*

96. *Id.* at 72. Note also that, as an additional problem with pursuing our existing court system as an avenue for reform, a number of arbitrary characteristics are reported to have significant impacts on whether or not a plaintiff can attain a successful judgement when litigating employment rights violations. For example, African American plaintiffs have their cases dismissed more often, and lose on summary judgement more often, especially when the presiding judge is white. *Id.* at 267. Additionally, employees in management positions, older employees, employees who have worked with the employer for a long period of time, and employees working for unionized organizations are less likely to have their cases dismissed. *Id.* at 70.

IV. AN ALTERNATIVE APPROACH TO SEXUAL HARASSMENT: EMPLOYEE-DRIVEN GROUPS AND THE FAIR FOOD PROGRAM

Part IV of this Note argues that employee-driven groups with private regulatory authority, modeled after the Fair Food Program, can offer an alternative means of effectively combatting sexual harassment in the workplace.[97] Part IV.A discusses the Fair Food Program and its structure in detail, while the remainder of this Part examines how a similar program can circumvent those barriers to success that recent movements face.[98] Part IV.B then analyzes how a worker-driven organization, or an organization run by employees, can reduce the prospect of retaliatory action for coming forward either by allowing workers to represent themselves to their employers as a group, or by enabling employees to report to an independent "monitoring agency," thereby "diffusing the target of any retaliation."[99] With this group-oriented focus, and through the employees' "common experiences," workers can also avoid the shortcomings of perceiving harassment as a function of an individual bad actor harming an individual employee, and can instead evaluate a broader pattern of inequity

97. The impact of employee-driven groups as it relates to improving worker conditions, particularly in the discrimination and harassment contexts, has garnered significant recognition, both in the abstract, and as it relates to specific programs that have seen success. *See e.g.*, Manoj Dias-Abey, *Justice on Our Fields: Can "Alt-Labor" Organizations Improve Migrant Farm Workers' Conditions?*, 53 HARV. C.R.-C.L. L. REV. 168, 195 (2018); Greg Asbed & Steve Hitov, *Preventing Forced Labor in Corporate Supply Chains: The Fair Food Program and Worker-Driven Social Responsibility*, 52 WAKE FOREST L. REV. 497, 498 (2017); Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. PA. J.L. & SOC. CHANGE 39, 45 (2013); Alan Hyde, *Employee Caucus: A Key Institution in the Emerging System of Employment Law*, 69 CHI.-KENT L. REV. 149, 149–50 (1993); Michael J. Yelnosky, *Title VII, Mediation, and Collective Action*, *U. ILL. L. REV. 583*, *615* (1999). While this Note does not aim to explore the efficacy of unions, their shortcomings are often addressed when advocating for non-unionized employee groups. *See* BERREY ET AL., *supra* note 50, at 93 ("While the unions were helpful in securing certain benefits, such as workmen's compensation, none of the unions played a significant role in supporting the plaintiffs' assertions of discrimination."). *See also* Sturm, *supra* note 59, at 530; Dias-Abey, *supra* at 195; Hyde, *supra*, at 150.

98. The idea of using a system modeled after the Fair Food Program to combat sexual harassment in Hollywood was briefly addressed in an article published by *The Nation*. Gregg Kaufmann, *What Farmworkers Can Teach Hollywood About Ending Sexual Harassment*, NATION (Jan. 18, 2018), https://www.thenation.com/article/what-farmworkers-can-teach-hollywood-about-ending-sexual-harassment [https://perma.cc/S37A-AVAW]. This Note, however, centers on the discussion of how a worker-driven organization can address the shortcomings of current movements, along with how government intervention might serve to facilitate the creation of such an organization.

99. Sturm, *supra* note 59, at 531–32.

that fosters harassing behaviors.[100] Part IV.C goes on to explore how employee groups with regulatory authority are able to produce the external pressures necessary to foster systemic accountability.

A. THE FAIR FOOD PROGRAM MODEL

The Fair Food Program (or the Program) is one such worker-driven organization that demonstrates the potential for worker-driven groups to foster corporate accountability and tangible change. The Coalition of Immokalee Workers (CIW), a coalition of farmworkers in Florida's tomato industry, founded the Program to combat various human rights violations — in particular slavery and human trafficking — within the American agriculture industry.[101] Within six years of its inception, the Fair Food Program has "nearly ended" the epidemic of forced labor in not only Florida, but also the East Coast tomato industry.[102] The initiative has also tangibly reduced sexual harassment and violence, which was once "ubiquitous" in American agriculture.[103] Significantly, prior to the Program's inception, there were several successful prosecutions for farm labor slavery in Florida that liberated over 1200 employees.[104] But, only midlevel supervisors were imprisoned for the crimes, and according to one of the Program's co-founders, the failure to punish those who benefited from the forced labor allowed the industry to remain largely unchanged, sustaining the need for an initiative like the Fair Food Program.[105]

First, to give a cursory review of the Program's major tenets, its structure mandates that participating retail buyers, like Subway, McDonald's, and Walmart, pledge to buy produce only from

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100. *Id.*

101. Asbed & Hitov, *supra* note 97, at 498.

102. *Id.* ("[C]aptive workers were held against their will by their employers through threats and, all too often, the actual use of violence — including beatings, shootings, and pistol-whippings.").

103. *See id.* at 509 (citing Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 ME. L. REV. 157, 169 (2002) (indicating that eighty percent of farmworker women describe having been sexually harassed on the job, and that an EEOC investigation in California concluded that "hundreds, if not thousands, of women had to have sex with supervisors to get or keep jobs and/or put up with a constant barrage of grabbing and touching and propositions for sex by supervisors")).

104. Asbed & Hitov, *supra* note 97, at 503.

105. *Id.*

those growers that adhere to the Program's code of conduct.[106] This code of conduct is one shaped by the workers' collective input, reflecting their day-to-day experiences in the agriculture industry.[107] Moreover, those retail buyers also pledge to pay a "penny-a-pound" premium from those growers adhering to the code of conduct, who then pass along that increased revenue to their farmworkers.[108] These pledges are not merely symbolic, but rather are codified by a legally binding contract with the coalition.[109] Finally, in order to review and uphold the participating growers' adherence to the code of conduct, the Program employs a rigorous auditing and complaint system carried out by an independent organization.[110] If an audit reveals a violation, punishment is harsh and swift.[111]

Among the many characteristics of the organization that the Program credits with its success, its founders emphasize the critical roles community-based problem solving, analysis, and reflection have played in their strategy for lasting change.[112] Noting the Program's emphasis on a fluid board of community members and worker participation, the founders noted that Fair Food's emphasis on "participatory dialogue" and "broad-based, participatory leadership designed to facilitate member participation," while somewhat antithetical to traditional American organizing approaches that focus on individual leadership, is critical to the Program's success."[113] This community-wide reflection has allowed the Program to identify the causes of "supply-chain abuses," ultimately concluding that those responsible for farmworker poverty and mistreatment were "not only at the feet of the farm bosses and growers whom the CIW had been battling for a decade, but also squarely within the corporate suites of major food

106. Nancy Gagliardi, *The Evolution of the Tomato Industry — and How WalMart, McDonald's, and Chipotle Helped*, FORBES (Feb. 8, 2016), https://www.forbes.com/sites/nancygagliardi/2016/02/08/the-evolution-of-the-tomato-industry-and-how-walmart-mcdonalds-and-chipotle-helped [https://perma.cc/47VB-QKCU].

107. Asbed & Hitov, *supra* note 97, at 510.

108. Holly Burkhalter, *Fair Food Program Helps End the Use of Slavery in the Tomato Fields*, WASH. POST (Sept. 2, 2012), https://www.washingtonpost.com/opinions/fair-food-program-helps-end-the-use-of-slavery-in-the-tomato-fields/2012/09/02/788f1a1a-f39c-11e1-892d-bc92fee603a7_story.html [https://perma.cc/F8UQ-CVF2].

109. Asbed & Hitov, *supra* note 97, at 511.

110. Dias-Abey, *supra* note 97, at 199.

111. *Id.* at 201.

112. Asbed & Hitov, *supra* note 97, at 504.

113. *Id.*

retailers."[114] Therefore, worker involvement proved critical to the development of the industry-specific code of conduct, which reflected a worker's understanding of day-to-day responsibilities and experiences.[115]

Further, the Program emphasizes the rigor of its auditing and complaint systems, along with the fact that its implementation is conducted by an independent third party, as critical components of its strategy. The independent party — "the Standards Council" — is a separate not-for-profit organization founded by the coalition to oversee the Program.[116] The auditing regimen includes an astounding number of interviews: at least fifty percent of every growers' employees, at all levels of management, must be interviewed, with those conducting the interviews aiming to visit every participating grower at least twice a season.[117] The results of the interviews, along with every grower's payroll records, timekeeping systems, and minimum wage calculations, are then evaluated recurrently.[118]

Moreover, the Program's complaint system, also executed by the Standards Council, boasts a 24/7 hotline where workers can lodge complaints. Any retaliatory conduct directed toward a complainant is addressed; if the retaliation involves termination or reduction in work, the retaliator must be immediately fired or reprimanded in front of the affected workers, and a second offense results in mandatory dismissal.[119] Growers that violate the code of conduct, as discovered either through the audits or through a filed complaint, are subjected to a "zero-tolerance" poli-

114. *Id.* at 505–06 (noting "that the massive retail food chains were leveraging their volume purchases to demand ever lower prices from their Florida tomato suppliers, and that the downward pressure on prices was in turn translated, year after year, into a concomitant downward pressure on wages and working conditions for farmworkers").

115. *See id.* at 514–16. For example, the Fair Food Program has a specific mandate concerning the number of tomatoes growers are permitted to require workers to collect per bucket. Prior to the implementation of the Program's code of conduct, workers were required to fill their buckets well beyond the brim, ultimately leading to systematic wage violations and often violent debates over adequate collection. *See id.* at 515–16.

116. *Id.* at 522.

117. Asbed & Hitov, *supra* note 97, at 522.

118. Dias-Abey, *supra* note 97, at 202 ("In the 2014–2015 growing year for example, 27 management audits, 32 payroll audits, and 36 operation audits were carried out in Florida (3617 workers and 102 crew leaders were interviewed).").

119. Asbed & Hitov, *supra* note 97, at 523.

cy, where, for example, those growers found to engage in forced labor or child labor are immediately suspended.[120]

B. EFFECTIVELY CIRCUMVENTING THREATS OF RETALIATION

The Fair Food Program circumvents many barriers to justice other movements face. First, the Program rigorously combats retaliation both because the organization is collective in nature and, therefore, diffuses the prospect of individualized retaliation, and also because retaliation is actually punished in practice. Being that this punishment is extrajudicial, holding someone accountable for retaliation in this context need not meet the law's heightened standard for employer liability.[121] Likewise, because the party implementing those sanctions against the offending grower is not an internal employee, the prospect of retaliation against a complainant is greatly diminished. Finally, the extralegal composition of the enforcing body may also encourage undocumented workers to report human rights violations, where they might otherwise fear legal sanctions like deportation.[122]

Again, because the means through which violations are sanctioned is not through a courtroom, punishments can also be implemented where the legal standard may not have otherwise been met. As discussed, retaliation, for example, is an offense where the Standards Council can punish offenders without meeting the current legal standard for vicarious liability. As such, the Program has stated, "[s]uspension is automatic when the [Fair Food Standards Council]'s investigation finds that forced labor has taken place in association with a Participating Grower's operations, regardless of whether the grower could be found legally liable. That is what zero tolerance looks like in practice."[123] As such, the enforcement agency is not bound by the inherent limita-

120. Dias-Abey, *supra* note 97, at 203. The enforcement policy for violations is categorized into three groups: Article I violations (e.g. forced labor), Article II violations (e.g. discrimination), and Article III violations (e.g. wage violations), which correspond with a gradation of punishments. *Id.* Article I sanctions, for example, are met with immediate suspension, while an Article III sanction will likely take the form of a corrective action plan that addresses remediation and those changes necessary to prevent recurrence. *Id.*

121. *See infra* Part III explaining that, while courts hold employers strictly liable for other forms of discrimination, courts require concrete employment decisions, such as firing or demotions, to hold employers liable for sexual harassment. As such, the Fair Food Program can sanction retaliatory acts other than firings and demotions.

122. Dias-Abey, *supra* note 97, at 207–08.

123. Asbed & Hitov, *supra* note 97, at 529.

tions of individual litigation,[124] and therefore, broader patterns of discrimination and inequity can be both noticed and addressed.

Initially, the Fair Food Program might seem indistinguishable from an effective internal complaint system implemented by a corporation itself. Indeed, companies like Intel, Home Depot, and Deloitte have garnered recognition for internal systems that have successfully reduced sexual harassment in the workplace, bolstered employee confidence in internal processes, and increased the company participation of marginalized groups.[125]

However, internal complaint systems are often limited in their effectiveness.[126] Some critics point, again, to the looming possibility of retaliatory action upon employee attempts to utilize whatever internal system she has access to.[127] Additionally, employees are afforded less protection against retaliation when filing an internal complaint than when they file a formal EEOC charge.[128]

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124. *See infra* Part III explaining the shortcomings of neglecting broad patterns of sexual harassment, and failing to approach the problem in the aggregate.

125. *See* Sturm, *supra* note 59, at 491–518. Intel, for example, after revamping and investing in their own harassment complaint processes, reported an increase in formal, internally filed complaints, a decrease in complaints made to the EEOC, a decrease in harassment suits filed in court, and a reported increase in employee confidence. *Id.* at 491. Similarly, both Home Depot and Deloitte substantially increased female advancement and participation in each of their respective organizations through internally implemented complaint systems; Home Depot saw a thirty percent increase in female managerial positions. *Id.* at 518. In her evaluation of the efficacy of these programs, Sturm highlights a number of principles these successful processes have in common, including formal data collection, sustainable means of accountability, and some element of external evaluation. *Id.* at 519–20.

126. *See, e.g.*, Noam Scheiber & Julie Creswell, *Sexual Harassment Cases Show the Ineffectiveness of Going to H.R.*, N.Y. TIMES (Dec. 12, 2017), https://www.nytimes.com/2017/12/12/business/sexual-harassment-human-resources.html [https://perma.cc/JXF3-DYM6]; Edward A. Marshall, *Excluding Participation in Internal Complaint Mechanisms from Absolute Retaliation Protection: Why Everyone, Including the Employer, Loses*, 5 EMP. RTS. & EMP. POL'Y J. 549 (2001); Sarah Kessler, *Corporate Sexual Harassment Hotlines Don't Work. They're Not Designed To*, QUARTZ (May 2, 2017), https://qz.com/work/971112/corporate-sexual-harassment-hotlines-dont-work-theyre-not-designed-to [https://perma.cc/E3DZ-4XDS]; Frank Dobbin & Alexanda Kalev, *Training Programs and Reporting Systems Won't End Sexual Harassment. Promoting More Women Will*, HARV. BUS. REV. (Nov. 15, 2017), https://hbr.org/2017/11/training-programs-and-reporting-systems-wont-end-sexual-harassment-promoting-more-women-will [https://perma.cc/5NP3-39S8].

127. *See* Marshall, *supra* note 126, at 552.

128. *Id.* at 551–52 (citing Clark County Sch. Dist. v. Breeden, 532 U.S. 268 (2001)) ("[T]he Court in [*Breeden*] endorsed the view long adhered to by the lower courts that the retaliation clause of Title VII provides employees with far less protection when submitting complaints internally than when filing charges with the [EEOC]. . . . [E]mployees lodging an internal grievance with their employer have traditionally been protected only to the extent their complaint was based on a 'good faith and reasonable belief in the unlawfulness of the [opposed] practice.' This diluted protection provides a temptation for an employer to unilaterally assess the veracity and reasonableness of an internal complaint and

Further, internal complaint systems can often be sham-like, representing only a cursory effort at eradicating systemic problems, particularly because their implementation can serve to circumvent employer liability under Title VII jurisprudence.[129]

C. REDUCING THE IMPACT OF CORPORATE INERTIA

Unlike an internal system created by a corporation, the Fair Food Program obviates the need for a corporate, ethical impetus because the Program is employee-driven, thereby manifesting a genuine effort to reduce harassment. Indeed, the Fair Food Program founders acknowledged that many corporations, despite a "professed desire for a responsible supply system," failed to use their purchasing power for the cause. The Program, therefore, was a reaction to empty promises and corporate inertia. It is important to note, however, that the Program did depend in part on those same retail brands caring enough about human rights in practice to join the Program.[130] Yet, the responsibility and task of making that program a successful one was not left in the hands of corporate officers, but rather the workers themselves.

In short, private, regulatory programs modeled after the Fair Food Program, through worker-driven codes of conduct, collective participation, rigorous auditing and complaint systems, and extra-judicial means of imposing penalties, can circumvent those roadblocks faced by current reform efforts. These programs can effectively combat retaliation and threats of retaliation by allowing employees to present themselves in the collective, diffusing the possibility of one retaliatory target. Through this group-

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to subject the employee to reprisal when that determination establishes, in the mind of the employer, that the employee's report was untruthful or fell short of describing unlawful conduct.").

129. *Id.* at 550; Sturm, *supra* note 59, at 490. Reports also indicate that few companies have taken new steps to prevent harassment despite the movement's public traction. As one article reported, "[o]rganizers who work with female janitors, fast food workers, hotel housekeepers, nannies and eldercare providers say that women in those fields have become more willing to speak up. But it's not clear whom they should tell." Jodi Kantor, *#MeToo Called for an Overhaul. Are Workplaces Really Changing?*, SHRM (Mar. 27, 2018), https://www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/MeToo-Called-for-an-Overhaul-Are-Workplaces-Really-Changing.aspx [https://perma.cc/XR8U-QS9P].

130. Asbed & Hitov, *supra* note 97, at 507–08. Note that consumer and student activism was integral in forcing major retail brands, like Taco Bell, to commit to taking action on forced labor. *Id.* Many farmworker alliances on university campuses demanded that those brands accept the coalition's demands, and given that having a presence on university grounds is often integral to those brands' success, they ultimately conceded. *Id.*

oriented lens, these programs are able to address harassment as a broad pattern, avoiding the inefficacy of seeing harassment at the micro level. Finally, through private contract, these programs sidestep the barriers to corporate liability that would otherwise exist in the litigation arena.[131]

V. GOVERNMENT INTERVENTION AND WORKER-DRIVEN, PRIVATE REGULATORY BODIES

Although Part IV of this Note proposes worker-driven and private regulatory bodies as a solution to the shortcomings of our existing litigation and enforcement systems aimed at combatting sexual harassment, government can still play a significant role in addressing these issues. A potential roadblock to the implementation of a Fair Food-like program aimed at diminishing harassment is how to mandate that companies and industries agree to their terms. Although the Fair Food Program achieved effective enforcement of standards through a legally binding private contract, how did the Program elicit corporate agreement to sign those contracts?

While the founders of the Fair Food Program credit consumer and student activism in forcing major retail brands to take action, government facilitation of private regulatory bodies might prove critical where public activism fails to manifest in this kind of corporate action.[132] Outlining a specific agenda by which gov-

131. This Note does not purport to define what a comparable Fair Food-like program should look like in a sexual harassment context specific to a given industry. Indeed, one of the strengths of Fair Food is that the standards of the program are dictated by workers themselves. However, it is worth mentioning a program similar to Fair Food that exists in the sexual harassment and workplace context: the RESPECT program implemented by Model Alliance, a research and policy organization that focuses on models' rights in the fashion industry. RESPECT, like the Fair Food Program, requires participating fashion brands, publishing companies, and modeling agencies to sign a legally-binding agreement to adhere to a Code of Conduct. That Code of Conduct is also created by workers, where workers "must be at the head of the table in . . . implementing and enforcing labor rights initiatives." *A Comparative Analysis of the Model Alliance's RESPECT Program*, WSR NETWORK (June 2018), https://wsr-network.org/model-alliance-respect-program [https://perma.cc/R79Q-PTLA] (last visited Nov. 22, 2019). While RESPECT does specifically target sexual harassment and abuse, it was announced in May of 2018, and therefore an evaluation of its success or failure is likely to be premature. *Blueprint for Change*, PROGRAM FOR RESPECT (2018), http://programforrespect.org/blueprintforchange [https://perma.cc/L253-YU2H] (last visited Nov. 22, 2019).

132. Asbed & Hitov, *supra* note 97, at 526–31. This Note does not argue that current activism surrounding sexual harassment is alone incapable of producing a program resembling the Fair Food Program. Instead, this Note focuses on what government intervention might look like if public activism alone is not enough.

ernment intervention could coerce or elicit corporate willingness to participate in private regulatory schemes is beyond the scope of this Note. However, this Note does argue that existing theories on incentivizing corporate social responsibility (CSR) can be explored as plausible foundations for what that agenda might look like.[133] The CSR tactics that incentivized the creation of another private, regulatory body — i.e., the Bangladesh Accord — exemplify the myriad ways in which government intervention can foster the existence of comparable programs.

In recent years, many governments around the world, including the United Kingdom, the United States, China, and India, have begun to actively promote corporate responsibility by embracing "novel incentives to move companies toward and beyond minimum regulatory goals."[134] Government policies or actions

133. Corporate Social Responsibility is "often understood as the voluntary actions [corporations] take *beyond* legal compliance." Virginia Harper Ho, *Beyond Regulation: A Comparative Look at State-Centric Corporate Social Responsibility and the Law in China*, 46 VAND. J. TRANSNAT'L L. 375, 375 (2013) (emphasis added). However, Corporate Social Responsibility can also be, and has been, understood as an effort to comply with minimum regulatory standards. *Id.* Corporate Social Responsibility can be understood more broadly as "the continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large." Afra Afsharipour & Shruti Rana, *The Emergence of New Corporate Social Responsibility Regimes in China and India*, 14 U.C. DAVIS BUS. L.J. 175, 179 (2014). Because tactics for eliciting any of the above definitions of corporate responsibility could arguably prove useful for an agenda to implement a Fair Food-like program, the distinction among definitions is of marginal importance for the purposes of this Note.

134. Ho, *supra* note 133, at 375. *See also* Afsharipour & Rana, *supra* note 133, at 177; Cynthia A. Williams, *Oil and the International Law: The Geopolitical Significant of Petroleum Corporations: Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457 (2004); Larry Catá Backer, *Are Supply Chains Transnational Legal Orders? What We Can Learn from the Rana Plaza Factory Building Collapse*, 1 U.C. IRVINE J. INT'L., TRANS. & COMP. L. 11 (2016); Tracey Roberts, *Innovations in Governance: A Functional Typology of Private Governance Institutions*, 22 DUKE ENVTL. L. & POL'Y F. 67 (2011); Janice Fine & Jennifer Gordon, *Strengthening Labor Standards Enforcement through Partnerships with Workers' Organizations*, 38 POL. & SOC'Y 552 (2010); Jette Steen Knudsen et al., *Government Policies for Corporate Social Responsibility in Europe: A Comparative Analysis of Institutionalization*, 43 POL'Y & POL. 81 (2013); Cary Coglianese & Jennifer Nash, *Government Clubs: Theory and Evidence from Voluntary Environmental Programs* 1 (Faculty Scholarship at Penn Law: Legal Scholarship Repository, Paper No. 253, 2008), http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.900.7747&rep=rep1&type=pdf [https://perma.cc/QJA5-WN4C]. The United Kingdom, in particular, has garnered praise for prioritizing CSR: "more than any nation . . . studied, Great Britain has developed policies and incentives, asked for public feedback and communicated to citizens that responsible global corporate behavior is imperative. . . . [T]he UK government has been active in encouraging companies to think more carefully about social and environmental responsibilities, and has been a leading influence in a number of public/private partnerships on specific CSR issues." SUSAN A. AARONSON & JAMES T. REEVES,

that aim to promote responsible corporate behavior, without explicitly mandating such behavior, can be understood as taking three distinct forms: endorsement, facilitation, and partnership.[135] Similarly, the World Bank and the United Nations identified facilitating, partnering, and endorsing as "key public-sector roles in CSR."[136]

Government action aimed at promoting CSR that possibly takes the form of endorsement includes: raising awareness about a particular issue, providing training or education programs, or simply "leading by example" through adoption of responsible practices themselves.[137] The second form of government action, facilitation, can be understood as taking the promotion of corporate responsibility one step further, through conduct that might include the following: hosting conventions, creating voluntary guidelines, "establishing financial and reputational incentives," or implementing "government-subsidized services to aid companies in . . . reporting."[138] Finally, partnership, which can be understood as CSR promotion taken one step further, includes "direct government collaboration" with other private entities, whether they be corporations or "civil society organizations."[139]

While scholars and governments alike recognize these three, distinct means of eliciting responsible corporate behavior, many initiatives employ all three at once. As the European Commission explained in its "Renewed EU Strategy for Corporate Responsibility," public actors can promote CSR through a "smart mix" of measures.[140] Discussing some successful CSR measures implemented in the U.K., one scholar noted that public organizations had both developed serious partnerships with corporations, but also harnessed publicity and public concern to draw attention

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CORPORATE RESPONSIBILITY IN THE GLOBAL VILLAGE: THE ROLE OF PUBLIC POLICY 21 (2003)).

135. Ho, *supra* note 133, at 386.

136. *Id.* (citation and internal quotation marks omitted). Ho also notes that governments can facilitate CSR by explicitly mandating that corporations adhere to certain standards through, for example, national legislation.

137. *Id.*

138. *Id.*

139. *Id.* at 386–87.

140. *Id.* at 391 (citing COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS: A RENEWED STRATEGY 2011–14 FOR CORPORATE SOCIAL RESPONSIBILITY 7 (Oct. 25, 2011), http://www.europarl.europa.eu/meetdocs/2009_2014/documents/com/com_com(2011)0681_/com_com(2011)0681_en.pdf [https://perma.cc/NDH4-PMMT]).

to important social issues, thereby employing both partnership and endorsement means of CSR promotion.[141] Similarly, another scholar in describing the European Union's partnerships with private actors, such as corporations or NGOs, stated that "governments, business, and civil society will contribute to agenda setting, provide resources, [and] share responsibility for the success of particular projects. . . . In this model, governments adopt a soft regulatory agenda, acting as participants, organizers, and facilitators."[142]

One such example of government intervention that has featured elements of endorsement, facilitation, and partnership, is that which followed the 2013 collapse of Rana Plaza, a garment factory in Bangladesh, and ultimately culminated in an initiative much like the Fair Food Program, called the Bangladesh Accord.[143] The Bangladesh Accord is an independent, legally binding agreement between retail brands and Bangladeshi trade unions, aimed at creating a safer garment industry by recognizing and mitigating the "weaknesses of company-controlled monitoring programs" and "the failure of the Bangladeshi government to enforce its own laws."[144] Among the agreement's most salient elements include: independent inspectors with the authority to publicly report findings, financial support to allow factories to make necessary repairs, a corporate commitment to buy from those factories that meet the standards, the Steering Committee

141. Williams, *supra* note 134, at 466–67.

142. Ho, *supra* note 133, at 393.

143. The Rana Plaza factory collapsed on April 24, 2013, killing over 1000 workers, and gravely injuring 2500. *See* Alexandra Rose Caleca, *The Effects of Globalization on Bangladesh's Ready-Made Garment Industry: The High Cost of Cheap Clothing*, 40 BROOK. J. INT'L L. 279, 295 (2014). Among the global brands that sourced garments from this factory were Benneton, Cato Fashions, and Primark. *Rana Plaza*, CLEAN CLOTHES CAMPAIGN, https://cleanclothes.org/campaigns/past/rana-plaza [https://perma.cc/CS82-3RZW] (last visited Oct. 14, 2019). The collapse was described by some as the deadliest disaster in the garment industry's history, and by others as the worst industrial accident since 1984. Caleca, *supra* at 279–80 (2014). According to some sources, the building's owner illegally expanded the structure, building those additions intended for garment production with substandard building materials and on poor foundations. Although cracks in the building had been discovered, and an engineer had deemed the building unsafe, garment workers were ordered to return the following day or lose a month's pay. *Id.*; *see also* Susan Johnson, *Environmental Disasters and Human Health Consequences: A Year in Review*, 4 SUSTAINABLE DEV. L. & POL'Y 37, 38 (2014).

144. CLEAN CLOTHES CAMPAIGN & MAQUILA SOLIDARITY NETWORK, *supra* note 152, at 4.

equally comprised of union and corporate representatives, and an independent, legally-binding dispute resolution system.[145]

Through a myriad of combinations of endorsement, facilitation, and partnership, governments, world leaders, and activists across the globe collectively prioritized garment factory safety following the tragedy. For example, a human rights group collected nearly one million signatures urging retail brands to improve factory safety.[146] Likewise, many governments publicly endorsed efforts to improve worker standards. For example, the European Commission for Trade and the Commissioner for Employment, Social Affairs, and Inclusion issued a joint statement urging the Bangladeshi government to reform their labor law polices and commended those retailers that had "stay[ed] engaged in Bangladesh."[147] Bangladesh's commerce minister also publicly admitted to failing to manage the country's worst operators.[148] Consequently, President Barack Obama effectively increased tariffs for Bangladeshi goods, in what scholars called a "powerful message to the U.S. retailers who have failed to respond to the . . . labor conditions environment" and "symbolic support for workers' rights."[149]

Germany was among the most proactive governments in its efforts to elicit stronger commitments to worker safety.[150] After the collapse, the German government facilitated the convention of over twenty major retail brands, including Walmart, Gap, and

145. *Id.*; *Accord on Fire and Building Safety in Bangladesh*, WSR NETWORK (Mar. 1, 2019), https://wsr-network.org/success-stories/accord-on-fire-and-building-safety-in-bangladesh. [https://perma.cc/2ADR-Q23Y].

146. Andrew North, *Dhaka Rana Plaza Collapse: Pressure Tells on Retailers and Government*, BBC NEWS (May 14, 2013), https://www.bbc.com/news/world-asia-22525431 [https://perma.cc/DB5Z-U6V4].

147. Steven Greenhouse & Jim Yardley, *Global Retailers Join Safety Plan for Bangladesh*, N.Y. TIMES (May 13, 2013), http://www.nytimes.com/2013/05/14/world/asia/bangladeshs-cabinet-approves-changes-to-labor-laws.html [https://perma.cc/LR7L-G95Z]; European Commission Press Release IP/14/802, Staying Engaged: Bangladesh Sustainability Compact — One Year On (July 8, 2014), https://europa.eu/rapid/press-release_IP-14-802_en.htm [https://perma.cc/EW7T-UH3M].

148. North, *supra* note 146.

149. *US Ends Trade Privileges to Bangladesh Following Garment Factory Disasters*, PRI (June 28, 2013), https://www.pri.org/stories/2013-06-28/us-ends-trade-privileges-bangladesh-following-garment-factory-disasters [https://perma.cc/FBN7-9DNY].

150. *Three Years After Rana Plaza*, FED. MINISTRY FOR ECON. COOPERATION & DEV. (Apr. 21, 2016), https://www.bmz.de/en/press/aktuelleMeldungen/2016/april/160421_pm_034_Three-years-after-Rana-Plaza-enforcing-decent-work-in-the-textile-sector-worldwide/index.html [https://perma.cc/B7B2-VTZH].

H&M, to discuss strategies for improving worker safety.[151] This meeting, sponsored by the German Society for International Cooperation, also invited a number of NGOs, the International Labor Organization, and the Ethical Trading Initiative.[152] By the end of this convention, which advocacy groups hoped would spur agreement among global retail companies to commit to industry improvements, over forty corporations announced they would sign the Bangladesh Accord.[153]

Much like the Fair Food Program, the Bangladesh Accord is a largely worker-driven group, with private authority to regulate factory standards and to sanction those that fail to meet those standards.[154] Its creation was largely incited by the collective recognition of unacceptable labor conditions that followed the Rana Plaza tragedy, followed by government intervention that both endorsed, facilitated, and partnered with the Bangladesh Accord.[155] Specifically, corporations were incentivized to sign a legally binding contract with a worker-driven, private organization through a combination of government intervention, public pressure, and political activism.[156]

Indeed, the circumstances that led to the Bangladesh Accord seem to fit cleanly into a paradigm that some scholars call "the

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151. Steven Greenhouse, *Retailers Split on Contrition After Collapse of Factories*, N.Y. TIMES (Apr. 30, 2013), https://www.nytimes.com/2013/05/01/world/asia/retailers-split-on-bangladesh-factory-collapse.html [https://perma.cc/6UZA-XDTU]. Notably, the German government had arranged for this convention prior to the collapse of Rana Plaza. *Id*.

152. CLEAN CLOTHES CAMPAIGN & MAQUILA SOLIDARITY NETWORK, THE HISTORY BEHIND THE BANGLADESH FIRE AND SAFETY ACCORD 3–4 (2013), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=2844&context=globaldocs [https://perma.cc/37MX-MJYR].

153. *Id.* While several major U.S. retail companies ultimately declined to join the Bangladesh Accord, the largest purchasers of Bangladeshi garments did join, including H&M. *Id.*; Benjamin A. Evans, *Accord on Fire and Building Safety in Bangladesh: An International Response to Bangladesh Labor Conditions*, 40 N.C. J. INT'L L. & COM. REG. 597, 606 (2015); Greenhouse, *supra* note 151.

154. *Id.* ("Unlike existing multi-stakeholder initiatives and corporate social responsibility programs, the Bangladesh Accord is a legally binding and enforceable agreement, in which brands are obligated to implement their commitments under the program."). *See also* Evans, *supra* note 153, at 607–08 ("The provision for binding arbitration is what gives the Bangladesh Accord its legal heft and separates it from previous agreements on internally improving industry safety . . . Therefore, the local courts of each member of the Bangladesh Accord have the authority and jurisdiction to enforce an award made against a company that may break its obligations.").

155. CLEAN CLOTHES CAMPAIGN & MAQUILA SOLIDARITY NETWORK, *supra* note 152, at 1–4.

156. *See generally id.*; *Accord on Fire and Building Safety in Bangladesh*, *supra* note 153.

relational model."[157] One scholar writes that this model "emphasizes cooperation and joint responsibility between public- and private-sector actors" where "governments, business, and civil society will contribute to agenda setting, provide resources, [and] share responsibility for the success of particular projects."[158] Through this relational model, government intervention, public activism, and corporate cooperation created a worker-driven, private regulatory body, much like the Fair Food Program.[159]

VI. CONCLUSION

Although the Weinstein scandal, and the onslaught of sexual misconduct allegations against other powerful men that followed, generated seemingly unprecedented public concern of sexual violence and harassment in the workplace, many of the movements formed in response, and aimed at combatting such misconduct, are flawed in a number of ways. First, the movements fail to adequately address the prospect of retaliatory conduct inflicted on those who come forward. Victims of sexual harassment, despite any cultural shift towards believing accusers, are still likely to face hostility and adverse employment action. Second, movements that focus on broadening access to the litigation system as a means of combatting sexual harassment, ignore its inherent flaws. Employer liability under existing sexual harassment law is exceedingly difficult to establish, and therefore systemic change through litigation alone is unlikely. And, the practical inability to achieve class action certification in employment discrimination cases, coupled with our court system's tendency to reward those that conceive of harassment in terms of isolated incidents, prevents litigation from providing an avenue through which sexual harassment can be attacked in the aggregate.

However, worker-driven, private regulatory bodies like the Fair Food Program can avoid these shortcomings. By allowing

157. Ho, *supra* note 133, at 393.

158. *Id.*

159. *Accord on Fire and Building Safety in Bangladesh*, *supra* note 153. Although this Note does not aim to exhaustively evaluate the success of the Bangladesh Accord, one report describes it as having had a "tremendously positive impact," noting that "[m]ore than 470 factories had fully remediated all violations and 934 factories had completed at least 90% of the required repairs and renovations," and "the Bangladesh Accord's complaint mechanism has resolved more than 290 safety complaints from workers and their representatives." *Id.*

workers to represent themselves as a group and by giving these workers the opportunity to complain to an external party, retaliation and the threat of retaliation is greatly diminished. Also, private, legally binding contracts allow these groups to effectively implement sanctions for code violations without needing to overcome unfavorable employer liability law. Finally, through its collective orientation, as well as its ability to circumvent formal litigation processes and hold employers accountable, these groups are able to address sexual harassment in the aggregate, recognizing and dismantling broader patterns that foster misconduct.

Worker-driven, private regulatory bodies can be, and have been, elicited through a combination of government intervention and public attention aimed at fostering corporate social responsibility. Given that sexual harassment has already generated widespread activism and media attention, it would seem that — as was the case with the global outrage over factory conditions following the Rana Plaza collapse — if such public attention were coupled with traditional forms of government CSR promotion, a comparable, worker-driven group modeled after the Fair Food Program is certainly possible.