DISRUPTING ADHESION CONTRACTS WITH #METOO INNOVATORS

Xuan-Thao Nguyen[*]

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[*] Professor Xuan-Thao Nguyen is the Gerald L. Bepko Chair in Law & Director, Center for Intellectual Property & Innovation, Indiana University McKinney School of Law. The author dedicates this Article to her Contracts students, Winter Quarter 2019, University of Washington School of Law. Special thanks to Wonji Kerper for her superb assistance. Many thanks to Robert Gomulkiewicz and Jennifer Fan of UW School of Law for having lunches with me and discussing innovators and their role in shaping legal solutions and remedies. Many thanks to Kristin Johnson and fellow panelists on the Women and Technology Roundtable, Gordon Gamm Symposium—The Implications of Artificial Intelligence for a Just Society, Nov.7–8, 2019, Tulane University School of Law.

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Adhesion contracts are everywhere. Take it or leave it, the dominant party holds the leverage while the weaker party adheres. Ninety percent of employment contracts contain mandatory arbitration clauses, and attempts to challenge arbitration requirements meet with judicial indifference or hostility. Ultimately, arbitration clauses eviscerate the employee's right to a jury trial and access to the court system in general. In recent years, employers in the tech sector have faced unexpected resistance from innovators. Just as innovators are known for disrupting old business models through technological innovations, #MeToo reformers are disrupting the seemingly insurmountable adhesion contract regime. They organize, protest, demand, and seize back their constitutional and substantive rights. Leveraging their talent capital power in the tech sector, the innovators achieve results. Their efforts have led to businesses removing their arbitration clauses, as these pioneers regain their rights without relying on the conventional contract theory of unconscionability.

INTRODUCTION

INNOVATORS in the tech sector are often affluent tech employees who possess the tech evangelist's view that a technologist has the ability to change the world.[1] The tech culture fosters a collaborative working environment for brainstorming ideas, creating designs, and embracing innovation. But that very culture perpetuated a toxic environment of sexual harassment and misconduct, where the victims faced demotion or pressure to depart, while sexual predators received large payouts, accelerated to new opportunities, or obtained fresh new capital funding.[2] When the #MeToo movement erupted in other sectors, women in tech spoke out, started organizing, and initiated their own social disruption.

These women focused their efforts on contracts of adhesion. Employment agreements in tech and elsewhere are standard form, take-it-or-leave-it contracts, containing forced arbitration provisions stating that

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[1] Noam Scheiber, *Google Workers Reject Silicon Valley Individualism in Walkout*, N.Y.TIMES (Nov. 6, 2018), https://www.nytimes.com/2018/11/06/business/google-employee-walkout-labor.html (reporting how tech workers have surprised everyone by organizing for their collective rights, shattering their stereotype of individualism).

[2] *See generally* Mengqi Sun & Ezequiel Minaya, *Google Workers' Walkout Signals Crisis of Faith in Company Culture, Recent Employee Activism is in Response to Article that Detailed Company's Protection of Three Executives Accused of Sexual Misconduct*, WALL ST. J. (Nov. 2, 2018, 5:30 AM), https://www.wsj.com/articles/employee-discontent-threatens-googles-reputation-1541151001.

employees cannot bring sexual harassment, discrimination, and other claims under federal and state laws against tech companies in court. In other words, tech workers have pre-assigned and pre-settled their rights. Moreover, the clauses require the employees to keep silent, as the proceeding and results are secret and often accompanied by non-disclosure agreements.

The conventional path to void adhesion contracts under modern contract law has been futile. Arguments that mandatory arbitration provisions should be severed under the doctrine of unconscionability have proven ineffective, wasteful, and costly. Thus, the #MeToo tech visionaries have leveraged their inventive minds to chart a new path to disrupt adhesion contracts and remove forced arbitration provisions from employment contracts, reclaiming their substantive rights and their access to justice in public courts.[3]

This Article focuses on the #MeToo tech innovators' new disruption of adhesion contracts. This article posits that the tech women who are #MeToo innovators have adopted a more effective means of destroying adhesion contracts than the traditionally ineffective unconscionability argument. These women's success in demanding and receiving the removal of arbitration provisions in employment agreements through collective organizing is a significant milestone that neither legislation nor judicial efforts could provide to protect tech workers.

Part I traces the origin of adhesion contracts. Part II explores the take-it-or-leave-it employment contracts containing mandatory arbitration provisions. Part III dissects the tech culture where employers have enabled sexual misconduct. Part IV identifies and documents the #MeToo innovators' disruption movement, illustrating how these women use survey evidence, share personal narratives, utilize technology, and leverage their talents to establish real change. Finally, Part V provides an analysis of how the #MeToo innovators have disrupted adhesion contracts with arbitration provisions where conventional unconscionability arguments have proven ineffective.

The Article concludes with a prediction that the #MeToo innovators' disruption will serve as a new contract lore where contract people—judges, lawyers and scholars alike—who have believed in unconscionability as the primary judicial tool for policing contracts, will recognize that, in reality, the best modern tool for disruption is the collective organizing efforts of tech workers.[4]

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[3] *See generally* Alex Morris, *When Google Walked Rage Drove the Protests Last Year, But Can It Bring About Lasting Change at Tech Companies?*, N.Y.MAG (Feb. 5, 2019), http://nymag.com/intelligencer/2019/02/can-the-google-walkout-bring-about-change-at-tech-companies.html (documenting the #MeToo innovators' workers movement in the tech industry).

[4] This new contract law follows examples of contract lore identified and explained by Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 505–07

I. THE ORIGIN OF ADHESION CONTRACTS

Adhesion contracts are firmly rooted in American contract law and business practice. Adhesion contracts are typical standardized form contracts provided by a party with superior bargaining power to the weaker party or adherent as a "take-it-or-leave-it" proposition.[5] These contracts leave employees no opportunity to negotiate their contractual terms.[6] Moreover, adhesion contracts in a consumer context do not provide the weaker party with any overt manifestation of assent. This practice allows contract formation to occur without the weaker party's awareness of either the terms or the existence of the contract itself.[7]

Adhesion contracts are everywhere, from common carrier tickets,[8] Uber rideshares,[9] LimeBike,[10] computer software,[11] to website Terms of

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(2002) (outlining three examples of contract lore in which contract people have held on to "traditional beliefs" that have no support in reality).

[5] Keena v. Groupon, Inc. 192 F. Supp. 3d 630, 637 (W.D.N.C. 2016); E. ALLAN FARNSWORTH ET AL., CONTRACTS CASES AND MATERIALS 607–08 (9th ed. 2019) (Although adhesion contracts, "or take-it-or-leave-it contracts, have become the norm . . . the disparity in bargaining power that results from these contracts is not considered sufficient to render them unconscionable.").

[6] Brown v. Soh, 909 A.2d 43, 49 (Conn. 2006) ("The most salient feature of adhesion contracts is that they are not subject to the normal bargaining processes of ordinary contracts," and they tend to involve "standard form contracts prepared by one party, to be signed by the party in a weaker position, usually a consumer, who has little choice about the terms . . . .") (internal quotation marks omitted); Adler v. Fred Lind Manor, 103 P.3d 773, 782–83 (Wash. 2005) (establishing factors to determine whether an adhesion contract exists: "(1) whether the contract is a standard form printed contract, (2) whether it was 'prepared by one party and submitted to the other on a "take it or leave it" basis, and (3) whether there was 'no true equality of bargaining power' between the parties.").

[7] Kinkel v. Cingular Wireless, 857 N.E.2d 250, 266 (Ill. 2006) (stating that in a contract of adhesion, "the terms . . . are nonnegotiable and presented in fine print in language that the average consumer might not fully understand"); *see also* Cheryl B. Preston & Eli McCann, *Llewellyn Slept Here: A Short History of Sticky Contracts and Feudalism*, 91 OR. L. REV. 129, 140–42 (2012); Cheryl B. Preston & Eli W. McCann, *Unwrapping Shrinkwraps, Clickwraps, and Browsewraps: How the Law Went Wrong from Horse Traders to the Law of the Horse*, 26 BYU J. PUB. L. 1, 22 (2011).

[8] *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585, 593 (1991) ("Common sense dictates that a ticket of this kind will be a form contract the terms of which are not subject to negotiation, and that an individual purchasing the ticket will not have bargaining parity with the cruise line.")

[9] Dara Kerr, *How Risky is your Uber Ride? Maybe More Than You Think*, CNET (Oct. 8, 2014, 4:00 AM), https://www.cnet.com/news/how-risky-is-your-uber-ride-maybe-more-than-you-think/.

[10] *See generally* David Gutman, *Did You Read the Fine Print? We Did. These Are the Rights You Give Up by Renting a LimeBike or Ofo*, SEATTLE

Use or Terms of Service.[12] In fact, these contracts govern modern daily commerce.[13] Undeniably, adhesion contracts provide benefits such as convenience, efficiency and cost reduction.[14] Parties who are repeat players and possess greater power in contractual relationships highly favor adhesion contracts.[15] Some scholars believe that adhesion contracts generate cost savings that even benefit consumers.[16] It is no surprise, then, that "standard form contracts probably account for more than ninety-nine percent of all the contracts."[17]

Epistemologically, adhesion contracts have a rich history. The phrase "adhesion contract" is not of American, but French origin. The French jurist Raymond Saleilles coined the phrase in 1901.[18] The American scholar Edwin Paterson imported the phrase to the United States in

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TIMES (updated Aug. 14, 2018, 3:26 PM), https://www.seattletimes.com/seattle-news/transportation/bike-share-user-agreements-the-rights-you-give-up-by-renting-a-limebike-or-ofo/.

[11] *See generally* Hill v. Gateway 2000, Inc., 105 F.3d 1147, 1149 (7th Cir. 1997) (upholding mass contracts used in sales of computers wherein the purchasers had paid for the computer without seeing the terms of the contract); ProCD, Inc. v. Zeidenberg, 86 F.3d 1447, 1452 (7th Cir. 1996) (recognizing one-sided mass contracts in sales of computer software).

[12] *See* Davis v. USA Nutra Labs, 303 F. Supp. 3d 1183, 1196 (D.N.M. 2018) (enforcing Groupon's terms of use, an example of adhesion contract); Plazza v. Airbnb, Inc., 289 F. Supp. 3d 537, 557–58 (S.D.N.Y. 2018) (considering Airbnb's terms of service as a "standard adhesion contract").

[13] *See Hill*, 105 F.3d at 1149 (noting that mass contracts where pay-first-terms-later are "common for air transportation, insurance, and many other endeavors"); Williams v. TCF Nat'l Bank, No. 12 C 05115, 2013 WL 708123, at *9 (N.D. Ill. Feb. 26, 2013) ("[C]ontracts of adhesion are a fact of modern life and the lack of negotiation over the arbitration provision does not, standing alone, establish procedural unconscionability.").

[14] Robert A. Hillman, *Rolling Contracts*, 71 FORDHAM L. REV. 743, 747 (2002) ("[B]ecause of the efficiencies and benefits of standard forms, it is not a reach to predict that the economy would come to a screeching halt without them.")

[15] *See, e.g.*, Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 637 (1943).

[16] *See Hill*, 105 F.3d at 1149 ("Customers as a group are better off when vendors skip costly and ineffectual steps such as telephonic recitation, and use instead a simple approve-or-return device. Competent adults are bound by such documents, read or unread."); *see generally* Hillman, *supra* note 14 at 747 (noting the benefits of adhesion contracts).

[17] *See* W. David Slawson, *Standard Form Contracts and Democratice Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529 (1971).

[18] Shelley Smith, *Reforming the Law of Adhesion Contracts: A Judicial Response to the Subprime Mortgage Crisis*, 14 LEWIS & CLARK L. REV. 1035, 1035 n.1 (2010) (citing Raymond Saleilles, De la Déclaration de Volonté, art. 133, §89, at 229 (1901)).

his law review article published in 1919.[19] Since then, adhesion contracts have attracted many scholars' attention. This attention was so prominent that some scholars have even constructed an intellectual history of adhesion contracts in the United States.[20] Additionally, scholars have posited that adhesion contracts "mirror the feudal system" that threaten "fundamental principles of contract law."[21]

There exists a love-hate relationship with adhesion contracts in modernity.[22] Many academics share a grave concern about the inequality of bargaining power that adhesion contracts present.[23] Professor Charles L. Knapp, an eminent contract law scholar, has lamented, "[I]t is impossible to tell whether the judges are truly as naïve as they profess to be about the realities of bargaining in the real world, or whether they just don't care."[24] Other scholars have joined the chorus, observing that courts have failed to rein in the dangers adhesion contracts pose.[25] Overall, many academics fear that the persistent use of adhesion contracts undermines contract law through the privatization of contract terms, including access to courts and employees waiving their rights.[26]

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[19] Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198, 222 (1919); Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 856–57 (1964).

[20] *See generally* Preston and McCann, *supra* note 7 at 172–75.

[21] *See id.*; Alfred C. Yen, *Western Frontier or Feudal Society: Metaphors and Perceptions of Cyberspace*, 17 BERKELEY TECH. L. J. 1207 (2002) (discussing scholars evoking feudal society in critiquing the digital era).

[22] *See, e.g.*, Robert W. Gomulkiewicz, *Is the License Still the Product?*, 60 ARIZ. L. REV. 425, 427 (2017) ("Software developers may love licenses, but many people love to hate licenses, especially end-user-license agreements (EULAs)" due to adhesive characteristics.); Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) (stating that contracts of adhesion "enable [firms] . . . to legislate in a substantially authoritarian manner"); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1229 (1983) ("The use of form documents, if legally enforceable, imparts to firms . . . a freedom from legal restraint and an ability to control relationships across a market.").

[23] Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 144 (2005) (observing that inequality of bargaining power issues "can be observed in the contexts of contract defenses, contract formation, contract interpretation, and contract remedies.").

[24] Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 798 n.64 (2002).

[25] Preston and McCann, *supra* note 7, at 130 (stating that courts have not been able to keep adhesion contracts' dangers in check).

[26] Knapp, *supra* note 24, at 798 (upon detailing concerns about adhesion contracts, concluding by asking and answering, "Can powerful private interests, with the ability to control most of the terms of most of the contracts they make, deprive large segments of American society of their access to the courts for which all of us pay, and to which all of us have historically had access? The answer, until now, is—sadly, to some of us—that apparently they can."). *See*

II. TAKE-IT-OR-LEAVE-IT EMPLOYMENT CONTRACTS AND MANDATORY ARBITRATION PROVISIONS

Some courts have defined adhesion contracts as standardized agreements prepared by the superior party—generally the employer—where the weaker party is denied the opportunity to negotiate terms, and often is not given any explanation of the terms.[27] Other courts believe otherwise. For example, Virginia courts have declined to find adhesion contracts where employees are not required to work for employers. [28] Due to the take-it-or-leave-it nature of the adhesion contract, the "economic pressure exerted by employers on all, but the most sought-after employees may be particularly acute." [29] As the employer imposes mandatory arbitration provision in the adhesion employment contract, "few employees are in a position to refuse a job because of an arbitration requirement."[30]

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also Irma S. Russell, *Got Wheels? Article 2A, Standardized Rental Car Terms, Rational Inaction, and Unilateral Private Ordering*, 40 LOY. L.A. L. REV. 137 (2006); Carol Van Sambeek, *The Four Corners Approach to Judging the Enforceability of Arbitration Agreements, Which Waive Statutory Rights to Litigate Employment Discrimination Claims*, 5 APPALACHIAN J.L. 247, 255 (2006).

[27] Larsen v. Western States Ins. Agency, Inc., 170 P.3d 956, 959 (Mont. 2007); Vitale v. Schering-Plough Corp., 146 A.3d 162, 169 (NJ. App. Div. 2016) ("When an employee has little to no bargaining power and a contract is presented on "a take-it-or-leave-it" basis, the contract is one of adhesion."); Buraczynski v. Eyring, 919 S.W.2d 314, 320 (Tenn. 1996) (defining an adhesion contract as "a standardized form offered on what amounts to a 'take it or leave it' basis, without affording the weaker party a realistic opportunity to bargain, and under conditions whereby the weaker party can only obtain the desired product or service by submitting to the form of the contract").

[28] *See e.g.*, Schwam v. XO Communs., Inc., No. 05-1060, 2006 U.S. App. LEXIS 7428, at *5–6 (4th Cir. Mar. 24, 2006) (citing Philyaw v. Platinum Enters., 54 Va. Cir. 364 (Va. Cir. 2001)); Green v. Zachry Indus., Inc., 36 F. Supp. 3d 669, 677 (W.D. Va. 2014) (finding that because the plaintiff "had the freedom to consider employment elsewhere," the employment agreement with arbitration provision "is not an unenforceable contract of adhesion."); Zalit v. Global Linguist Solutions, 53 F. Supp. 3d 835, 845–46 (E.D. Va. 2014) ("Simply because an employer and an employee do not stand on equal footing with respect to bargaining power does not magically transform an employment agreement into an adhesion contract."); Senture v. Dietrich, 575 F. Supp. 2d 724, 727 n.1 (E.D. Va. 2008) ("If an employee has the freedom to consider employment elsewhere and is not bound to continue working for his current employer, an employment agreement will not be considered an adhesion contract.").

[29] Fitz v. NCR Corp., 118 Cal. App. 4th 702, 722 (Cal. Ct. App. 2004); *see also* Sosa v. Paulos, 924 P.2d 357, 362 (Utah 1996). *Compare* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 33 (1991) ("Mere inequality in bargaining power, however, is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context.").

[30] *Fitz*, 118 Cal. App. at 722.

For the past forty years, employers across the United States have routinely inserted mandatory arbitration provisions in employment agreements. Studies indicate that in both public and private companies, more than "half—53.9 percent—of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures."[31] In other words, about sixty million Americans are bound by employment contracts with arbitration clauses.[32] Also, a recent study of approximately 800,000 contracts formed by public companies and attached to documents filed with the Security Exchange Commission, reveals that employment agreements with arbitration clauses constitutes the largest percentage.[33] Specifically, out of 140,980 employment agreements, 42% contain confidential, mandatory arbitration provisions.[34] In contrast, out of 167,523 credit agreements, only 0.04% contain arbitration provisions.[35]

Courts have long supported the inclusion of arbitration clauses in employment contracts. For example, in 1974, the New York Supreme court in *Riccardi v. Modern Silver Linen Supply Co., Inc.* held that an arbitration provision in an employment contract was enforceable when both parties were obligated to arbitrate all disputes arising out of the agreement.[36] The Court upheld the provision even though the employer had the sole discretion to arbitrate or bring an action against the employee in disputes involving a violation of a restrictive covenant.[37]

In more recent decades, the use of arbitration has shifted claims from public courts to private proceedings. This change received a strong

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[31] ALEXANDER J.S. COLVIN, ECON. POL'Y INST. THE GROWING USE OF MANDATORY ARBITRATION 10 (2006), https://www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/.

[32] *Id.*; *see also* Jaclyn Diaz, *More Employers Turn to Arbitration to Handle Job Claims*, BLOOMBERG L. (Dec. 6, 2018, 3:16 AM), https://news.bloomberglaw.com/daily-labor-report/more-employers-turn-to-arbitration-to-handle-job-claims.

[33] Sarath Sanga, *A New Strategy for Regulating Arbitration*, 113 NW. U. L. REV. 1121, 1151 (2019).

[34] *Id.*

[35] *Id.*

[36] Riccardi v. Modern Silver Linen Supply Co., Inc., 356 N.Y.S.2d 872 (N.Y. 1974).

[37] *Id.*; *see also* Sablosky v. Edward S. Gordon Co., 538 N.Y.S.2d 513, 517 (1989) (explaining that the Riccardi court "decided the case on narrower grounds, emphasizing that the parties exchanged binding promises to submit all disputes to arbitration except those relating to breach of the restrictive covenant provision, and held that it was permissible for the parties to carve out an area of potential controversy from an otherwise mutually binding arbitration agreement and give one party the unilateral right to select the dispute resolution forum in that area").

endorsement from the U.S. Supreme Court. Employers have become emboldened to impose mandatory arbitration on all employee claims, including civil rights and discrimination claims.[38] The Court's enthusiasm for arbitration originated in a decision in 1983.[39] Later, the Supreme Court in 1991 approved arbitration of age-discrimination claims in *Gilmer v. Interstate/Johnson Lane Corp*.[40] The Court held that neither the text nor the legislative history of the Age Discrimination in Employment Act removes age-discrimination claims from arbitration.[41] A decade later, the Supreme Court upheld the arbitrability of Title VII claims in *Circuit City Stores, Inc. v. Adams*.[42] In that case, the employee faced on-the-job harassment and retaliation based upon his sexual orientation.

He brought an action in state court for discrimination under a civil rights statute.[43] The employment contract at issue extended arbitration to all claims under federal and state statutes, including Title VII of the Civil Rights Act.[44] The Supreme Court praised the benefits of arbitration, claiming that "arbitration agreements can be enforced under the FAA without contravening the policies of congressional enactments giving employees specific protection against discrimination prohibited by federal law."[45] Later, the Supreme Court upheld an employer's ability to force mandatory arbitration of race discrimination claims,[46] as well as another age discrimination case.[47] Lower courts followed the Supreme Court's lead and approved arbitration clauses in other employment discrimination claims.[48]

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[38] *See e.g.*, Epic Systems Corp. v. Lewis, 138 S. Ct. 1612, 1632 (2018) (holding that mandatory agreements requiring parties to resolve employment-related disputes through one-on-one arbitration do not violate the National Labor Relations Act).

[39] *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983) ("Section 2 [of the FAA] is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary.").

[40] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

[41] *Id.*

[42] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[43] Brief for Respondent at 1, Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (No. 99-1379), 2000 WL 1369473, at *1.

[44] *Circuit City Stores*, 532 U.S. at 110.

[45] *Id.* at 123.

[46] Rent-A-Center, W, Inc. v. Jackson, 561 U.S. 63, 72–76 (2010).

[47] *See also* 14 Penn Plaza LLC v. Pyett, 556 U.S. 247, 274 (2009).

[48] Panepucci v. Honigman Miller Schwartz & Cohn LLP, 281 Fed. Appx 482, 483 (6th Cir. 2008) (forcing arbitration of pregnancy-discrimination); Am. Gen. Life & Accident Ins. Co. v. Wood, 429 F.3d 83, 85 (4th Cir. 2005) (compelling arbitration in a sex discrimination case); Musnick v. King Motor Co. of Fort Lauderdale, 325 F.3d 1255, 1262 (11th Cir. 2003) (upholding arbitration of religious-discrimination claims).

Alarmed by the Court's direction, scholars have expressed concerns about the inclusion of mandatory arbitration in employment contracts.[49] They have documented how the take-it-or-leave-it adhesive characteristics of employment agreements force employees to arbitrate all claims, prospectively waiving their substantive rights.[50] Lacking real bargaining power, employees essentially pre-sell and pre-settle their claims by agreeing to arbitrate their claims without access to judicial protection.[51]

These concerns, unfortunately, are no longer purely academic, but comprise the harsh reality faced by employees today. In *Cooper v. MRM Investment Co.*, Tonya Cooper alleged that she was sexually harassed and discharged as an assistant manager of a KFC franchise.[52] She earned $400 to $450 per week plus possible bonuses.[53] She signed the "Arbitration of Employee Rights," which required her to use "confidential binding arbitration" for any claims arising between her and KFC, its related entities, and their current or former employees.[54] The terms included any claims concerning compensation, sexual harassment, and termination of employment, among others.[55] After she complained to management about the alleged sexual harassment, KFC fired her. By signing the employment contract with the arbitration agreement, she had waived her Title VII employment discrimination claims in federal court.[56] Likewise,

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[49] A search in Westlaw with adhesion contract and employment as search terms appearing in the same sentence yields 242 results. Due to the space constraint, I will provide a few here. Charles L. Knapp, *Blowing the Whistle on Mandatory Arbitration: Unconscionability as a Signaling Device*, 46 SAN DIEGO L. REV. 609 (2009); Jean R. Sternlight, *Disarming Employees: How American Employers Are Using Mandatory Arbitration to Deprive Workers of Legal Protection*, 80 BROOK. L. REV. 1309, 1317–22 (2015).

[50] David S. Schwartz, *Enforcing Small Pricing to Protect Big Business: Employee and Consumer Rights Claims in the Age of Compelled Arbitration*, 1 WIS. L. REV. 33, 116 (1997) (warning about the harms of standardization of mandatory arbitration in employment contracts).

[51] *Id.* at 114–16 (explaining the nature and scope of the prospective waivers of substantive rights); *see also* Michael C. Harper, *Age-Based Exit Incentives, Coercion, and the Prospective Waiver of ADEA Rights: The Failure of the Older Workers' Benefit Protection Act*, 79 VA. L. REV. 1271, 1296–97 (1993) ("The employer who has purchased the right to discriminate is surely more likely to indulge discriminatory preferences . . . . An employee who waives her rights to be free of discrimination at the outset of employment may be blinded by her need for a job and the immediate prospect of a higher salary."); Judith A. McMorrow, *Who Owns Rights: Waiving and Settling Private Rights of Action*, 34 VILL. L. REV. 429, 464 (1989).

[52] Cooper v. MRM Inv. Co., 367 F.3d 493 (6th Cir. 2004).

[53] *Id.* at 497.

[54] *Id.* at 497–98.

[55] *Id.*

[56] *See* Cooper v. MRM Inv. Co., 199 F. Supp. 2d 771, 779–80 (M.D. Tenn. 2002).

her right to have a jury of her peers evaluate her claim also vanished.[57]

Similarly, in *American General Life and Accident Insurance Co. v. Wood*, Larry P. Wood commenced an action in West Virginia state court against his employer, asserting state law claims of sex discrimination and wage law violations.[58] Because he had signed an arbitration agreement, Wood had forfeited his right to sue under antidiscrimination law in state proceedings.[59] Moreover, his "relinquishment of state-created constitutional rights to state judicial forums and trial by jury did not render" the arbitration agreement unenforceable.[60]

In recent years, even when the employees have never signed the arbitration agreement, an employer can still compel an employee to arbitrate rather than litigate their claims. For instance, in *Seawright v. American General Financial Services*, Lisa Seawright worked for her employer for twenty-seven years, from 1978 to 2005.[61] She alleged that her employer terminated her in violation of Tennessee antidiscrimination law and the federal Family and Medical Leave Act.[62] The company insisted that she must arbitrate her claims per their Agreement, introduced by the employer more than twenty years after her employment began, even though she had never consented to the arbitration.[63] Indeed, it was not until April 1999 that the company notified its employees, via a series of announcements and informational meetings, about its then-new employee dispute resolution program.[64] The company's informational brochure stated that all disputes, including disputes for "legally protected rights such as freedom from discrimination, retaliation, or harassment,"[65] were to be conducted through binding arbitration.[66] The brochure also indicated that employees "seeking, accepting, or continuing employment" with the company automatically agreed to resolve all claims through binding arbitration.[67] Thus, without assenting to the arbitration agreement, Ms. Seawright was forced to arbitrate, forfeiting her substantive and constitutional rights.[68]

The constitutional right to a jury trial was once a cherished right re-

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[57] *Id.* at 775, 779.

[58] Am. Gen. Life and Accident Ins. Co. v. Wood, 429 F.3d 83, 85 (4th Cir. 2005).

[59] *Id.* at 86–87.

[60] *Id.* at 88.

[61] Seawright v. Am. Gen. Fin. Serv. Inc., 507 F.3d 967, 970 (6th Cir. 2007).

[62] *Id.* at 970.

[63] *Id.* at 970–71.

[64] *Id.*

[65] *Seawright*, 507 F.3d at 971.

[66] *Id.* The company sent a letter that reminded its employees about binding arbitration two years after the program became effective.

[67] *Id.*

[68] *Id.* at 979–80 (Martin, J., dissenting).

spected in employment contract cases.[69] Traditionally, the right could not be waived unless the employees knowingly and voluntarily waived it.[70] The Supreme Court's declaration of a "national policy favoring arbitration, combined with the erosion of the "knowing and voluntarily waive" standard, has culminated in a voluminous body of law favoring employers.[71]

In addition to stripping employees of their constitutional rights to jury trial and other substantive rights, the use of adhesion contracts with arbitration provisions deprive states of the authority to protect their citizens.[72] The Supreme Court has assured states that they still have the authority to regulate contracts and protect their own citizens. The assurance, at best, is illusory.[73] Worse, empirical evidence in a recent study establishes that the Supreme Court's assurance has been false, as the Court has foreclosed "nearly every plausible circumstance" under which states "may regulate . . . arbitration clauses" in contracts.[74]

In summary, the problems caused by adhesion employment contracts with mandatory provisions have culminated in a systemic crisis. For employees, the inequality of power, waiver of substantive rights, and elimination of the constitutional right to a jury trial are the daily reality in the workplace across the nation. Meanwhile, states face an inability to regulate contracts as they choose. Contracts now are products of privatization, buried deep the in secrecy of arbitration, aided by the Supreme Court's "national policy favoring arbitration."[75]

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[69] *Id.* at 981 (stating that under Sixth Circuit precedent, "employees cannot not be compelled to arbitrate their claims if they did not knowingly and voluntarily waive their constitutional right to a jury trial").

[70] *Id.* (reviewing Sixth Circuit precedents on "knowing and voluntary standard for agreements to arbitrate in lieu of litigation").

[71] *See* Sanga, *supra* note 33, at 1128–35 (analyzing the Supreme Court's "national policy favoring arbitration"). Professor Sanga traced the origin of the Supreme Court's national policy favoring arbitration to Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395 (1967) and Southland Corp. v. Keating, 465 U.S. 1, 14–16 (1984).

[72] *See* Sanga, *supra* note 33, at 1128–29 (demonstrating how states have lost control over contract enforcement).

[73] *Id.* at 1128.

[74] *Id.* at 1129.

[75] *See* Natalie Hrubos, Note, *Agreements to Arbitrate Employment Discrimination Claims:* Pyett *Illustrates Need to Re-Forest the Legal Landscape*, 18 TEMP. POL. & CIV. RTS. L. REV. 281 (2008); Michael H. LeRoy, *Do Courts Create Moral Hazard?: When Judges Nullify Employer Liability in Arbitrations*, 93 MINN. L. REV. 998 (2009).

III. TECH EMPLOYERS AS ENABLERS OF SEXUAL MISCONDUCTS

Women across industries struggle to report sexual harassment in the workplace.[76] The tech sector in particular fosters a culture that cherishes bold ideas, prizes high performers, and protects tech evangelists. Unfortunately, it enables sexual harassment and misconduct in tech camps, conferences and venture capital meetings, and during job interviews and in office settings.

A. What Women in Tech Face

The tech culture is rooted in welcoming new ideas, breaking down barriers, and encouraging creative collaboration.[77] The same tech culture also enables sexual harassment and misconduct.[78] At the annual Foo Camp, an "unconference" annual tech event,[79] attendees "bounce around the space and ideas and conversations, and so many of the normal social distances break down into collaboration," while at the same time female attendees frequently face sexually explicit questions from creators of tech companies during their presentations.[80] During the evening, the Foo

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[76] Claire Cain Miller, *It's Not Just Fox: Why Women Don't Report Sexual Harassment*, N.Y. TIMES (Apr. 10, 2017), https://www.nytimes.com/2017/04/10/upshot/its-not-just-fox-why-women-dont-report-sexual-harassment.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer.

[77] *See* Nick Bastone, *The 29 Tech Companies With the Best Company Culture in 2018*, BUSINESS INSIDER (Dec. 30, 2018), https://www.businessinsider.com/best-company-culture-2018-full-list-2018-12.

[78] *See generally* Katie Benner, *Women in Tech Speak Frankly on Culture of Harassment*, N.Y. TIMES (Jun. 30, 2017), https://www.nytimes.com/2017/06/30/technology/women-entrepreneurs-speak-out-sexual-harassment.html; Sara O'Brien & Laurie Segall, *Sexual Harassment in Tech: Women Tell Their Stories*, CNN TECH, https://money.cnn.com/technology/sexual-harassment-tech/ (last visited Nov. 28, 2019); John Pletz, *1 in 4 Women Report Harassment at Tech Conferences: Study*, CRAIN'S CHICAGO BUSINESS (Mar. 12, 2019, 2:04 PM), https://www.chicagobusiness.com/john-pletz-technology/1-4-women-report-harassment-tech-conferences-study.

[79] See *Foo Camp*, WIKIPEDIA, https://en.wikipedia.org/wiki/Foo_Camp (last visited Nov. 28, 2019), for more information on Foo Camp.

[80] Caitlin Mullen, *Where Tech Conferences Get It Wrong for Women*, BIZJOURNALS, https://www.bizjournals.com/bizwomen/news/latest-news/2019/03/where-tech-conferences-get-it-wrong-for-women.html?page=all ("From sexist comments to robot strippers, tech conferences—and the industry itself—often have an atmosphere that doesn't exactly convey gender equality in the field."). Quinn Norton, *Robert Scoble and Me*, MEDIUM (Oct. 19, 2017), https://medium.com/@quinnnorton/robert-scoble-and-me-9b14ee92fffb. Additonally, female attendees face sexual harassment and assaults at tech camps and

Camp unconference shifts to a casual vibe for different activities, as recalled by attendees.[81] The drinking, and the pressure to drink, has reportedly led to male attendees continuing to pour drinks for drunk female attendees, creating an uncomfortable environment.[82] Also at Foo Camp and Startup Riot, powerful technology evangelist Robert Scoble openly sexually assaulted female attendees by putting his hands on their breasts and bottoms when others introduced him to them in public spaces.[83] From Foo Camp to Startup Riot to Dent Conference, predators roamed and assaulted women in tech even after the women had reported the misconduct to the organizers.[84]

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conferences. Davey Alba, *A Multimillion-Dollar Startup Hid A Sexual Harassment Incident By Its CEO—Then A Community of Outsiders Dragged It Into the Light*, BUZZFEED NEWS (May 13, 2019, 9:30 AM), https://www.buzzfeednews.com/article/daveyalba/datacamp-sexual-harassment-metoo-tech-startup ("One evening that week at an after-hours bar with a live band playing, DataCamp CEO Jonathan Cornelissen groped 27-year-old Kara Woo, a DataCamp curriculum lead. According to Woo, as other DataCamp employees milled about, a drunken Cornelissen pressed his crotch into Woo's behind, fondling her hips and thighs."); Gaby Del Valle, *A WeWork employee says she was fired after reporting sexual assault. The company says her claims are meritless. A new lawsuit claims the company spent more on parties than on sexual harassment training*, VOX (updated Oct. 12, 2018, 6:05 PM), https://www.vox.com/the-goods/2018/10/12/17969190/wework-lawsuit-sexual-assault-harassment-retaliation ("The complaint, which was filed on Thursday in the Manhattan Supreme Court, details former employee Ruby Anaya's allegations against the company. Anaya, who began working at WeWork in 2014, says she was groped by two different employees at two company-wide events where attendance was mandatory and alcohol was readily available . . . . The first alleged incident occurred in August 2017 at an annual company event called Summer Camp; on Facebook, the company described Summer Camp as a "festival-esque getaway" for employees and their guests. Anaya claims that a male co-worker "grabbed [her] from behind in a sexual manner," and that when that employee was questioned by human resources, he said he didn't remember the event because he was "black-out drunk."); O'Brien & Segall, *supra* note 78 (reporting that at a tech conference in 2014, Pavel Curda propositioned to Gesche Haas with an email that read, "I will not leave Berlin without having sex with you. Deal?").

[81] *Id.*

[82] *Id.*

[83] *Id.; see also* Doree Shafrir, *Another Woman Has Accused Robert Scoble of Sexual Harassment*, BUZZFEED (Oct. 19, 2017, 11:56 PM), https://www.buzzfeednews.com/article/doree/woman-accuses-robert-scoble-of-sexual-harassment#.blJWzWxjX (reporting that Scoble groped Greer at the Startup Riot tech conference in Atlanta).

[84] Alyssa Newcomb, *#MeToo: Sexual Harassment Rallying Cry Hits Silicon Valley*, NBC NEWS (Oct. 23, 2017), https://www.nbcnews.com/tech/tech-news/metoo-sexual-harassment-rallying-cry-hits-silicon-valley-n813271 ("Sarah Kunst, founder of Proday Media, tweeted she had reported Scoble's bad

Meanwhile, the same behavior goes on in the ordinary workplace. Susan Fowler, a former engineer at Uber, recounts experiencing a culture of sexual harassment daily.[85] Beginning on her first official day on the Site Reliability Engineer team, the team manager asked her to have sex with him in a string of messages over the company's chat platform.[86] She immediately took screenshots and reported him to Human Resources (HR).[87] HR and upper management at Uber informed her that because it was the first time the manager had committed sexual harassment and he was a "high performer" at the Company, they would not take any action beyond talking to him.[88] HR also ordered that Fowler make a choice of either transferring to a different team or staying with the same team and receiving a negative review from the manager.[89] HR explained to Fowler that the negative review would not be viewed as retaliation because she was given an option to transfer.[90] Fowler subsequently transferred to a different team. During her one-year tenure at Uber, Fowler also documented other sexist emails and chat records and sent them to HR. Instead of working to fix the problems, the HR representative accused Fowler of initiating the incidents, and blamed her for saving the emails and chat records.[91] Her new manager then threatened to fire her if she reported him to HR.[92] Fowler reported the threat to HR and the Chief Technology Officer. Though they admitted to her that the threat was illegal, because the manager was a "high performer," they once again did nothing.[93]

Fowler soon learned that other female engineers at Uber had similar experiences.[94] They, too, had reported to HR to no avail.[95] Together, Fowler and the female engineers requested a meeting with HR about the

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behavior to organizers of the Dent Conference, yet he still continued to attend.").

[85] Susan Fowler, *Reflecting on One Very, Very Strange Year at Uber*, SUSAN FOWLER BLOG (Feb. 19, 2017), https://www.susanjfowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber.

[86] *Id.*

[87] *Id.*

[88] *Id.* ("Upper management told me that he 'was a high performer' (i.e. had stellar performance reviews from his superiors) and they wouldn't feel comfortable punishing him for what was probably just an innocent mistake on his part.").

[89] *Id.*

[90] *Id.*

[91] *Id.* ("The HR rep began the meeting by asking me if I had noticed that *I* was the common theme in all of the reports I had been making, and that if I had ever considered that I might be the problem.").

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

manager's sexual harassment, but the HR representative insisted that the manager "had never been reported before."[96] Later, around the same time the women left Uber, the company's female workforce dropped from 25% women to less than 6%.[97]

Sexual harassment and misconduct are an "open secret" in the tech industry.[98] The pervasiveness of the open secret occurs beyond the campfires, conferences, unconferences, and team projects. Harassment even occurred during these women's interviews for their jobs at tech companies. For example, Dan McClure, the co-founder and former CEO of startup accelerator 500 Startups, told a potential female hire, "I was getting confused figuring out whether to hire you or hit on you."[99]

Very few women dare to speak out about this harassment for fear of destroying both their careers and personal lives.[100] For example, entrepreneur Cheryl Yeoh did not speak out after Dan McClure pushed himself on her in a corner because she "had to preserve" her business relationship with him in order for a contract to be signed that same week.[101] The few female founders in the industry have received lurid texts, groping, and unwanted sexual propositions. For example, founders Niniane Wang, Susan Ho, and Leiti Hsu all described their dealings with Binary

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[96] *Id.*

[97] *Id.*

[98] Newcomb, *supra* note 84 ("Much like Hollywood and the Harvey Weinstein story, a culture of sexual harassment and misconduct being perpetrated by some of the most powerful men in Silicon Valley had long been whispered about. The technology industry's shameful open secret was publicly aired earlier this year when female founders began coming forward to share stories of male investors crossing the line . . . .").

[99] Alyssa Newcomb, *Silicon Valley Grapples With How to Fix a Sexist Culture*, NBC NEWS (July 26, 2017, 3:15 PM), https://www.nbcnews.com/tech/tech-news/silicon-valley-grapples-how-fix-sexist-culture-n776906.

[100] *See, e.g.*, Erika Beras, *Poll: Nearly Half of the Women Who Experienced Sexual Harassment Leave Theirs Jobs or Switch Careers*, MARKETPLACE, (Mar. 9, 2018), https://www.marketplace.org/2018/03/09/new-numbers-reflect-lasting-effects-workplace-harassment-women/; Newcomb, *supra* note 99; ELYSE SHAW ET. AL., INST. FOR WOMEN'S POL'Y RES., SEXUAL HARASSMENT AND ASSAULT AT WORK: UNDERSTANDING THE COSTS (Oct. 15, 2018), https://iwpr.org/publications/sexual-harassment-work-cost/ ("Sexual harassment and assault at work have serious implications for women and for their employers. Women who are targets may experience a range of negative consequences, including physical and mental health problems, career interruptions, and lower earnings.").

[101] Cheryl Y. Sew Hoy, *Shedding Light on the "Black Box of Inappropriateness,"* CHERYL: BREADCRUMBS: A SERIES OF CONNECTED EVENTS (July 3, 2017), https://cherylyeoh.com/2017/07/03/shedding-light-on-the-black-box-of-inappropriateness/.

Capital's Justin Caldbeck.[102] Wielding their economic prowess, venture capitalists have attempted to use their companies' funding to silence the female founders.[103]

Often, the women suffer. Their work performance may suffer due to the harassment, and they are often fired if they report sexual misconduct.[104] Some women had no place to turn. In one extreme case, a woman committed suicide because after she informed her husband and friends, she was ostracized by her tech peers and received hate mail and endless accusations.[105]

B. What Predators Receive

Tech companies go after talent. That often means *male* talent. That translates into rewarding male tech workers who are deemed as "high performers" with a slap on the wrist when women report sexual harassment.[106] Tech companies protect high-performing men by driving wom-

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[102] Sarah Lacy, *Binary Capital's Justin Calbeck Accused of Unwanted Sexual Advances Towards Female Founders. Where's the Outrage*?, PANDO (June 22, 2017), https://pando.com/2017/06/22/binary-capitals-justin-caldbeck-accused-unwanted-sexual-advances-towards-female-founders-wheres-outrage/. *See also* Laura Sydell, *How a Female Engineer Built a Public Case Against a Sexual Harasser in Silicon Valley*, NPR (Dec. 13, 2017, 1:17 PM), https://www.npr.org/sections/alltechconsidered/2017/12/13/568455103/how-a-woman-engineer-built-a-public-case-against-a-sexual-harasser-in-silicon-va.

[103] *See* Benner, *supra* note 78; Sarah Lacy, *Founder: Days Before Scandal Broke, Binary's Justice Caldbeck "Tried to Use Funding to Shut Me Up,"* PANDO (June 24, 2017), https://pando.com/2017/06/24/niniane-wang-days-scandal-broke-binarys-justin-caldbeck-tried-use-funding-shut-me/.

[104] Debra S. Katz, *30 Million Women Can't Sue Their Employer Over Harassment. Hopefully That's Changing*, WASH. POST (May 17, 2018, 4:55 PM), https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d_story.html?noredirect=on&utm_term=.896e57d13a2a ("[A]s many as 75 percent, according to the Equal Employment Opportunity Commission—report suffering retaliation along with the initial abuse."); Shafrir, *supra* note 82 (reporting what happened to Michele Greer after she reported sexual harassment).

[105] Norton, *supra* note 80 ("But after one fateful party, she told her new husband that she was sexually assaulted. He threw her assaulter off a mailing list we were all on, and then quit as the list administrator. It blew up into a local scandal, and people demanded to know who the victim was. We tried to hide her identity, but her name got posted to the list. Once she was outed as a victim, the hate mail, the barrage of nasty questions, the endless accusations took, such a toll on her. Eventually, she took her own life. She'd just never been able to put it all back together after that.").

[106] Fowler, *supra* note 85; *see also* Marianne Cooper, *The 3 Things That Make Organizations More Prone to Sexual Harassment*, THE ATLANTIC (Nov. 27, 2017), https://www.theatlantic.com/business/archive/2017/11/organizations-sexual-harassment/546707/ (reporting that Amazon's CEO Jeff Bezos' silence

en out of the workplace. They do this by refusing to grant transfers, giving them negative reviews, and threatening to fire them.[107] But forcing women out of the industry is not the only way that the tech companies protect perpetrators of sexual misconduct.

Tech companies have also paid powerful predators attractive exit packages. A study by Blind reported that 33.05% of respondents in the survey stated that their companies have paid "high dollar exit packages" to employees accused of sexual misconduct.[108] These companies include Google, Intel, Booking.com, Uber, Microsoft, Cisco, Overall, Oracle, Amazon, Apple, LinkedIn, and Facebook.[109] For example, Google paid Android founder Andy Rubin almost $100 million amid employees accusing Rubin of sexual harassment.[110] Google also paid $15 million to Amit Singhal, who was accused of sexual harassment.[111]

There is yet another way the tech sector has been enabling sexual misconduct: the tech culture fails to punish powerful male employees or employers who have sexually harassed women, even encouraging rivals to hire them or prompting investors to fund them. For example, Google paid Amit Singhal to leave the company, but Uber immediately hired him, allowing him to collect $15 million from Google and enjoy new power at Uber.[112] Eyal Gutentag, Uber's LA general manager, left the

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after Roy Price, head of Amazon Studios resigned amid sexual harassment allegations, "continues a pattern of inaction by the company").

[107] Fowler, *supra* note 85.

[108] Kyle McCarthy, *1/3 of Tech Employees: My Company Has Given Generous Exit Packages To Employees Accused of Sexual Misconduct*, BLIND (Nov. 13, 2018), https://www.teamblind.com/blog/index.php/2018/11/13/one-third-of-tech-employees-my-company-has-given-generous-exit-packages-to-employees-accused-of-sexual-misconduct.

[109] *Id.*

[110] Nate Swanner, *Sexual Harassment Payouts in Tech: Here are the Worst Offenders*, DICE (Nov. 15, 2018), https://insights.dice.com/2018/11/15/sexual-harassment-payouts-tech-companies/; *see also* Jillian D'Onfro, *Google's Approval Of $135 Million Payout To Execs Accused Of Sexual Misconduct Sparks Fresh Employee Backlash*, FORBES (Mar. 12, 2019), https://www.forbes.com/sites/jilliandonfro/2019/03/12/googles-approval-of-135-million-payout-to-execs-accused-of-sexual-misconduct-sparks-fresh-employee-backlash/#6dea10e23cf3.

[111] Shannon Liao, *Google Confirms It Agreed to Pay $135 Million to Two Execs Accused of Sexual Harassment*, THE VERGE (Mar. 11, 2019), https://www.theverge.com/2019/3/11/18260712/google-amit-singhal-andy-rubin-payout-lawsuit-accused-sexual-harassment (reporting that Google first offered to pay Amit Singhal $45 million but then reduced to $15 million because he joined Uber, a rival company).

[112] *Id. See also* Gabrielle Canon, *Google gave top executive $90m payoff but kept sexual misconduct claim quiet*, THE GUARDIAN (Oct. 25, 2018, 6:42PM), https://www.theguardian.com/technology/2018/oct/25/google-andy-rubin-android-creator-payoff-sexual-misconduct-report ("[E]xecutives had rela-

company after multiple employees reported him for groping female subordinates.[113] Four months later, Gutentag had a new powerful position as Chief Operations Officer at HopSkipDrive, a competitor of Uber.[114] He subsequently joined ZipRecruiter, a tech unicorn valued at more than a billion dollars as Chief Marketing Officer.[115] Likewise, Mike Cagney, the former CEO of Social Finance, left the company after a series of people reported his sexual misconduct. He then founded a new startup with fresh funding of $120 million.[116] Also, Steve Jurvetson left Draper Fisher Jurvetson after the firm's internal investigation about his sexual misconduct, and two months later, he then debuted Future Ventures with $200 million in new funding.[117]

In addition to large payouts and new jobs, the predators received praise from their peers for their conduct. For instance, Dave McClure received admiration from his peers after the women came forward to report how he has sexually assaulted them:

> "yeah, but you were always upfront about it. It was your USP. Why is anyone surprised? ;)"
> "Dave you're not a creep, you're a solid dude. I sorta wish you didn't apologize for wanting a sex life like other human beings."
> "Dave, well done; continue. Listen, yr head went on a pike, but yr. past behaviour is THE NORM, every industry & setting. Keep communicating."
> "This took guts. Respect to Dave as well here a great example."
> "Jesus F*cking Christ you are a MAN and hit on a woman. That is NORMAL behavior. Don't let people neuter you publicly for being YOU!"
> "You are only human! i wish u the best"

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tionships and extramarital affairs with subordinate employees, including David Drummond, Alphabet's chief legal officer," with Jennifer Blakely, who "was then transferred to another department, before leaving a year later, having been asked to sign paperwork saying she had departed voluntarily. Drummond's career, meanwhile, accelerated."); Mike Isaac & Daisuke Wakabayashi, *Amit Singhal, Uber Executive Linked to Old Harassment Claim, Resigns*, N.Y. TIMES (Feb 27, 2017), https://www.nytimes.com/2017/02/27/technology/uber-sexual-harassment-amit-singhal-resign.html.

[113] *See* Ryan Mac & Davey Alba, *These Tech Execs Faced #MeToo Allegations. They All Have New Jobs*, BUZZFEED (Apr. 16, 2019, 8:00 AM), https://www.buzzfeednews.com/article/ryanmac/tech-men-accused-sexual-misconduct-new-jobs-metoo.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

> "Read your story of self-castration. Sorry you felt it necessary. They're still going to call you a monster forever. Shouldn't have apologized"
> "Unpin this immediately and delete that medium post. You have nothing to be ashamed of. No counseling needed. You are a f*cking MAN OWN IT."[118]

In sum, the tech culture has allowed abusers to engage in sexual harassment, assault, and misconduct for far too long without consequences. Tech employers and investors refuse to punish the perpetrators—instead, they enable, reward, and protect them.

IV. #METOO INNOVATORS, DISRUPTION CULTURE, AND REMOVAL OF ARBITRATION CLAUSES IN ADHESION CONTRACTS

Gretchen Carlson, a former Fox News host, describes the familiar scenario that women who have signed contracts with forced arbitration agreements face after they pursue sexual harassment claims in the workplace:

> In the process, she'll probably be black-listed, demoted and fired from her job. She may get a paltry settlement, but our woman will probably work again. No one else at her place of employment will know what happened to her and, worst of all, the perpetrator gets to stay on the job because nobody knows about it, the whole process is secret. And that person is free to harass again and again.[119]

As mentioned above, about sixty million American workers are barred from having access to the court system to adjudicate their employment claims because their employment contracts contain arbitration provisions.[120] Women constitute 47% of the total workforce, meaning millions of women cannot go to court if they experience sexual harassment in the workplace.[121] Nor is what Carlson has described confined to the news industry.

As innovators, the women and men in tech have engaged their own internal social disruption moment: they are organizing and forcing man-

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[118] Sew Hoy, *supra* note 101.

[119] Jacqueline Thomsen, *Gretchen Carlson Urges Lawmakers to Pass Bill Ending Arbitration for Sexual Harassment Claims*, THE HILL (May 16, 2019, 11:35 AM), https://thehill.com/blogs/in-the-know/in-the-know/444032-gretchen-carlson-urges-lawmakers-to-pass-bill-ending-arbitration-for-sexual.

[120] COLVIN, *supra* note 31.

[121] Richard Fry & Renee Sepler, *Women May Never Make Up Half of the U.S. Workforce*, PEW RESEARCH (Jan. 31, 2017), https://www.pewresearch.org/fact-tank/2017/01/31/women-may-never-make-up-half-of-the-u-s-workforce/; Katz, *supra* note 104.

agement to remove mandatory arbitration provisions from the adhesion contracts. In so doing, they are bypassing the conventional and ineffective route of appealing to courts to stay arbitration. They also discard the unconscionability argument against adhesion contracts, as courts have become either hostile or indifferent to the theory.

A. Social Disruption Moment: Survey Evidence and Personal Narratives

The tech sector highly prizes ideas that disrupt traditional business models. Stories about disturbances etch in the mind of entrepreneurs, founders, and tech workers. Disruption in the tech industry means innovation: an underrated product or service becomes popular by replacing or displacing a conventional product or service.[122] The key features of disruption that outplay competitors are low cost and high accessibility.[123] Tangible examples of disruption include Netflix streaming video, Wikipedia for constantly updated encyclopedias, and LEDs for efficient and cheap light sources.[124] True disruption is a "gamble," is "stealthy," and takes time.[125]

Within the ethos of disruption innovation, the women and men in tech have been orchestrating their approach to disrupt adhesion contracts that include mandatory arbitration provisions. After witnessing the #MeToo movement, during which millions of women and some men in a wide range of industries have spoken out about their experiences, tech innovators wanted to use their expertise and the tools that are familiar and available to them.[126] But first, they needed data to understand the scope of the problem.[127] Thus, tech innovators turned to survey evidence.

For survey evidence, seven women in Silicon Valley with backgrounds in venture capital, academic, entrepreneurship, product marketing, and marketing research collaborated to conduct a survey of women in tech.[128] Together, they had 210 women complete an online survey in

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[122] "Disruptive innovation" was coined by Clayton Christensen. Peter Daisyme, *What is Disruption, Really? 8 Examples and What to Learn from Them*, STARTUPGRIND, https://www.startupgrind.com/blog/what-is-disruption-really-8-examples-and-what-to-learn-from-them/ (last visited Nov. 28, 2019).

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *See generally* Farhad Manjoo, *Why the Google Walkout Was a Watershed Moment in Tech*, N.Y. TIMES (Nov. 7, 2018), https://www.nytimes.com/2018/11/07/technology/google-walkout-watershed-tech.html.

[127] Newcomb, *supra* note 84 (reporting that as of October 2017, there were more than 1.6 million #MeToo tweets about their experience with sexual harassment and misconduct in a variety of industries).

[128] ELEPHANT IN THE VALLEY, https://www.elephantinthevalley.com/ (last visited July 12, 2019).

early 2015. The participants were tech veterans who had worked in the sector for more than ten years.[129] They came from venture capital firms. They are the CEO, CMO, and CTOs at tech companies. They are founders, entrepreneurs, and marketers in the tech sector.[130] The researchers collected the results and posted their findings online.

The aptly named "Elephant in the Valley" survey divulges what women have been experiencing in tech.[131] The survey reveals that 60% of women had received unwanted sexual advances, 65% of the harassment came from their superiors, and 50% suffered it more than once.[132] More than 30% of the women who experienced sexual harassment were afraid for their own personal safety in the workplace. Most of the women did not dare to take action after they were sexually harassed. About 39% of those who were harassed did not do anything for fear of harming their careers, while another 30% did not report because they just wanted to forget what happened to them. For the women who reported sexual harassment, 60% were dissatisfied with management action. The participants, 29% of them, reported that they signed non-disclosure agreements as part of their employment contracts.[133] That means they must refrain from speaking about their experiences and the treatment they received from their employers.

To supplement the survey results, some women in tech were courageous enough to step forward, providing personal narratives of their experience.[134] In so doing, they named the perpetrators and exposed sexual misconduct. As described above, in 2017, Susan Fowler, Quinn Norton, Sarah Kunst, Niniane Wang, Susan Ho, Leiti Hsu, Cheryl Yeoh, and many others publicly recounted, described, and posted their experiences on Medium, Twitter, and their own websites.

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[129] *Id.*

[130] *Id.*

[131] *Id.*

[132] Newcomb, *supra* note 84.

[133] ELEPHANT, *supra* note 128. Tech companies often use nondisparagement clauses in employment contracts to silence employees and hide abuses. *See* Katie Benner, *Abuses Hide in the Silence of Nondisparagement Agreements*, N.Y. TIMES (July 21, 2017), https://www.nytimes.com/2017/07/21/technology/silicon-valley-sexual-harassment-non-disparagement-agreements.html?action=click&module=RelatedCoverage&pgtype=Article&region=Footer.

[134] Some courageous female founders in tech spoke out while many understandingly were reluctant to publicly detail the sexual harassments. *See* Laura Sydell, *Struggling for Investments, Silicon Valley Women Reluctant to Speak out on Harassment*, NPR (Nov. 16, 2017, 7:15 AM), https://www.npr.org/sections/alltechconsidered/2017/11/16/564498133/struggling-for-investments-silicon-valley-women-reluctant-to-speak-out-on-harass.

In particular, founder Niniane Wang methodically built her case against Justin Caldbeck, a potential investor in her startup who had pressured her for sex, in order to stop Caldbeck from harassing other women.[135] She gathered evidence, including texts, emails, and phone records, teamed up with two other women who had faced similar treatment from Caldbeck, and together published their stories in a "dispassionate way with evidence that describes the details of what happened without extraneous, irrelevant content."[136] They selected The Information, a media outlet frequented by the tech elite, to post their stories—all so others might know what happened to women in the tech industry.[137] As true disruption is stealthy and takes time, after gathering survey evidence and learning from personal narratives, the innovators next leveraged their culture and tech tools for real change through collective organizing.

B. #MeToo, Innovators and Collective Organizing in Tech

Through speaking out, the women in tech learned that their employment contracts prohibited them from speaking disparagingly about their employers and contained mandatory arbitration clauses.[138] They could not sue their employers in any court of law.

The women in tech know that in employment contracts with arbitration provisions, employers increase their chances of winning when they use arbitration to keep all claims and problems secret.[139] Illustratively, in a study of 2,802 mandatory employment arbitration cases decided between 2003 and 2004, the employee's winning rate was only 17.9% when an employer had only one case in arbitration.[140] That small winning rate, however, drops to 15.3% when the employer had four cases and 4.5% when the employer had twenty-five cases before the same arbitrator.[141]

Armed with the evidence from various studies, the "Elephant in the Valley" survey and personal narratives, the innovators in the tech sector

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[135] Sydell, *supra* note 102.

[136] *Id.*

[137] *Id.*

[138] *See* Bloomberg Editorial Board, *Mandatory Arbitration Enables Sexual Harassment* (Jun. 12, 2019), https://www.bloomberg.com/opinion/articles/2019-06-12/forced-arbitration-enables-sexual-harassment.

[139] *See* Nick Wingfield & Jessica Silver-Greenberg, *Microsoft Moves to End Secrecy in Sexual Harassment Claims*, N.Y. TIMES (Dec. 19, 2017), https://www.nytimes.com/2017/12/19/technology/microsoft-sexual-harassment-arbitration.html ("The more often companies head to arbitration, the better their chances of winning the case."); *see also* COLVIN, *supra* note 31.

[140] Katherine V.W. Stone & Alexander J.S. Colvin, *The Arbitration Epidemic,* ECON. POL'Y INST. (Dec. 7, 2015), https://www.epi.org/publication/the-arbitration-epidemic/ (documenting repeat employers' advantages in arbitration).

[141] *Id.*

took the collective step of mobilizing for permanent disruption: forcing employers to remove arbitration clauses from employment adhesion contracts.

One of the most impressive mobilization efforts was the "Google Walkout for Real Change" on November 1, 2018.[142] The walkout attracted tens of thousands of Google employees from offices around the world, a week after a report from the New York Times exposed Google's payment of $90 million to its former executive Andy Rubin, who had faced credible allegations of sexual misconduct.[143] The global protest began at 11:10 a.m. in Google's Tokyo offices and then spread to Singapore, Haifa, Zurich, Berlin, London, Dublin, New York, San Francisco, Seattle, Kirkland, and Chicago offices, among others.[144] The innovators listed five demands for Google, and at the top of the list was the removal of the forced arbitration in cases of harassment and discrimination.[145]

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[142] Julian D'Onfro & Michelle Castillo, *Google employees around the world are walking out today to protest the company's handling of sexual misconduct*, CNBC (updated Nov. 1, 2018, 6:05 PM), https://www.cnbc.com/2018/11/01/google-employees-walk-out-in-protest-of-sexual-misconduct-handling.html.

[143] Daisuke Wakabayashi & Katie Benner, *How Google Protected Andy Rubin, the "Father of Android,"* N.Y. TIMES (Oct. 25, 2018), https://www.nytimes.com/2018/10/25/technology/google-sexual-harassment-andy-rubin.html?action=click&module=Top%20Stories&pgtype=Homepage; Daisuke Wakabayashi & Kate Conger, *Google Workers Fume Over Executives' Payouts After Sexual Harassment Claims*, N.Y. TIMES (Oct. 26, 2018), https://www.nytimes.com/2018/10/26/technology/sexual-harassment-google.html.

[144] Hannah Rodriguez, *Google Employees in Seattle, Kirkland Walk Out Over Treatment of Women at Workplace*, SEATTLE TIMES (Nov. 1, 2018), https://www.seattletimes.com/seattle-news/seattle-google-employees-walk-out-over-treatment-of-female-employees/; Emily Sullivan & Laurel Wamsley, *Google Employees Walk Out to Protest Company's Treatment of Women*, NPR (Nov. 1, 2018), https://www.npr.org/2018/11/01/662851489/google-employees-plan-global-walkout-to-protest-companys-treatment-of-women; Matthew Weaver et al., *Google Walkout: Global Protests After Sexual Misconduct Allegations*, THE GUARDIAN (Nov. 1, 2018, 4:20 PM), https://www.theguardian.com/technology/2018/nov/01/google-walkout-global-protests-employees-sexual-harassment-scandals.

[145] The organizers have five specific demands:

1. An end to Forced Arbitration in cases of harassment and discrimination.
2. A commitment to end pay and opportunity inequality.
3. A publicly disclosed sexual harassment transparency report.
4. A clear, uniform, globally inclusive process for reporting sexual misconduct safely and anonymously.

In planning the walkout, the organizers at Google utilized the collaborative and open company culture to generate and gather comments and suggestions internally from more than 1,000 employees,[146] condensing the vast pool of ideas into the list of five demands.[147] They used Google technology to connect, scale, and build the movement for their rights as tech workers.[148] Overall, the innovators leveraged their skills in designing, building, and marketing Google tech products to serve and sustain their workers' rights movement.[149]

The innovators at Google also leveraged their talent capital, as they knew that compared to the general workforce across sectors, tech workers have better and more bargaining power.[150] Tech companies compete fiercely for talent, while collaborating with one another in recruiting and hiring it.[151] Tech workers know that they are in high demand: employers cannot risk losing talented tech workers in droves.[152] In organizing the walkout, tech workers at Google were able to amplify their strength through collective action in order to push their demands to management.[153]

The success of the organizing efforts culminated in the Google executives' response two weeks after the walkout.[154] Google agreed to re-

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> 5. Elevate the Chief Diversity Office to answer directly to the CEO and make recommendations directly to the Board of Directors. In addition, appoint an Employee Representative to the Board.

Sullivan & Wamsley, *supra* note 144.

[146] Manjoo, *supra* note 1256.

[147] *See* Sullivan & Wamsley, *supra* note 144.

[148] Nitasha Tiku, *Google Wanted to Prohibit Workers From Organizing by Email*, WIRED (Jan. 24, 2019, 3:04 PM), https://www.wired.com/story/google-wanted-prohibit-workers-organizing-by-email/; *see* Sullivan & Wamsley, *supra* note 144.

[149] *See* Sullivan & Wamsley, *supra* note 144.

[150] *Id.*

[151] *See* Jeff John Roberts, *Tech Workers Will Get Average of $5,770 Under Final Anti-Poaching Settlement*, FORTUNE (Sept. 3, 2015), http://fortune.com/2015/09/03/koh-anti-poach-order/.

[152] Manjoo, *supra* note 126 ("[T]he tight labor market gives [tech workers] greater leeway in voicing their concerns, and the promise that their voices are valued gives them an expectation that they can effect change.").

[153] Manjoo, *supra* note 126.

[154] Sharon Florentine, *Google Employee Walkout Results in Forced Arbitration Policy Change*, CIO (Nov. 21, 2018, 2:30 AM), https://www.cio.com/article/3322836/google-employee-walkout-results-in-forced-arbitration-policy-change.html; Shirin Ghaffary & Rani Molla, *Tech Companies Like Google are Giving Workers the Right to Take Sexual Harassment Claims to Court—But Employees are Calling for More*, VOX (Nov. 19, 2018, 1:44 PM), https://www.vox.com/2018/11/19/18095426/google-sexual-harassment-forced-arbitration-claim-workplace-lawsuit-sue.

move its arbitration provision for sexual harassment cases.[155] Following in Google's footsteps, other tech companies like Airbnb, eBay, Square, and Facebook subsequently removed forced arbitration clauses in sexual harassment and sexual assault claims.[156]

Recognizing that removing forced arbitration only for sexual harassment and sexual assault claims was insufficient to help all tech workers, a group of thirty-five organizers at Google pressed for further change.[157] When 2019 arrived, the organizers embarked on a new campaign with a focus on "Ending Forced Arbitration" on all claims in all employment contracts.[158] The coordinators took to social media to educate others about the need to end forced arbitration in all claims, including sexual harassment, assaults, and discrimination cases pertaining to sexual orientation, sex, race, gender identity, age, and ability.[159] By March 21, 2019, five months after the walkout, Google removed forced arbitration clauses from their employment contracts.[160]

In organizing tech workers, the Google walkout planners were fully aware that the majority of tech workers for Google actually work as in-

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[155] *See id.*

[156] Ghaffary & Molla, *supra* note 154. Google, however, was not the first in the tech industry to end mandatory arbitration clauses for sexual harassment claims. A year before, in 2017, Microsoft ended forced arbitration for sexual harassment claims. *See also* Daisuke Wakabayashi, *Uber Eliminates Forced Arbitration for Sexual Misconduct Claim*s, N.Y. TIMES (May 15, 2018), https://www.nytimes.com/2018/05/15/technology/uber-sex-misconduct.html (reporting Uber ended its arbitration requirement only for sexual assault or harassment claims for its employees, drivers and riders, but refuses to remove arbitration requirement "for other legal claims, like discrimination."); Wingfield & Silver-Greenberg, *supra* note 139.

[157] Megan Rose Dickey, *Google Employees Demand the End of Forced Arbitration Across the Tech Industry*, TECHCRUNCH (Dec. 10, 2018), https://techcrunch.com/2018/12/10/google-employees-demand-the-end-of-forced-arbitration-across-the-tech-industry/.

[158] *Googlers for Ending Forced Arbitration Launch Public Education campaign via Social Media*, MEDIUM (Jan. 14, 2019), https://blog.usejournal.com/googlers-for-ending-forced-arbitration-launch-public-education-campaign-via-social-media-e46d7608cd0e.

[159] Dickey, *supra* note 157; Krista Gmelich, *Google Workers Keep Up Fight on Forced Arbitration After Walkout*, BLOOMBERG (Jan 15, 2019), https://www.bloomberg.com/news/articles/2019-01-15/google-workers-keep-up-fight-on-forced-arbitration-after-walkout./.

[160] *See generally* Kim Elsesser, *Google Ditches Mandatory Arbitration Policy*, FORBES (Feb. 22, 2019), https://www.forbes.com/sites/kimelsesser/2019/02/22/google-ditches-mandatory-arbitration-policy/#5f02fa4e5a1f; Nitasha Tiku, *Google Ends Forced Arbitration After Employee Protest*, WIRED (Feb. 21, 2019), https://www.wired.com/story/google-ends-forced-arbitration-after-employee-protest/ (reporting that Google went beyond what the company had initially removed mandatory arbitrations for sexual harassment claims).

dependent contractors.[161] At Google, the total workforce consists of 121,000 temporary workers and contractors, but only 102,000 full-time employees.[162] In the tech sector, temporary workers and contractors constitute half of the workforce.[163] As the shadow workforce, independent contractors are the second-class citizens of the tech sector.[164] With an inclusive vision, the walkout directors demanded the removal of forced arbitrations for contractors, alongside full-time employees.[165] The organizing efforts brought unprecedented results: in May 2019, Google removed forced arbitration from contracts with contractors who work directly for Google.[166]

The victory in dismantling adhesion contracts in the tech sector came at a cost. Google targeted more than 300 employees in retaliation after the walkout.[167] The company went after Claire Stapleton, one of the walkout organizers, by demoting her from her role as a marketing manager and demanding that she take a medical leave.[168] Another organizer, Meredith Whittaker—the leader of Google's Open Research—was told that her employment at Google would be "changed dramatically."[169] The retaliation culminated in the departure of Claire Stapleton after months of retribution and interference.[170] But their sacrifices significantly shifted

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[161] Daisuke Wakabayashi, *Google's Shadow Work Force: Temps Who Outnumber Full-Time Employees*, N.Y. TIMES (May 28, 2019), https://www.nytimes.com/2019/05/28/technology/google-temp-workers.html (reporting Google contractors and temporary workers receive lower pays and less benefits but face sexual harassment from Google managers).

[162] *Id.*

[163] *Id.* (reporting tech companies save $100,000 "a year on average per American job" per worker by using temps and contractors).

[164] Manjoo, *supra* note 127 (stating that the organizers at Google "include points of view of that have long been marginalized in tech—of minority workers, for instance, and of contractors, the industry's second-class citizens.").

[165] Manjoo, *supra* note 126.

[166] Dickey, *supra* note 157.

[167] Kate Conger & Daisuke Wakabayashi, *Google Employees Say They Faced Retaliation After Organizing Walkout*, N.Y. TIMES (Apr. 22, 2019), https://www.nytimes.com/2019/04/22/technology/google-walkout-employees-retaliation.html.

[168] Conger & Wakabayashi, *supra* note 167

[169] *Id.*; *e.g.,* Dickey, *supra* note 157 (reporting that Whitetaker was not allowed to "continue her work as before").

[170] Alexia Fernández Campbell, *A Google Walkout Organizer Just Quit, Saying She was Branded with a "Scarlet Letter,"* VOX (June 7, 2019), https://www.vox.com/policy-and-politics/2019/6/7/18656562/google-walkout-organizer-stapleton-quits; Julia Carrier Wong, *"I've Paid a Huge Personal Cost": Google Walkout Organizer Resigns Over Alleged Retaliation*, THE GUARDIAN (June 7, 2019), https://www.theguardian.com/technology/2019/jun/07/google-walkout-organizer-claire-stapleton-resigns.

the tech sector and made a long-lasting impact.[171]

V. BEYOND CONTRACT THEORY OF UNCONSCIONABILITY

In a very short time, innovators have successfully forced their companies to remove mandatory arbitration clauses from their employment contracts. On the other hand, for decades, contract scholars, judges, and other advocates relied unsuccessfully on the doctrine of unconscionability to reign in the use of mandatory arbitration clauses in employment contracts. In other words, through collective organizing efforts, the innovators have achieved a significant milestone in employment contract reform that was previously impossible. Their victory casts doubt on the effectiveness of the unconscionability doctrine as a policing tool in adhesion employment contracts.

A. A Brief History of the Unconscionability Doctrine

Under contracts law, the primary tool for judges to regulate adhesion contracts is the doctrine of unconscionability.[172] Many scholars have documented the history of the unconscionability doctrine,[173] but for this Article's purpose, a brief history of the doctrine is sufficient.

Unconscionability existed at common law to avoid outrageously unfair contracts. As Justice Frankfurter asserted years ago, "The fundamental principle of law that the courts will not enforce a bargain where one party has unconscionably taken advantage of the necessities and distress of the other has found expression in an almost infinite variety of

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[171] *See generally* Thomsen, *supra* note 119 (explaining how the tech workers movement has emboldened others to step up in ending forced arbitration for sexual harassment claims).

[172] *See, e.g.*, Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1087–88 (2006) (recognizing unconscionability as the "primary policing doctrine"); *see also* Alan M. White & Cathy Lesser Mansfield, *Literacy and Contract*, 13 STAN. L. & POL'Y REV. 233, 254 (2002) (stating that unconscionability has become the "most common" judicial tool in policing adhesion contracts).

[173] *See* Waters v. Min Ltd., 587 N.E.2d 231, 232–33 (Mass. 1992) ("The doctrine of unconscionability has long been recognized by common law courts in this country and in England."); *see also* A.H. Angelo & E.P. Ellinger, *Unconscionable Contracts: A Comparative Study of the Approaches in England, France, Germany and the United States*, 14 LOY. L.A. INT'L & COMP. L.J. 455, 498–99 (1992) (a comparative history of unconscionability in contracts law); *see generally* Cellini & Wertz, *Unconscionability Contract Provisions: A History of Unenforceability from Roman Law to the U.C.C.*, 42 TUL. L. REV. 193 (1967); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 HASTINGS L.J. 459, 466–71 (1995) (providing a history of unconscionability).

cases."[174] The application of the doctrine began primarily in equity rather than law. The court could refuse to enforce a contract when an overreaching party with great bargaining power had rendered the terms patently unfair.[175] Later, with the incorporation of unconscionability provision in Article 2 of the Uniform Commercial Code, unconscionability became a valid legal argument.[176]

As modern procedural rules merged law and equity, courts expanded and recognized unconscionability as a defense in non-U.C.C. cases.[177] As of today, the doctrine of unconscionability splits into procedural and substantive components. As the names suggest, procedural unconscionability focuses on the manner in which the contract was formed, the tactics and any high-pressure sales pitches used, any unequal bargaining

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[174] United States v. Bethlehem Steel Corp., 315 U.S. 289, 327–28 (1942) (Frankfurter, J., dissenting).

[175] *See* Maxwell v. Fid. Fin. Serv., Inc., 907 P.2d 51, 57 (Ariz. 1995) ("Traditionally, equity courts recognized the defense of unconscionability in denying relief to plaintiffs who were guilty of unconscionable conduct . . . . Because barring relief was a matter of the chancellor's discretion, equity never developed a clear set of rules for analyzing claims of unconscionability . . . . Additionally, in equity unconscionability served as a remedial doctrine, limiting a party's remedies without truly affecting its substantive legal rights."); *see also* State ex rel. King v. B&B Inv. Grp., Inc., 329 P.3d 658, 670 (N.M. 2014) ("Unconscionability is an equitable doctrine, rooted in public policy, which allows courts to render unenforceable an agreement that is unreasonably favorable to one party while precluding a meaningful choice of the other party." (citation omitted)).

[176] *See Maxwell*, 907 P.2d 51, 57 ("However, the enactment of an unconscionability defense under U.C.C. Article 2 changed that. The rule as it now exists is largely substantive, working primarily as a defense both in law and in equity and applying to claims for damages as well as specific performance."); *see also* U.C.C. § 2-302 ("Unconscionable Contract or Clause (1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result. (2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be afforded a reasonable opportunity to present evidence as to its commercial setting, purpose, and effect to aid the court in making the determination."); *see generally* M.P. Ellinghaus, *In Defense of Unconscionability*, 78 YALE L.J. 757 (1969); Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework for U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 42 (1981); Arthur A. Leff, *Unconscionability and the Code—the Emperor's New Clause*, 115 U. PA. L. REV. 485, 543–46 (1967) (a critique and defense of the U.C.C.'s unconscionability provision).

[177] *See* Casey v. Lupkes, 286 N.W.2d 204, 207 (Iowa 1979) ("We hold that the defense of unconscionability is available in any contract action. The trial court erred in holding otherwise.").

power exerted, or any undecipherable terms utilized.[178] Substantive unconscionability refers to contracts with overly harsh, oppressive terms that shock the conscience.[179] For example, substantively unconscionable contracts contain extreme price terms compared to the actual value of the goods sold or services offered, unjustifiably high financing costs, and a lack of buyer's remedies.[180]

Courts decide as a matter of law whether a contract or its particular term is unconscionable at the time of formation.[181] The assessment on unconscionability is a case-by-case basis.[182] Typically, to prevail on the unconscionability grounds, the party asserting the doctrine must prove

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[178] *See Waters*, 587 N.E.2d 231 (affirming unconscionability determination where there was clear overreaching and oppression and gross inadequacy of consideration in the transfer of annuity with disproportionally large value in exchange for very little amount); *see also* Robert A. Hillman, *Online Boilerplate: Would Mandatory Website Disclosure of E-Standard Terms Backfire?*, 104 MICH. L. REV. 837, 854 (2006) ("Procedural unconscionability involves the manner in which the contract was made and regulates situations resembling, among other things, duress, misrepresentation, or, most important here, an unfair presentation of the terms.").

[179] *See* Gandee v. LDL Freedom Enter., Inc., 293 P.3d 1197, 1199 (Wash. 2013) ("A term is substantively unconscionable where it is 'one-sided or overly harsh' . . . '[s]hocking to the conscience' . . . 'monstrously harsh' . . . or 'exceedingly calloused.'") (citation omitted); *see also* Leff, *supra* note 176, at 485–86.

[180] *See generally* Frank P. Darr, *Unconscionability and Price Fairness*, 30 HOUS. L. REV. 1819 (1994) (applying unconscionability in policing price fairness in contracts); Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982) (advocating for a much greater application of the doctrine beyond price fairness); Jeffrey L. Harrison, *Class, Personality, Contract, and Unconscionability*, 35 WM. & MARY L. REV. 445, 450 (1994).

[181] *See* Original Great Am. Chocolate Chip Cookie Co., Inc. v. River Valley Cookies, Ltd., 970 F.2d 273, 281 (7th Cir. 1992) ("The doctrine of unconscionability, closely allied as it is to fraud and duress, is designed to prevent overreaching at the contract-formation stage."); *see also* Day v. CTA, Inc., 324 P.3d 1205, 1209 (Mont. 2014) ("A contract is unconscionable if it is a contract of adhesion and if the contractual terms unreasonably favor the drafter.").

[182] *See* Fotomat Corp. of Florida v. Chanda, 464 So. 2d 626, 629 (Fla. Dist. Ct. App. 1985) ("Florida has long recognized the principle that the courts are not concerned with the wisdom or folly of contracts . . . but where it is perfectly plain to the court that one party has overreached the other and has gained an unjust and undeserved advantage which it would be inequitable to permit him to enforce, a court will grant relief even though the victimized parties owe their predicament largely to their own stupidity."); *see also* Res. Mgmt, Co. v. Weston Ranch & Livestock Co., Inc., 706 P.2d 1028, 1041 (Utah 1985) (recognizing that unconscionability "defies precise definition" but "the standard for determining unconscionability is high, even if not precise"); Amy J. Schmitz, *Embracing Unconscionability's Safety Net Function*, 58 ALA. L. REV. 73 (2006) (arguing that unconscionability is necessarily flexible and contextual in order to both meet its function of protecting core human value).

both procedural and substantive unconscionability in order to obtain relief.[183] The remedy is either the nonenforcement or limited enforcement of the contract.[184]

B. Arbitration Clauses and Unconscionability in Employment Contracts

As concerns about mandatory arbitration provisions in employment contracts grew in light of the Supreme Court's string of employer-friendly decisions,[185] contract law scholars and litigants championed the doctrine of unconscionability as a way to challenge the enforceability of

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[183] Pendergast v. Sprint Nextel Corp., 592 F.3d 1119. 1134 (11th Cir. 2010) ("Our review of Florida law confirms the district court's interpretation of Florida law as requiring a showing of both procedural and substantive unconscionability."); Circuit City Stores, Inc. v. Mantor, 335 F.3d 1101, 1105 (9th Cir. 2003) ("[A] contract to arbitrate is unenforceable under the doctrine of unconscionability when there is 'both a procedural and substantive element of unconscionability."); In re DiMare, 462 B.R. 283, (D. Mass. Bankr. 2011); Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1533 (Cal. App. Ct. 1997) ("The prevailing view is that [procedural and substantive unconscionability] must both be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability."); Basulto v. Hialeah Automotive, 141 So.3d 1145, 1159 (Florida 2014) ("We agree with our district courts of appeal that procedural and substantive unconscionability must be established to avoid enforcement of the terms within an arbitration agreement. However, we conclude that while both elements must be present, they need not be present to the same degree."); Sitogum Holdings, Inc. v. Ropes, 800 A.2d 915, 922 (N.J. Sup. Ct. Mar. 21, 2002) (reviewing New Jersey cases on unconscionability and concluding that the New Jersey Supreme Court has "clearly included both the procedural and substantive unconscionability concepts" in evaluating contract unconscionability); Strand v. U.S. Bank Nat. Ass'n ND, 693 N.W.2d 918, 924 (N. Dakota 2005) ("We agree with the majority of courts which have addressed the issue and hold that a party alleging unconscionability must demonstrate some quantum of both procedural and substantive unconscionability."); Cottonwood Fin., Ltd. V. Estes, 810 N.W.2d 852, 856 (Wis. Ct. App. 2012) ("A determination of unconscionability requires a mixture of both procedural and substantive unconscionability that is analyzed on a case-by-case basis."); Coady v. Cross Country Bank, 729 N.W.2d 732. 741 (Wis. Ct. App. 2007) ("A determination of unconscionability requires a mixture of both procedural and substantive unconscionability that is analyzed on a case-by-case basis.").

[184] *See* Stephen E. Friedman, *Giving Unconscionability More Muscle: Attorney's Fees as a Remedy for Contractual Overreaching*, 44 GA. L. REV. 317 (2010) (advocating for the inclusion of attorney's fees as a remedy in cases where courts find unconscionability and arguing that the lack of adequate remedy undermines unconscionability's effectiveness).

[185] *See supra* notes 37–45.

arbitration agreements.[186]

Indeed, some litigants have identified potential issues of procedural and substantive unconscionability in mandatory arbitration clauses in employment contracts.[187] These issues include an employee's inability to negotiate the terms of the arbitration agreement before signing, a lack of clarity in language of the agreement, an absence of remedies, no real consideration provided by the employer, and excessive costs borne by the employee.[188] Likewise, scholars have focused on unconscionability as a counterweight to the enforceability of arbitration provisions in employment contracts.[189] Some believe that unconscionability is the "defense of choice" against arbitration agreements in employment contracts.[190]

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[186] *See* 9 U.S.C. § 2 (1947); *see also* Epic Sys. Corp., 138 S. Ct. 1612, 1622 (2018) (stating that the Federal Arbitration's saving clause "permits agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability") (citation omitted).

[187] *See, e.g.*, Douglas O. Smith, *The Future of Employee Collective Action Waivers*, 91 WIS. LAW. 32, 35 (2018) ("Issues of procedural and substantive unconscionability could include 1) the inability of the employee to negotiate concerning the terms of the arbitration agreement and the collective action waiver, including having insufficient time to review and to evaluate the agreement before being made to sign; 2) any ambiguity or lack of understandability of the language of the agreement and waiver; 3) lack of consideration given by the employer; 4) limitations of liability or of remedies that would be available in court under the employment statutes included in the scope of the arbitration agreement; and 5) excessive costs borne by employees that would make the arbitration process effectively unavailable to employees.").

[188] *See id.*; *see also* Menaka N. Fernando & Jennifer S. Schwartz, *Tackling Forced Arbitration*, 54 AM. ASS'N FOR JUST. (2018) (identifying issues to challenge forced arbitration in employment context).

[189] *See* Yongdan Li, *Applying the Doctrine of Unconscionability to Employment Arbitration Agreements, With Emphasis on Class Action/Arbitration Waivers*, 31 WHITTIER L. REV. 665, 670–71 (2009–2010) (reviewing how five state courts have applied the doctrine of unconscionability to determine whether to enforce employment arbitration agreement); *see also* Michael Schneidereit, Note, *A Cold Night: Unconscionability as a Defense to Mandatory Arbitration Clauses in Employment Agreements*, 55 HASTINGS L.J. 987, 991 (2004).

[190] Ramona L. Lampley, *Is Arbitration Under Attack?: Exploring the Recent Judicial Skepticism of the Class Arbitration Waiver and Innovative Solutions to the Unsettled Legal Landscape*, 18 CORNELL J.L. & PUB. POL'Y 477, 489–90 (2009) ("Unconscionability, a general state law defense to contracts, became the defense of choice in early cases contesting arbitration clauses in employment or consumer agreements."); Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757, 766, 799 (2004) (noting the increase in judicial embrace of unconscionability to counter arbitration agreements and asserting that the upsurge "appears to be activated in part by the excesses of opportunistic legal actors attempting to capi-

Despite the reliance of litigants and scholars on unconscionability in challenging arbitration clauses, judges have not responded positively to the unconscionability argument in this context.[191] For instance, in *Sablosky v. Edward S. Gordon Co.*, the New York Court of Appeals addressed whether an arbitration clause in the employment contract was unconscionable as a matter of law. In that case, the contract compelled the employee to submit all disputes to arbitration, but allowed the employer unilateral choice in pursuing arbitration or litigation.[192] Plaintiff Sablosky, a commission-based real estate salesman, alleged that he sold the Exxon Building in Midtown Manhattan and was denied his commission.[193] The employer compelled arbitration, and Sablosky sought to permanently stay arbitration[194] while arguing that the arbitration clause was unconscionable.[195] The Court ruled against him, reasoning that an "employer, who may hire hundreds of employees, should be able to protect itself from the delays and costs of extensive litigation by including as a condition of employment an agreement by the employee to arbitrate claims rather than litigate them."[196] The Court also rejected Sablosky's argument on procedural unconscionability. The Court observed that "almost all" employment contracts are prepared by the employer, and that "circumstance cannot render the arbitration clause contained in the contract unconscionable."[197] In other words, the imbalanced arbitration

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talize on problematic legal doctrine" established in the Supreme Court's pro-arbitration cases).

[191] *See, e.g.*, Willy E. Rice, *Unconscionable Judicial Disdain for Unsophisticated Consumers and Employees' Contractual Rights? Legal and Empirical Analysis of Courts' Mandatory Arbitration Rulings and the Systematic Erosion of Procedural and Substantive Unconscionability Defenses Under the Federal Arbitration Act, 1800–2015*, 25 B.U. PUB. INT. L.J. 143 (2016). Nevertheless, there are some cases where courts declined to enforce arbitration upon scrutinizing the terms of the arbitration clauses. *See* Baxter v. Genworth N. Am. Corp., 16 Cal. App. 5th 713, 723–37 (Cal. Ct. App. 2017) (affirming the lower court's finding that the arbitration agreement was procedurally unconscionable in a case where the employee "had no opportunity to negotiate the terms of the [arbitration] program." The court deemed that the employee had not had any meaningful choice in the matter and found the arbitration agreement substantively unconscionable); *see also* Brennan v. Bally Total Fitness, 198 F. Supp. 2d 377, 382–84 (S.D.N.Y. 2002) (finding the arbitration agreement in the present case of employment contract was both procedurally and substantively unconscionable).

[192] Sablosky v. Edward S. Gordon Co., 535 N.E.2d 643, 647 (N.Y. 1989).

[193] *Id.* at 644.

[194] *Id.*

[195] *Id.*

[196] *Id.* at 647.

[197] *Id.* ("Nor do we accept plaintiff's claim that the contract is one of adhesion or that it results from procedural unconscionability in the contract formation process. Such claims are judged by whether the party seeking to enforce

clause became a standard term in employment contracts.

On the opposite coast, even though California courts are more sympathetic to the unconscionability defense in employment arbitration contracts, they still favor arbitration for resolving disputes. Illustratively, the Supreme Court of California in *Graham v. Scissor-Tail, Inc.*[198] held that the standard form contract between a music promoter and a musician, which required arbitration of disputes between the parties by presumptively biased arbitrators, was unconscionable.[199] In that case, the standard form contract contained a provision that dictated the designated arbitrator be someone who favored one party.[200] In other words, while arbitration by a biased arbitrator *is* unconscionable, arbitration itself as the required method of solving disputes is not unconscionable. Accordingly, the Court ordered upon remand that the parties select a suitable arbitrator to decide their dispute.[201] Notably, the *Scissor-Tail* court em-

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the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties.").

[198] Daniela Caruso, *Contract Law and Distribution in the Age of Welfare Reform*, 49 ARIZ. L. REV. 665, 677 (2007) ("Within the Ninth Circuit, the tendency to invalidate arbitration clauses on grounds of unconscionability is most pronounced."); Erin O'Hara O'Conor et. al., *Customizing Employment Arbitration*, 98 IOWA L. REV. 133, 138 (2012) ("In California, state courts have struck down arbitration clauses that on their face require both parties to bring their claims to arbitration but then carve out from arbitration claims that are likely to be brought by the employer. Given that California is often a leader in state efforts to regulate unfair arbitration provisions, its stance on this issue could well spread to other states."). For a critique of California courts' application of unconscionability, see Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts are Circumventing the Federal Arbitration Act*, 3 HASTINGS BUS. L.J. 39 (2006) (showing that "unconscionability challenges before the California appellate courts succeed with far greater frequency when the contractual provision at issue is an arbitration agreement"); Steven J. Burton, *The New Judicial Hostility to Arbitration: Federal Preemption, Contract Unconscionability, and Agreements to Arbitrate*, 2006 J. DISP. RESOL. 469, 486 (2006). *See also* Susan Randall, *Judicial Attitudes Toward Arbitration and the Resurgence of Unconscionability*, 52 BUFF. L. REV. 185, 207–09 (2004); Stempel, *supra* note 190, at 799–802.

[199] Graham v. Scissor-Tail, Inc., 623 P.2d 165 (Cal. 1990).

[200] *Id.* at 178 ("[I]t must be concluded that a contractual provision designating the union of one of the parties to the contract as the arbitrator of all disputes arising thereunder including those concerning the compensation due under the contract does not achieve the 'minimum levels of integrity' which we must demand of a contractually structured substitute for judicial proceedings.").

[201] *Id.* at 180 ("In light of the strong public policy of this state in favor of resolving disputes by arbitration, however, we do not believe that the parties herein should for this reason be precluded from availing themselves of nonjudicial means of settling their differences . . . . We therefore conclude that upon remand the trial court should afford the parties a reasonable opportunity to agree

phasized that "strong public policy" of the State of California is "in favor of resolving disputes by arbitration."[202]

In summary, as long as the forced arbitration clause does not violate procedural unconscionability, and the clause does not contain harsh terms in violation of substantive unconscionability, courts will enforce the mandatory arbitration agreement.[203] That means employees cannot challenge their employers for imposing forced arbitration clauses as per se unconscionable.[204] In other words, the unconscionability doctrine is an ineffective means for employees seeking to stay arbitration.

CONCLUSION

Seeking judicial redress in voiding employment arbitration clauses via unconscionability has proven futile, wasteful, and costly to employees. Enforceable arbitration agreements continue to constitute a significant portion of today's employment contracts, privatizing disputes, maintaining secrecy, perpetuating wrongdoings, and depriving employees' constitutional and substantive rights.[205] But if forced arbitration in adhesion contracts is "left unchecked," as a prominent contracts scholar has warned, we will face a situation that where we solve our problem in "much the same way as the Austrians in the 1938 Anschluss solved their Nazi problem: by handing over the keys to the city."[206]

The innovators forged a different path. They were not naïve enough to embrace the futile route of unconscionability claims. They did not seek judicial redress to stay arbitration. Instead, they brilliantly opted for collective organizing action, demanding that their employers remove enforceable arbitration agreements from their contracts. They have achieved the improbable by policing and correcting employers' wrongs extra-judicially, gaining back their constitutional and substantive rights in the process.

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on a suitable arbitrator and, failing such agreement, the court should on petition of either party appoint the arbitrator.").

[202] *Id.* at 180. *See also* Armendariz v. Foundation Health Psychcare Services, Inc., 6 P.3d 669 (Cal. 2000) (finding substantive unconscionability because the arbitration in the present case required the employees but not the employers to arbitrate claims).

[203] *See* Li, *supra* note 189, at 671 (reviewing how five state courts have applied the doctrine of unconscionability to determine whether to enforce employment arbitration agreement).

[204] Knapp, *supra* note 24, at 781 ("Courts entertaining challenges to arbitration have steadfastly declined to entertain the notion that imposing arbitration on an unwilling party could be unconscionable per se.").

[205] Knapp, *supra* note 24, at 781–89 (identifying problems with mandatory arbitration in adhesion contracts).

[206] *Id.* at 789.

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