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MORALS CLAUSES: PAST, PRESENT AND FUTURE

CAROLINE EPSTEIN*

This note argues that morals clauses remain important in talent contracts, despite the liberalization of the modern moral climate. Morals clauses, express and implied, are employed to terminate a contract when talent misbehaves. These clauses have a storied history, but are still relevant despite the considerable changes in social norms since they were first implemented. These clauses are applicable to various sectors of the entertainment industry, including motion picture, television, athletics, and advertising. Their popularity has also led to the implementation of reverse morals clauses, which protect the employee from improprieties of the employer. The outgrowth of Internet and social media has only made such clauses more important, by providing more opportunities for talent misbehavior and public embarrassment. This note finds that morals clauses remain relevant, effectual, nuanced, and flexible, well suited to adapt to a changing legal and cultural landscape.

* J.D. Candidate, New York University School of Law, 2016; B.A. English & Government, magna cum laude, Georgetown University, 2013. The author would like to thank the 2015-16 Editorial Board of the Journal of Intellectual Property & Entertainment Law, as well as Professor Day Krolik, for their invaluable assistance in the editing process.

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INTRODUCTION

Imagine you are the chief executive of a major news network. You have just signed a multi-million dollar contract with your top news anchor, Fred Fabricate. Just as you are congratulating yourself on your shrewd negotiations, you notice a troubling headline trending on Facebook, Twitter, and your Daily Beast Cheat Sheet: “Fred Fabricate’s Web of Lies!” According to the articles, your golden boy has falsified details of past news reports. You call your lawyers in distress, and thankfully they have a solution. Fabricate has a morals clause in his contract with the network, and his conduct is grounds for termination of the agreement. You sigh in relief, thankful that this disaster can be resolved with minimal financial liability.

This example is adapted from the recent fallout surrounding Brian Williams and NBC News. Unfortunately for NBC, the separation was not as seamless as the hypothetical above. Williams has been a presence on the Network since 1993, and

was a rare bright spot in the struggling network news industry.¹ Since the revelations of Williams' exaggerations of his experiences in Iraq, NBC has scrambled to perform damage control for their popular *Nightly News* program.² Initially, Williams issued a public apology and stepped away from the show for several days.³ Then, rumors began to swirl that Williams' embellishments went beyond this singular occurrence. A six-month suspension without pay quickly followed.⁴ Ultimately, Williams was jettisoned to MSNBC, NBC's ratings-challenged cable analogue.⁵ Concerns remain whether Williams can "win back the trust of both his colleagues and his viewers . . . [and] abide by the normal checks and balances that exist" for those in the news industry.⁶ The incident "set off a debate about the level of trustworthiness required from someone who explained the world to nearly 10 million people a night"; however, NBC's primary concern was "protecting the integrity of its news operation, once called the crown jewel of the company."⁷ NBC made clear that the incident provided a right to terminate Williams pursuant to the morals clause in his personal services contract.

The Fabricate hypothetical and its real-life counterpart are merely illustrations of how a morals clause might be activated in a talent contract. A morals clause is:

A contractual provision that gives one contracting party (usually a company) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought) in the event that such other party engages in reprehensible behavior or conduct that may negatively impact his or her public image and, by association, the public image of the contracting company.⁸

¹ See Emily Steel, *Brian Williams Scandal Prompts Frantic Efforts at NBC to Curb Rising Damage*, N.Y. TIMES (Feb. 11, 2015), <http://www.nytimes.com/2015/02/12/business/media/frantic-efforts-at-nbc-to-curb-rising-damage-caused-by-brian-williams.html>.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ Emily Steel, *Brian Williams Return is Part of Revamp at MSNBC*, N.Y. TIMES (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/business/media/williams-return-is-part-of-revamp-at-msnbc.html>.

⁶ *Id.* (internal quotation marks omitted).

⁷ Steel, *supra* note 1.

⁸ Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 (2009).

The television, motion picture, athletic, and advertising industries all include morals clauses in talent agreements.⁹

The value of a morals clause lies in the protection it provides to the contracting company.¹⁰ Companies employ talent to achieve “meaning transference”; they aim to use a “‘celebrity’s established familiarity and credibility’ to make a product [or] project ‘similarly familiar and credible’ to consumers.”¹¹ Unfortunately, meaning transference cannot be limited to only positive associations with talent; incidental transfers of negative meanings may also occur when talent misbehaves in a professional or personal context.¹² Businesses spend considerable sums of money to cultivate the ideal image, and negative associations can wreak havoc upon their efforts.¹³ Because a morals clause allows the contracting company to swiftly sever its relationship with troublesome talent,¹⁴ it is an excellent form of corporate protection.¹⁵

This note will argue that morals clauses remain essential and influential in entertainment contracts of all kinds, despite the considerable changes in social norms since they were first implemented, and the obstacles such changes represent. Part I will begin with a discussion of the history of morals clauses. Part II will examine the two categories of morals clauses: express and implied. Part III will address the use of morals clauses in various sectors of the entertainment industry: motion picture, television, athletics, and advertising. Part IV will discuss the outgrowth of reverse morals clauses, which protect the employee from improprieties of the employer. Part V will address drafting concerns, and Part VI will explore the implications of social media and the current moral climate.

I

HISTORY OF MORALS CLAUSES

Despite the increasing prevalence of cases involving morals clauses in the public consciousness, the clauses themselves are not new and history provides

⁹ Noah B. Kressler, *Using The Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 239 (2005).

¹⁰ See Sarah D. Katz, “Reputations....A Lifetime to Build, Seconds to Destroy”: Maximizing Mutually Protective Value of Morals Clauses in Talent Agreements, 20 CARDOZO J. INT’L & COMP. L. 185, 187 (2011).

¹¹ *Id.* at 190.

¹² *Id.* at 191.

¹³ See Margaret DiBianca, *Bad Boys, Bad Boys: Whatcha Gonna Do When They Work for You?*, 13 No. 2 DEL. EMP. L. LETTER 1 (2008).

¹⁴ Katz, *supra* note 10, at 192.

¹⁵ See Pinguelo & Cedrone, *supra* note 8, at 366–67.

important context in understanding them. Morals clauses were successful and unabashed contract mechanisms used not only to sever contracts due to moral misconduct, but also to censor political activity.

The seminal case that triggered the use of morals clauses in talent contracts, was the moral impropriety of Fatty Arbuckle.¹⁶ In 1921, Comedian Roscoe “Fatty” Arbuckle had just signed a three-year, three-million-dollar contract with Paramount Pictures when a female guest at his party was found severely injured in his hotel suite.¹⁷ After the guest died from her injuries,¹⁸ Arbuckle was arrested on rape and murder charges, turning public opinion against the previously beloved performer.¹⁹ Although he was ultimately acquitted at trial, the court of public opinion had already made its damning judgment.²⁰ Universal Studios was not involved with the Arbuckle case, but the fallout from the incident inspired Universal to begin including morals clauses in all of their talent contracts.²¹

During the late 1940s and 1950s, movie studios more frequently used the clauses to challenge political expression than immoral conduct.²² For example, morals clauses were used as grounds for dismissal of controversial talent known as the Hollywood Ten.²³ These ten influential actors and screenwriters were jailed and blacklisted by big movie studios for publicly denouncing the activities of the House Committee on Un-American Activities (HUAC) during its investigation of Communist influence in Hollywood at the height of the McCarthy Era.²⁴ “Fearing

¹⁶ See Pinguelo & Cedrone, *supra* note 8, at 354.

¹⁷ *Id.*

¹⁸ The guest, Virginia Rappe, died of a ruptured bladder. It was speculated that the 266 pound Arbuckle had crushed her bladder while sexually assaulting her. Gilbert King, *The Skinny on the Fatty Arbuckle Trial*, SMITHSONIAN MAG. (Nov. 8, 2011), <http://www.smithsonianmag.com/history/the-skinny-on-the-fatty-arbuckle-trial-131228859/>.

¹⁹ Pinguelo & Cedrone, *supra* note 8, at 354.

²⁰ See King, *supra* note 18.

²¹ “As a direct result of the Arbuckle case in San Francisco, Stanchfield & Levy, attorneys for the Universal Film Manufacturing Company, have drawn up a protective clause . . . to [be] inserted in all existing and future actors', actresses', and directors' contracts with the company.” Pinguelo & Cedrone, *supra* note 8, at 354; see also *Morality Clause for Films*, N.Y. TIMES, Sept. 22, 1921, at 8, available at <http://timesmachine.nytimes.com/timesmachine/1921/09/22/98743776.html?pageNumber=8>.

²² Pinguelo & Cedrone, *supra* note 8, at 355.

²³ *Id.*

²⁴ “During the investigative hearings, members of HUAC grilled the witnesses about their past and present associations with the Communist Party . . . [M]ost individuals either sought leniency by cooperating with investigators or cited their Fifth Amendment right against self-incrimination. . . [T]he Hollywood Ten[] not only refused to cooperate with the investigation but denounced the HUAC anti-communist hearings as an outrageous violation of their civil rights, as

widespread boycotts amid a shrinking market share of consumer leisure spending, studios used the morals clause, a customary clause in talent agreements for twenty-five years, to terminate and disassociate themselves from the scandalized Hollywood Ten.²⁵ The controversial activity and its perceived impact on the studio's image were cited as grounds for their dismissal.²⁶

The three most notorious of the Hollywood Ten cases were litigated before the Ninth Circuit Court of Appeals between 1947 and 1957 and are referred to as the "Hollywood Ten Trilogy."²⁷ In *Loew's, Inc. v. Cole*,²⁸ MGM²⁹ dismissed a member of the Hollywood Ten, Lester Cole, more than a month after he testified before HUAC.³⁰ Cole sued MGM based on the suspicious delay between his testimony and firing, but the Ninth Circuit ruled that the damage dealt to the studio's image was sufficient grounds for his dismissal.³¹ The parties eventually settled the case.³² The other two cases in the trilogy, *Twentieth Century-Fox Film Corp. v. Lardner*³³ and *Scott v. RKO Radio Pictures, Inc.*,³⁴ relied on similar reasoning, finding in favor of the studios at the expense of Fox writer, Lardner, and RKO producer and director, Scott. In both cases, the courts relied on *Cole's* rationale that "the natural result of the artist's refusal to answer the committee's

the First Amendment to the U.S. Constitution gave them the right to belong to any political organization they chose." *Hollywood Ten*, A+E NETWORKS (2009), <http://www.history.com/topics/cold-war/hollywood-ten>.

²⁵ Kressler, *supra* note 9, at 238.

²⁶ For example, RKO's letters of dismissal to Adrian Scott and Edward Dmytryk, two members of the Hollywood Ten, stated: "By your conduct . . . and by your actions, attitude, public statements and general conduct . . . you have brought yourself into disrepute with large sections of the public, have offended the community, have prejudiced this corporation as your employer and the motion picture industry in general, have lessened your capacity fully to comply with your employment agreement and have otherwise violated your employment agreement with us." THOMAS D. SELZ ET AL., ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:107 (3d ed. 2014).

²⁷ Pinguelo & Cedrone, *supra* note 8, at 358.

²⁸ *Loew's, Inc. v. Cole*, 185 F.2d 641, 645 (9th Cir. 1950).

²⁹ MGM was the trade name for Loew's at the time. Pinguelo & Cedrone, *supra* note 8, at 358.

³⁰ SELZ ET AL., *supra* note 26, at § 9:107.

³¹ Pinguelo & Cedrone, *supra* note 8, at 359. The court opined, "[a] film company might well continue indefinitely the employment of an actor whose private personal immorality is known to his employer, and yet be fully justified in discharging him when he so conducts himself as to make the same misconduct notorious." *Cole*, 185 F.2d at 658.

³² Pinguelo & Cedrone, *supra* note 8, at 359.

³³ *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954).

³⁴ *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957).

questions was that the public would believe he was a Communist.”³⁵ Because much of the population was opposed to communism, this was considered a violation of the express morals clause, and constituted grounds for termination.³⁶

In recent decades, morals clauses have become even more common in talent contracts, but the changing moral landscape has posed challenges to their efficacy and legality. Nonetheless, the growth of social media, the greater publicity given to once private information, and the speed with which private information is disseminated have augmented the need for morals clauses.³⁷

II TYPES OF MORALS CLAUSES

There are two basic types of morals clauses, express and implied. Each represents different considerations on the part of the talent and the contracting company and each poses unique interpretative challenges.

A. Express Morals Clauses

Express morals clauses are drafted as part of the employment agreement. A typical express morals clause reads as follows:

The spokesperson agrees to conduct herself with due regard to public conventions and morals, and agrees that she will not do or commit any act or thing that will tend to degrade her in society or bring her into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the [contracting company] in general. [Contracting company] shall have the right to terminate this Agreement if spokesperson breaches the foregoing.³⁸

Clauses can range widely based on the talent and contracting company involved, as well as the context of the agreement.³⁹ The standard punishment for violation of a clause under New York and California Law, where the clauses are frequently invoked, is termination of the agreement.⁴⁰

³⁵ Kressler, *supra* note 9, at 245.

³⁶ *Id.*

³⁷ See discussion *infra* Part VI.

³⁸ Sarah Osborn Hill, *How to Protect Your Brand When Your Spokesperson Is Behaving Badly: Morals Clauses in Spokesperson Agreements*, 57 FED. LAW 14, 14 (2010).

³⁹ See Kressler, *supra* note 9, at 251–54.

⁴⁰ *Id.* at 244.

New York and California case law define the scope of behavior prohibited by morals clauses, which goes beyond a mere requirement to obey the law, and includes a duty “to refrain from behavior that tends to ‘shock, insult, and offend the community and public morals and decency,’ bring the artist into ‘public disrepute, contempt, scorn and ridicule,’ or hurt or prejudice the interests of, lower the public prestige of, or reflect unfavorably upon, the artist’s employer or the industry in general.”⁴¹ *Loew’s, Inc. v. Cole, Twentieth Century-Fox Film Corp. v. Lardner, Scott v. RKO Radio Pictures, Inc.*,⁴² and *Nader v. ABC Television Inc.*⁴³ are the primary cases exploring morals clauses in talent contracts under contract law principles⁴⁴ and help illustrate how an express morals clause operates.⁴⁵

Compliance with express morals clauses is difficult because their requirements can be unpredictable, a problem that is further exasperated by the tremendous consequence of violating the clause. When talent knows an express morals clause is included in their contract, it is in their interests to moderate their actions to minimize the possibility of breach. However, moderation is not always easy. For instance, the members of the Hollywood Ten probably would have risked termination based on the slightest opposition to HUAC, because of the political tenor of the times.⁴⁶ In *Nader*, violation of the “disrepute” trigger would be impossible to predict ex-ante because the reviewing court only found it enforceable after external review, based upon an inherently unpredictable reasonableness standard.⁴⁷ Therefore, this lack of predictability can present distinct challenges to talents’ compliance with an express morals clause.

Because of the cost and unpredictability of morals clauses, they can be a point of contention between artists and employers in contract negotiations. Given

⁴¹ *Id.* at 244–45.

⁴² See discussion *supra* Part I.

⁴³ *Nader v. ABC Television Inc.*, 150 F. App’x. 54; see discussion *infra* Section III(i).

⁴⁴ *Pinguelo & Cedrone*, *supra* note 8, at 358. Although some other cases have involved morals clauses in contracts, they were not resolved on these grounds. *Id.* at 358 n. 57; see, e.g., *Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth.*, 971 F. Supp. 875, 887 (D.N.J. 1977) (deciding the case primarily on First Amendment grounds); *Vaughn v. Am. Basketball Assoc.*, 419 F. Supp. 1274, 1278–79 (S.D.N.Y. 1976) (deciding the case based on jurisdictional issues), and *Revels v. Miss N.C. Pageant Org.*, 627 S.E.2d 280, 284 (N.C. Ct. App. 2006) (ordering the case to be resolved in arbitration).

⁴⁵ *Lardner, Scott, and Cole* each had contracts containing a similar morals clause. *Kressler*, *supra* note 9, at 245.

⁴⁶ See *Pinguelo & Cedrone*, *supra* note 8, at 361–62.

⁴⁷ *Katz*, *supra* note 10, at 214. Sometimes it is unclear to talent whether they are violating a morals clause. For example, *Nader* had previously maintained his job despite arrests, making him believe this case would not be handled differently. See *id.*

that the current moral climate is more socially liberal than eras past,⁴⁸ many employers no longer require them and will delete them if necessary in a negotiation.⁴⁹ However, if a morals clause is necessary, there are several ways for companies to reduce the impact of a morals clause.⁵⁰ Lawyers can draft morals clauses to require plaintiffs to show evidence of a negative reaction before the court will find a violation.⁵¹

In addition to contractual limitations on morals clauses, state law can also impact their enforceability. New York and California provide the broadest protections for employees and do not allow employers to make decisions based on an employee's lifestyle.⁵² In contrast, Delaware does not have any laws of this nature, meaning that unless the basis of termination is a protected characteristic such as race, religion, gender or age, the employer can be the judge of conduct warranting termination.⁵³ In all states, clauses that improperly infringe on a performer's rights, such as First Amendment rights guaranteed by the United States Constitution, are not permitted.⁵⁴

Although express morals clauses remove some of the ambiguity associated with permissible employee behavior, lack of predictability as to when they might be triggered undoubtedly persists. As social norms continue to shift and evolve, this issue will only become more acute.

B. Implied Morals Clauses

Morals clauses can also be implied from principles of common law, which impose a duty upon talent to refrain from activities that are detrimental to the employer or that might devalue the talent's performance.⁵⁵ Whether a morals clause should be implied is a question of fact, and requires an evaluation of the

⁴⁸ See discussion *infra* Section VI(A).

⁴⁹ SELZ ET AL., *supra* note 26, at § 9:107.

⁵⁰ *Id.*

⁵¹ For example, "the words 'tend to' and 'may' [can] [be] removed, so that a demonstrably negative reaction is required before the clause can be triggered," and "most companies will agree to remove the right to terminate employment so that the only remedy is the right to remove a credit." *Id.*

⁵² DiBianca, *supra* note 13.

⁵³ *Id.*

⁵⁴ See, e.g., *Marilyn Manson, Inc. v. New Jersey Sports & Exposition Auth.*, 971 F. Supp. 875, 887 (D.N.J. 1977) (holding New Jersey Sports and Exhibition Authority's requirement that performers agree to a morals clause problematic from a constitutional First Amendment standpoint); see also Pinguelo & Cedrone, *supra* note 8, at 377.

⁵⁵ Kressler, *supra* note 9, at 246.

circumstances of the employment and conduct at issue.⁵⁶ Under both New York and California law this obligation of good conduct is considered an implied morals clause and is recognized as grounds to terminate an employment agreement.⁵⁷ Importantly, an implied moral obligation does not arise solely in the absence of an express provision; rather, these common law duties exist alongside any provisions in an employment agreement.⁵⁸

There are hurdles to establishing this implied duty. Principally, an implied morals clause requires a common law employment relationship, which is more difficult to establish in the current film industry than it was in the past for several reasons. One reason for this is the shift from the “star system,” which engendered exclusive contracts between talent and studios, to the “free agency system,” where actors work with many studios and function more like independent contractors than common law employees.⁵⁹ Another reason is that the tax-motivated system of creating “loan out” corporations challenges the employment relationship. “Loan outs” contract directly with studios to provide the personal services of the actor. This arrangement potentially destroys privity between the studio and actor by making the actor the common law employee of the loan-out rather than the studio.⁶⁰ Nonetheless, for the purposes of employment law, actors are traditionally considered common law employees, rather than independent contractors in New York and California courts.⁶¹ Furthermore, both jurisdictions disregard the “loan out” when determining if there is an employment relationship.⁶²

⁵⁶ *Id.*

⁵⁷ *Id.* at 246-47; *see, e.g.*, *Drayton v. Reid*, 5 Daly's Rep. 442, 444 (N.Y. Ct. Com. Pl. 1874) (holding that an actress's public scandal resulting from immoral conduct was just cause for termination of her employment contract); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 89 (9th Cir. 1957) (finding that an employee's conduct before a congressional committee breached “an implied covenant . . . not to do anything which would prejudice or injure his employer”).

⁵⁸ *Kressler, supra* note 9, at 250; *see also Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 850 (9th Cir. 1954) (finding that, despite the application of *expressio unius*, the parties intended to bolster potential remedies, not waive given common law rights, and Fox retained the right to discharge its employee for an unspecified cause).

⁵⁹ *Kressler, supra* note 9, at 247-48.

⁶⁰ *Id.* at 248; *see generally* Mary LaFrance, *The Separate Tax Status of Loan-Out Corporations*, 48 VAND. L. REV. 879 (1995) (discussing the tax considerations of loan-out corporations).

⁶¹ *See Kressler, supra* note 9, at 249-50. This is a multi-factor analysis, the most significant factor being the degree of control the employer maintains over the alleged employee. *See, e.g.*, *Makarova v. United States*, 201 F.3d 110, 114 (2d Cir. 2000) (finding that a performer was an employee because her producer maintained artistic control over her performance); *Johnson v. Berkofsky-Barret Prods., Inc.*, 260 Cal. Rptr. 1067, 1073 (Cal. Ct. App. 1989) (finding an actor

III APPLICATION OF MORALS CLAUSES IN ENTERTAINMENT INDUSTRIES

Morals clauses are common in many sectors of the entertainment industry. This section will explore the application of morals clauses to the television, motion picture, sports, and advertising industries.

A. Morals Clauses in the Television Industry

Historically, branding has dominated the television industry. Television programming was once entirely dominated by advertisers, who bought time from a network and then created programming.⁶³ Because the sponsor held a franchise on his time period, network consent was considered pro-forma and “[m]any programs were ad agency creations, designed to fulfill specific sponsor objectives.”⁶⁴ In the mid-1950s, numerous factors converged to bring an end to sponsor-franchised programming, and control shifted to the networks. Advertisers nonetheless provide the primary support for the medium, and when their support falters, the programming will often change to accommodate them and maintain their backing.⁶⁵

Because of the historical importance of advertising in the television industry, morals clauses are essential to protect advertising relationships, the brand of productions, and company image.⁶⁶ “[N]etworks have adopted a conservative bias [toward programming], with no risks and no controversy that would exclude, alienate, or miss parts of the audience.”⁶⁷ The talent, program, and sponsors are still closely related, and morals clauses are used to quickly sever the connection with talent that poses a threat to public image.⁶⁸

to be an employee because the production company “directed and supervised the manner in which he performed . . .”).

⁶² Kressler, *supra* note 9, at 249; *see, e.g.*, *Welch v. Metro-Goldwyn-Mayer Film Co.*, 254 Cal. Rptr. 645, 655 (Ct. App. 1988) (finding a talent agreement that contained specific obligations between an actor and studio as forming an employment relationship), *rev'd on other grounds*, 769 P.2d 932 (Cal. 1989); *Berkofsky-Barret Prods., Inc.*, 260 Cal. Rptr. at 1072 (holding that the court “need not focus on . . . [that] link in the employment chain”).

⁶³ Kressler, *supra* note 9, at 241.

⁶⁴ WILLIAM LEISS ET AL., *SOCIAL COMMUNICATION IN ADVERTISING* 108-09, (2d ed. 1997) (quoting ERIK BARNOUW, *THE SPONSOR: NOTES ON A MODERN POTENTATE* 33 (1978)).

⁶⁵ Kressler, *supra* note 9, at 241-42.

⁶⁶ Pinguelo & Cedrone, *supra* note 8, at 368.

⁶⁷ Katz, *supra* note 10, at 222.

⁶⁸ Kressler, *supra* note 9, at 243.

Morals clauses have remained important in the television industry. The effect of these clauses has been shown in high profile terminations of television actors, newscasters, and reality television stars.

1. *Television Actors*

The Southern District of New York addressed the issue of morals clauses in television actors' contracts in *Nader v. ABC Television*.⁶⁹ Michael Nader portrayed Dimitri Marick on "All my Children" from 1991 to 1999. When ABC asked Nader to return to the show in 2000, his agreement contained the network's standard "morals" clause, allowing ABC "to immediately terminate the contract if Nader engaged in conduct that 'might bring [him] into public disrepute, contempt, scandal or ridicule, or which might tend to reflect unfavorably on ABC.'"⁷⁰ During the contract Nader was arrested and charged with criminal sale of cocaine and resisting arrest. ABC immediately suspended Nader and he entered rehab.⁷¹ When ABC informed Nader that they were terminating his employment contract for his violation of the morals clause, Nader filed a lawsuit challenging this decision.⁷² The court found the morals clause valid, and held that Nader had breached it due to the media coverage of his arrest.⁷³

Several other high profile disputes involving television stars' contractual morals clauses have dominated the news in recent years. Most prominent is that of Charlie Sheen, who WBTV fired from its television show "Two and a Half Men" after he exhibited erratic behavior and publicly ridiculed the show's executive producer Chuck Lorre.⁷⁴ He challenged his termination in a \$100 million lawsuit.⁷⁵ This conduct is a classic example of what might fall within a traditional morals clause violation; however, Sheen's contract did not have a traditionally worded

⁶⁹ *Nader v. ABC Television*, 150 F. App'x 54 (2d Cir. 2005).

⁷⁰ *Morals Clause, Not Drug Addiction, Reason for Soap Star's Termination*, 19 No. 4 ANDREWS EMP. LITIG. REP. 12 (2004).

⁷¹ *Id.*

⁷² James G. Murphy, *Soap Star Slips Up on Morals Clause in Contract*, 11 No. 10 N.Y. EMP. L. LETTER 7 (2004).

⁷³ Kressler, *supra* note 9, at 245-46; *see also* Murphy, *supra* note 72 ("The court held, among other things, that the provisions of the morals clause weren't so vague, overly broad, and ambiguous as to render it void.").

⁷⁴ Sheen's antics included drug abuse, hospitalization, domestic abuse, rehab, and a series of bizarre interviews and tweets. Emily Yahr, *Let's All Remember the Infamous Charlie Sheen 'Two and a Half Men' Meltdown*, WASHINGTON POST STYLE BLOG (Feb. 19, 2015), <https://www.washingtonpost.com/news/style-blog/wp/2015/02/19/lets-all-remember-the-infamous-charlie-sheen-two-and-a-half-men-meltdown/>

⁷⁵ *Id.*

morals clause.⁷⁶ The “moral turpitude clause” in his contract essentially required a felony conviction before termination could be triggered, making the process more complicated.⁷⁷ As a result, WBTV relied upon the “force majeure” clause in the contract instead, citing Sheen’s incapacitated state as grounds for his termination.⁷⁸ The parties eventually settled the case.⁷⁹ Another example of a high profile dispute occurred when Mel Gibson made anti-Semitic remarks during an arrest for drunk driving, and ABC subsequently cancelled his contract for their miniseries on the Holocaust.⁸⁰ A recent and ongoing example is the mounting allegations of sexual misconduct Bill Cosby is facing, and the considerable media attention it has received, which led NBC and Netflix to shelve planned collaborations with him.⁸¹ Although the Cosby situation does not appear to be a case involving a morals clause, it raises interesting implications for the value and image of Cosby’s legacy as America’s favorite dad, Heathcliff Huxtable.⁸²

Overall, morality clauses in television actors’ contracts illustrate the contracting company’s concerns with public opinion and most importantly, the talent’s ability to work. Because television is dependent on a regimented production schedule and good ratings, factors that might derail filming or sour

⁷⁶ Eriq Gardner, *Charlie Sheen’s Contract: Was There Actually a Morals Clause?*, HOLLYWOOD REPORTER (Mar. 8, 2011, 9:13 AM), <http://www.hollywoodreporter.com/thr-esq/charlie-sheens-contract-was-actually-165309>.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Nellie Andreeva, *Charlie Sheen, Warner Bros TV & Chuck Lorre Announce Settlement*, DEADLINE HOLLYWOOD (Sept. 26, 2011, 3:12 PM), <http://deadline.com/2011/09/charlie-sheen-warner-bros-tv-chuck-lorre-announce-settlement-176345/> (official statement of Warner Bros. studio) (“Warner Bros. Television, Chuck Lorre and Charlie Sheen have resolved their dispute to the parties’ mutual satisfaction. The pending lawsuit and arbitration will be dismissed as to all parties. The parties have agreed to maintain confidentiality over the terms of the settlement.”).

⁸⁰ Pinguelo & Cedrone, *supra* note 8, at 349.

⁸¹ Dorothy Pomerantz, *Netflix and NBC Back Away from Bill Cosby*, FORBES (Nov. 19, 2014, 2:35 PM), <http://www.forbes.com/sites/dorothypomerantz/2014/11/19/netflix-and-nbc-back-away-from-bill-cosby/>.

⁸² See Nellie Andreeva, *Bill Cosby Controversy is NBC Conundrum: Will America Accept Him Playing a Family Man Again?*, DEADLINE HOLLYWOOD (Nov. 17, 2014, 8:30 AM), <http://deadline.com/2014/11/bill-cosby-controversy-nbc-series-plan-1201285605/>. Given that cast members of The Cosby Show were made to sign morality clauses, widely speculated to be the basis of Lisa Bonet’s abrupt departure, it is possible that the publicity surrounding Cosby’s misdeeds has implications for his prior body of work. See Kara Kovalchik, *10 Actors’ Dramatic Departures from Popular Shows*, MENTAL FLOSS (Sept. 12, 2011, 5:30 AM), <http://mental.floss.com/article/28735/10-actors-dramatic-departures-popular-shows>.

public opinion could prove fatal.⁸³ For example, although Charlie Sheen's remarks were alarming, the public seemed to revel in the entertainment value of his outlandish public persona.⁸⁴ The bigger concern seemed to be Sheen's questionable lifestyle habits affecting his performance, and the producer's general desire to eliminate him from the cast.⁸⁵ The *Nader* case involved similar concerns, given the incapacitating nature of Nader's cocaine addiction and the bad press it engendered.⁸⁶ On the other hand, the cases of Mel Gibson and Bill Cosby represent different concerns because the morally offensive allegations turned public opinion against them. Cosby has suffered widespread shaming in the media, especially given his towering cultural presence beforehand.⁸⁷ To this day, it appears Gibson's career has yet to recover.

2. Newscasters

Morals clauses have also been an issue for television newscasters. These clauses are key for news broadcasters, because newscasters must maintain credibility in order for viewers to trust them. Understandably, the public seems to have less tolerance for the controversial antics of those they trust to relay the news.

⁸³ This challenge has also paved the way for the success of streaming platforms like Netflix. Todd Spangler, *TV Ratings Have Hurt Creative Side of Television, Says Netflix Content Boss Sarandos*, VARIETY (Dec. 8, 2014, 12:46 PM), <http://variety.com/2014/digital/news/tv-ratings-have-hurt-creative-side-of-television-says-netflix-content-boss-sarandos-1201373908/>.

⁸⁴ Media sources still revel in the entertainment value of Sheen's "meltdown." See, e.g., Yahr, *supra* note 74.

⁸⁵ See *id.* Although, it does not appear his antics were unforgivable; as it was widely Sheen would return for the finale of *Two and a Half Men*. Lynette Rice, *It's Official: Charlie Sheen Will Have a Presence on the Two and a Half Men Finale – But There's a Catch*, PEOPLE (Feb. 6, 2015, 7:30 AM), <http://www.people.com/article/charlie-sheen-two-and-a-half-men-finale>.

⁸⁶ See Katz, *supra* note 10, at 213-14. His argument that he had been fired based on a disability, his cocaine addiction, was rejected by the court. ANDREWS EMP. LITIG. REP. 12, *supra* note 70.

⁸⁷ Cosby has lost millions of dollars, had several honorary degrees revoked, and has been accused of tarnishing the Cosby show legacy. See e.g., Daniel Bukszpan, *How Bill Cosby's Fortune and Legacy Collapsed*, FORTUNE (Jul. 15, 2015, 10:18 AM), <http://fortune.com/2015/07/15/bill-cosby-fortune-collapse/>; Sydney Ember & Colin Moynihan, *Honorary Degrees in Unwanted Spotlight*, N.Y. TIMES, Oct. 7, 2015, at C1, available at http://www.nytimes.com/2015/10/07/arts/television/to-revoke-or-not-colleges-that-gave-cosby-honors-face-a-tough-question.html?_r=0; Nancy Dillon & Corky Siemaszko, *Actor Who Played Bill Cosby's Son on 'The Cosby Show' Says Rape Allegations Have 'Tarnished' Show's Legacy*, N.Y. DAILY NEWS (Oct. 10, 2015, 12:06 AM), <http://www.nydailynews.com/entertainment/gossip/bill-cosby-questioned-alleged-1974-molestation-article-1.2391569>.

Bad publicity that might undermine their credibility can wreak havoc on their popularity and the network's viewership.

For example, Alycia Lane, a popular Philadelphia anchorwoman on a CBS subsidiary, attracted considerable negative public attention when she was arrested and charged with assault in New York City.⁸⁸ Lane allegedly hit a female police officer and called her a homophobic slur.⁸⁹ Although she pled not guilty and contested the charges, the incident activated the morals clause in her contract, and CBS terminated her employment.⁹⁰ Lane's alleged reprehensible statements proved to be the downfall of her career as an anchorwoman.

Another incident involved Virginia Galaviz, a reporter covering the "Crime Beat" for a TV station in San Antonio who was similarly terminated based on a morals clause in her contract.⁹¹ Galaviz was involved in three incidents that garnered negative media attention. She had a confrontation with a city councilman whom she was dating, she had an interaction with another woman whom her boyfriend was dating, and an altercation with her fiancée in which both of them were arrested.⁹² Although she challenged her termination and argued that the language of her morals clause was ambiguous, the trial and appeals court both held that her conduct was covered and her termination was justified.⁹³ Understandably, an arrestee with a violent record is no longer considered a credible crime reporter.

Brian Williams, discussed in the introduction, is the most recent example of a morals clause affecting a newscaster. Williams' contract contained the standard NBC News morals clause:

If artist commits any act or becomes involved in any situation, or occurrence, which brings artist into public disrepute, contempt, scandal or ridicule, or which justifiably shocks, insults or offends a

⁸⁸ DiBianca, *supra* note 13.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Morals Clause Forecloses Claim of San Antonio TV Reporter*, 21 No. 8 TEX. EMP. L. LETTER 2 (2010).

⁹² *Id.*

⁹³ *Galaviz v. Post-Newsweek Stations*, 380 F. App'x 457, 459-60 (5th Cir. 2010); *see also TV Reporter Fired Due to Morals Clause Violation, Not Sex Bias*, EMP. PRAC. GUIDE, 2013 WL 422203 (2009).

significant portion of the community, or if publicity is given to any such conduct . . . company shall have the right to terminate.⁹⁴

NBC executive Stephen Burke and Comcast CEO Brian Roberts had the ultimate responsibility of determining whether Williams breached his duties under the clause.⁹⁵ The fallout surrounding Williams has led to a major loss of credibility for both himself and NBC. His trustworthiness ranking has tumbled,⁹⁶ and the network has turned against their former star.⁹⁷ NBC lost nearly 700,000 viewers in the wake of the scandal, and it is still unclear if the scandal has permanently damaged the network's image and ratings.⁹⁸ Due to Williams' presence as a major news anchor with his own show, it is curious that his contract would contain the same morals clause as all other NBC News employees. Because of this clause, even if producers preapproved his comments and his lies, any resultant public disrepute would still activate the clause. Given his relative youth and success, it will be interesting to see if his reputation can be rehabilitated. His ultimate fate will be telling for the implications of bad press and the loss of credibility for television newscasters.

3. Reality Television Stars

Finally, morals clauses have become a huge issue within the burgeoning reality TV industry. Americans delight in the misbehavior of these stars and live vicariously through their transgressions. Catering to this public demand, while censoring the more outlandish actions and outbursts of talent, has posed a legitimate challenge to TV networks. Networks have been using morals clauses in an attempt to constrain the more controversial reality stars.

⁹⁴ Emily Smith, *Contract 'Morality Clause' Could Determine Brian Williams' Future*, N.Y. POST: PAGE SIX (Feb. 15, 2015, 10:33 PM), <http://pagesix.com/2015/02/15/brian-williams-future-hangs-on-morality-clause-in-contract>.

⁹⁵ *Id.*

⁹⁶ Lloyd Grove, *Peacock Panic: NBC Suspends Brian Williams for Six Months*, DAILY BEAST (Feb. 10, 2015, 5:55 AM), <http://www.thedailybeast.com/articles/2015/02/10/fear-and-loathing-at-nbc.html>.

⁹⁷ It is alleged that NBC seriously considered firing Williams before his 6-month unpaid suspension. Aaron Feis, *NBC Considered Firing Brian Williams Before Suspending Him*, N.Y. POST: PAGE SIX (Feb. 12, 2015, 12:04 PM), <http://pagesix.com/2015/02/12/nbc-considered-firing-brian-williams-before-suspending-him/>.

⁹⁸ "The viewer hemorrhage was magnified by the fact it happened in the winter — traditionally the most competitive season for network newscasts." Michael Starr, *'NBC Nightly News' Loses 700K Viewers After Brian Williams Scandal*, N.Y. POST (Feb. 18, 2015, 12:17 PM), <http://nypost.com/2015/02/18/nbc-nightly-news-loses-700k-viewers-after-brian-williams-scandal/>.

This phenomenon is aptly illustrated by the recent examples of controversies surrounding reality shows “Duck Dynasty” and “Here Comes Honey Boo Boo.” Phil Robertson, the patriarch of Duck Dynasty’s starring family was suspended by A&E after making anti-gay remarks in GQ magazine.⁹⁹ Although specifics of his agreement were not revealed, it was widely speculated that his suspension was based upon a morals clause in his contract with the network.¹⁰⁰ When A&E ended his suspension amidst fan protestation, they “saw ratings plummet nearly 50 percent from the show’s heights.”¹⁰¹ Similarly, after revelations that “Here Comes Honey Boo Boo” star “Mama June” Shannon was dating Mark McDaniel, a convicted sex offender who had recently been released from prison after a decade behind bars, TLC cancelled the show.¹⁰² Shannon lost payment for the early termination of the contract based upon the morality clause in her agreement with the network.¹⁰³ Because the other cast members did not violate their morals clauses, they still received the full benefit of their contracts.¹⁰⁴

These examples demonstrate the ever-present risks facing reality TV producers: “handing worldwide platforms to dubious people in questionable circumstances” and hoping those people will not implode until the show’s popularity is already in decline.¹⁰⁵ The consistent popularity of reality shows, built upon the misbehavior of their stars, demonstrates that the American public is far less concerned with the good morals of reality stars. However, morality clauses are

⁹⁹ Tim Kennealley, *‘Duck Dynasty’ Star Phil Robertson: What Are His Legal Options?*, THEWRAP (Dec. 19, 2013, 6:06 PM), <http://www.thewrap.com/phil-robertson-duck-dynasty-free-speech-religious-discrimination/>

¹⁰⁰ *Id.*; see also Scott Collins, *‘Duck Dynasty’: A&E Warned Phil Robertson About Speaking Out Too Much*, L.A. TIMES (Dec. 20, 2013, 4:55 PM), <http://www.latimes.com/entertainment/tv/showtracker/la-et-st-duck-dynasty-ae-warned-phil-robertson-about-speaking-out-too-much-20131220-story.html> (“Phil and other family members also probably signed contracts containing ‘morals clauses’ in which they promised to, among other things, avoid anything that would embarrass or bring shame to A&E or the brand.”).

¹⁰¹ Eric Deggans, *TLC’s ‘Honey Boo Boo’ Cancellation Shows Dangers Of Exploitative TV*, NAT’L PUB. RADIO (Oct. 24, 2014, 4:08 PM), <http://www.npr.org/2014/10/24/358567472/tlcs-honey-boo-boo-cancellation-shows-dangers-of-exploitative-tv>.

¹⁰² *Id.*

¹⁰³ Ryan Arciero, *‘Honey Boo Boo’: Mama June Is Losing Salary, New Child Molestation Interview*, EXAMINER (Nov. 1, 2014, 4:26 PM), <http://www.examiner.com/article/honey-boo-boo-mama-june-is-losing-payment-child-molestation-safety-risks>.

¹⁰⁴ *Id.*; see also Karen Butler, *‘Mama’ June Shannon Won’t Be Fully Paid for Final ‘Honey Boo Boo’ Season*, UNITED PRESS INT’L (Nov. 1, 2014, 2:50 PM), http://www.upi.com/Entertainment_News/TV/2014/11/01/Mama-June-Shannon-wont-be-fully-paid-for-final-Honey-Boo-Boo-season/6121414845458/.

¹⁰⁵ Deggans, *supra* note 101.

essential to protect the network's interests in the event that a talent's antics polarize public sentiment and destroy ratings.¹⁰⁶

B. Morals Clauses in the Motion Picture Industry

Movie studios also use morals clauses in contracts with talent. While the motion picture industry also faces the branding and advertising concerns of the television industry, these concerns are mitigated because motion pictures developed more independently from advertising than television did.¹⁰⁷ Although movie executives use product placement and co-marketing to "close the gap on budgets,"¹⁰⁸ advertisements are not as essential as they are to television networks. Motion pictures lack dependence on advertisers, but that does not render morals clauses irrelevant. The industry employs morals clauses to protect the value of a film's brand. Studios and their marketing partners have an economic interest in keeping a movie's brand value high, and morals clauses insure that talent does not compromise this value.¹⁰⁹ As brand value increases, actors or actresses that become a liability to maintaining this value are eliminated.¹¹⁰ The protective value of a morals clause in the motion picture context is therefore largely dependent on the specific parties and projects at issue.¹¹¹ Illustrative examples include the high profile cases *Loew's, Inc. v. Cole*,¹¹² *Twentieth Century-Fox Film Corp. v. Lardner*,¹¹³ and *Scott v. RKO Radio Pictures, Inc.*,¹¹⁴ discussed in Part I.

Additionally, the movie industry has several noteworthy prohibitions on express morals clauses. Both the Director's Guild of America and the Writer's Guild of America expressly prohibit morals clauses in any agreements signed by guild members as a response to the removal of screen credit for violators.¹¹⁵ Although the Screen Actors Guild does not have such a blanket prohibition, many contracts between studios and major talent do not contain a morals clause because

¹⁰⁶ As illustrated by the cases summarized, morals clauses can help minimize damaging fallout for networks. *See, e.g., id.*

¹⁰⁷ Kressler, *supra* note 9, at 243.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 244.

¹¹⁰ For example, they made the third American Pie movie without troubled and headline prone actress Tara Reid. *See id.*

¹¹¹ Katz, *supra* note 10, at 223.

¹¹² *Loew's, Inc. v. Cole*, 185 F.2d 641, 658 (9th Cir. 1950).

¹¹³ *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954).

¹¹⁴ *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957).

¹¹⁵ Credit is the lifeblood of writers and directors, who do not enjoy the same level of notoriety and recognition as on screen talent. SAG and AFTRA do not include such prohibitions. Katz, *supra* note 10, at 198-99.

these famous actors are influential enough to eliminate this contractual language.¹¹⁶ As a result, a morals clause is often the first thing stricken from a contract.¹¹⁷ However, studios may attempt other methods to coerce talent into behaving properly, such as threatening liability for monetary damages to a production or distancing a production from the studio.¹¹⁸

Movie studios have concerns similar to those of television networks when it comes to morals of the talents. Due to huge production budgets and the importance of ticket sales, incapacitated talent or bad press can derail the success of a movie. Therefore, studios consider morals clauses important to protecting their bottom line.

C. Morals Clauses in Sports Contracts

Morals clauses have also existed throughout the history of professional sports. Given the “tough guy” image cultivated by many professional athletes, morals clauses have different implications in the context of sports. The harbinger of the modern sports’ morals clause was that of Babe Ruth, who had a provision in his contract requiring him to abstain from alcohol and to be in bed by 1:00 am during the baseball season.¹¹⁹ Although his clause differed from modern morals clauses because violation did not result in termination of his contract, it did allow legal action upon breach, laying the foundation for the modern usage of morals clauses in professional sports.¹²⁰

Morals clauses have become routine in national league contracts. “As of 2008, the collective bargaining agreements in the National Football League,¹²¹

¹¹⁶ For example, “[w]hen Tom Cruise entered the ‘danger zone[,] with public tirades about psychiatry, Scientology, and postpartum depression,’ Paramount Pictures was still obligated by contract to release *Mission: Impossible III*,” and “when Mel Gibson was arrested for drunk driving in 2006, Disney had no right to terminate its distribution agreement for Gibson’s movie *Apocalypto*.” Katz, *supra* note 10, at 199-200.

¹¹⁷ *Id.*

¹¹⁸ Morgan Creek productions threatened to do as much when Lindsay Lohan misbehaved consistently on the set of *Georgia Rule*. *Id.* at 200 & n.84.

¹¹⁹ Porcher L. Taylor III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent’s Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L. J. 65, 75–76 (2010).

¹²⁰ *See id.*

¹²¹ Under § 11 of the NFL Player Contract, a football club may terminate the player contract “[i]f at any time, in the sole judgment of Club, . . . [the] Player has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club.” NATIONAL FOOTBALL LEAGUE COLLECTIVE BARGAINING AGREEMENT 2006-2012, at 252 (2006), *available at* <http://www.docslide.us/documents/nfl-collective-bargaining-agreement-2006-2012.html>.

National Basketball Association,¹²² National Hockey League,¹²³ and Major League Baseball¹²⁴ each contained a standard player agreement that included a morals clause.¹²⁵ Collective bargaining agreements leave little room for negotiation between individual players and teams on the subject of morals clauses because they are negotiated for the league as a whole.¹²⁶

Morals clauses in athletes' league contracts are employed by teams and leagues in an attempt to moderate the athletes' off-duty behavior. For example, the NFL suspended Adam "Pacman" Jones for the entire 2007 season after being arrested five times in less than two years. "Despite being reinstated by the NFL with clearly delineated requirements for avoiding subsequent suspensions, Jones became involved in an alcohol-related fight with a member of his security team during the 2008 season," resulting in another suspension.¹²⁷

Morals clauses are not always effective in this context. In an effort to circumvent these clauses, the leagues have been lenient in their interpretation of immoral conduct. For example, when Jayson Williams was indicted on manslaughter charges in 2002, his agent argued that the morals clause in his contract did not apply because the clause required intentional moral impropriety, and there was no allegation that his conduct was intentional.¹²⁸ Similarly, an NBA

¹²² Under § 16 of the NBA's Uniform Player Contract, a basketball team may terminate a player contract "if the Player shall . . . at any time, fail, refuse, or neglect to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, whether or not such acts would constitute a crime), and good sportsmanship." NATIONAL BASKETBALL ASSOCIATION COLLECTIVE BARGAINING AGREEMENT, at A-16 (2011), *available at* [http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA\(2011\)_newversion_reflectsJeremyLinRulingMay30_2013.pdf](http://www.ipmall.info/hosted_resources/SportsEntLaw_Institute/NBA_CBA(2011)_newversion_reflectsJeremyLinRulingMay30_2013.pdf).

¹²³ Under the NHL Standard Player's Contract, § 2(e), each NHL player agrees "to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally." COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYER'S ASSOCIATION, at 245 (2005), *available at* <http://www.nhl.com/cba/2005-CBA.pdf>.

¹²⁴ Under § 7(b) of the Major League Baseball Uniform Player's Contract, a baseball club "may terminate [a player contract] . . . if the Player shall at any time . . . fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship." 2012-2016 BASIC AGREEMENT, at 284 (2011), *available at* http://mlbplayers.mlb.com/pa/pdf/cba_english.pdf. *Id.* at 284.

¹²⁵ Pinguelo & Cedrone, *supra* note 8, at 364.

¹²⁶ *Id.*

¹²⁷ *Id.* at 373.

¹²⁸ Tom Canavan, *Williams Will Still Be Paid from Nets Deal, Agent Says: Morals Clause Does Not Apply to Remaining \$24 Million*, RECORD (Newark), Feb. 28, 2002, at A04.

Grievance Arbitrator reinstated player Latrell Spreewell's contract with the Golden State Warriors after finding that choking one's coach does not meet the NBA's "moral turpitude" standard.¹²⁹ When videos surfaced of Baltimore Ravens running back Ray Rice knocking unconscious his now-wife Janay in an Atlantic City elevator, he was initially suspended indefinitely, but won his appeal and was reinstated.¹³⁰ After public sentiment turned against Rice, the Ravens, and the NFL for how they handled the incident, the NFL strengthened its domestic violence policy.¹³¹ As these examples illustrate, although national sports leagues attempt to control their athletes' behavior through morality clauses, they have not been entirely effective.

D. Morals Clauses in Advertising

Morals clauses are prevalent in advertising contracts between brands and spokespeople. Many companies use celebrity spokespeople to distinguish their brands from other similar products.¹³² In choosing celebrity endorsers, advertisers emphasize "trustworthiness, values, image, reputation and publicity risk."¹³³ Studies illustrate that celebrity endorsements affect consumers favorably and commingle the public perception of the celebrity and the product.¹³⁴ However, this so called "meaning transference" can be a double-edged sword. When the celebrity offends the public, this negative perception can transfer from the person to the product.¹³⁵ "Advertisers worry that once a celebrity's image is connected with a product, it may become an albatross if it is besmirched by allegations of impropriety."¹³⁶ Therefore, companies often include morals clauses within endorsement contracts that allow them to protect themselves from these risks by quickly severing ties and disassociating the connection between offensive talent and products.¹³⁷

A typical morals clause in an endorsement contract is similar to a standard express morals clause, but the talent can negotiate for narrower clauses.¹³⁸ Courts

¹²⁹ Katz, *supra* note 10, at 208–09.

¹³⁰ Jill Martin & Steve Almasy, *Ray Rice Wins Suspension Appeal*, CNN (Nov. 30, 2014, 12:59 AM), <http://www.cnn.com/2014/11/28/us/ray-rice-reinstated/>.

¹³¹ Josh Levs, *NFL Toughens Policy Addressing Assault and Domestic Violence*, CNN (Dec. 10, 2014, 10:45 PM), <http://www.cnn.com/2014/12/10/us/nfl-conduct/index.html>.

¹³² Hill, *supra* note 38, at 14.

¹³³ Kressler, *supra* note 9, at 240–41.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Success will depend on the talent's leverage. Pinguelo & Cedrone, *supra* note 8, at 364.

have held that an express morals clause gives the brand owner a reasonable amount of time to determine the public perception of a clause violation and decide if they want to terminate the endorsement arrangement.¹³⁹ Although these clauses provide an exit opportunity for brand owners, endorsement agreements are still risky. Even if the fallout is minimized, there is potential for damage based on existing products featuring the celebrity's likeness, or the previously established association between the celebrity and the brand.¹⁴⁰

A striking example of the drawbacks of meaning transference is illustrated by the misstep of the "creator of branding," P&G. After choosing spokeswoman Marilyn Briggs, P&G suffered fallout when an adult film she starred in was released the same week as millions of Ivory soap boxes featuring her likeness.¹⁴¹ Numerous reviews of the film mentioned the association, and "Ivory's association with 'purity,' 'mildness' and 'home-and-hearth values' was fiercely bruised."¹⁴²

Many other similar mishaps have occurred with companies and their spokespeople in recent years.¹⁴³ For instance, when pictures surfaced of Kate Moss doing cocaine, retailer H&M and designers Chanel and Burberry dropped her from their advertising campaigns.¹⁴⁴ Less famous spokespeople are not immune from the effects of morals clauses either. Benjamin Curtis, most famous for being the "Dell Dude," was dismissed from his contract with Dell Inc. after being arrested for marijuana possession in 2003.¹⁴⁵

¹³⁹ Hill, *supra* note 38, at 14–15.

¹⁴⁰ *See id.* at 15.

¹⁴¹ Kressler, *supra* note 9, at 239.

¹⁴² *Id.*

¹⁴³ "Other such deals include . . . Seven-Up with Flip Wilson (later arrested for trafficking cocaine), Mazda with Ben Johnson (later implicated in an Olympic steroid scandal), Gillette with Vanessa Williams (later appearing nude in Penthouse magazine), Beef Industry Council with Cybil Shepherd (later telling a journalist she did not like to eat beef), Pepsi-Cola with Michael Jackson (later canceling his world tour amid charges of child molestation and admitting that he was addicted to painkillers), Pepsi-Cola with Madonna (later releasing her controversial video for "Like a Prayer"), Pepsi-Cola with Britney Spears (later appearing in numerous magazines drinking Diet Coke), O.J. Simpson with Hertz (later arrested for two murders), and National Fluid Milk Processors Board ("Got Milk?") with Mary- Kate and Ashley Olsen (the former later checked into a treatment facility for an eating disorder)." *Id.* at 241 n.43.

¹⁴⁴ *Id.* at 235; *see also* Pinguelo & Cedrone, *supra* note 8, at 347; *Kate Moss: Sorry I Let People Down*, CNN (Sept. 22, 2005, 3:13 PM), <http://www.cnn.com/2005/WORLD/europe/09/22/kate.moss/>.

¹⁴⁵ Pinguelo & Cedrone, *supra* note 8, at 372; *see also* Anthony Ramirez, "Desperate Housewives" Actor Arrested on Marijuana Charge, N.Y. TIMES, May 19, 2005, at B2, *available*

The most prominent morals clause mishaps have been violations of athletes' endorsement contracts. OJ Simpson, who led the way for sports stars to become spokespeople, also illustrated the importance of morals clauses when he was indicted for a double murder while serving as the spokesman for Hertz, among other brands.¹⁴⁶ Since then, these clauses have become more prevalent in sports endorsement contracts. While a 1997 survey found that less than half of all sports endorsement contracts had morals clauses, by 2003 that number had grown to at least seventy-five percent.¹⁴⁷ Commentators suggest that the growing use of morals clauses in endorsement contracts is due to a combination of factors: the significant amounts of money at stake, the increasing youth of athletes and the concerns posed by an athlete's potential volatility.¹⁴⁸

There are many other examples of athletes falling victim to morals clauses in endorsement contracts. In 1999, former Sacramento King's player Chris Webber successfully challenged the termination of his endorsement agreement with sportswear brand Fila pursuant to the morals clause.¹⁴⁹ Furthermore, after Kobe Bryant was charged with sexual assault in 2003, he lost endorsement deals with McDonald's, Nutella, Spalding, and Coke, altogether totaling \$4 million.¹⁵⁰ When

at http://www.nytimes.com/2005/05/19/nyregion/desperate-housewives-actor-arrested-on-marijuana-charge.html?_r=0.

¹⁴⁶ See Bruce Horowitz, *Simpson Ads Opened Door to Endorsements by Athletes Marketing: Sponsors Are Leery of Controversy. Hertz is Expected to at Least Temporarily Suspend Its Use of Ex-Football Star*, L.A. TIMES, June 15, 1994, at 18, available at http://articles.latimes.com/1994-06-15/news/mn-4395_1_sports-marketing. Morals clauses in these contracts allowed the brands to sever the relationship, but the damage was already done, specifically in the case of Hertz.

¹⁴⁷ Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 4 (2005).

¹⁴⁸ See *id.*; see also Pinguelo & Cedrone, *supra* note 8, at 369 (stating that in the sports industry alone, "as of May 31, 2008, Nike, Inc., owed more than \$3.8 billion in endorsement deals" and the "aggregate of sponsorship deals for the 2008 Beijing Olympics was approximately \$2.5 billion").

¹⁴⁹ Webber argued that paying an administrative fine did not constitute the conviction necessary to trigger the clause, winning a \$2.61 million judgment in arbitration. Pinguelo & Cedrone, *supra* note 8, at 377-78; see also 'Prematurely Terminated' - Kings' Webber Wins Ruling Against Fila, CNN/SPORTS ILLUSTRATED (July 8, 1999, 4:07 PM) https://web.archive.org/web/20040503065604/http://sportsillustrated.cnn.com/basketball/nba/news/1999/07/08/webber_fila_ap/.

¹⁵⁰ In "the greatest marketing comeback in the history of sports marketing," less than six years later, Bryant was re-engaged by Nike and Coke's Vitaminwater, put at number 10 on the Forbes Celebrity 100 list, and his jersey outsold all others in the NBA for the second time in the three years. Bryant's success at making the public and endorsing corporations "forget" his crimes is nothing short of astounding. Taylor, Pinguelo & Cedrone, *supra* note 119, at 101-02; see also

Atlanta Falcons quarterback Michael Vick was indicted on dogfighting charges in 2007, Nike, Reebok and Donruss dropped him from endorsement deals.¹⁵¹ After the adultery scandal that surrounded Tiger Woods in 2009, he lost \$22 million in endorsement deals with companies including Gatorade, Accenture, and AT&T.¹⁵² Finally, aided by a broadly-worded morals clause, Nike ended its endorsement deal with seven-time Tour de France winner, Lance Armstrong, in 2012 following mounting allegations that he abused performance enhancing drugs over the course of his career.¹⁵³ As all of these examples illustrate, morals clause violations in sports endorsement contracts are widespread.

Because advertisers try to appeal to a wide audience and sell products to the public, they are likely to have lower tolerance for controversies and any bad press about a spokesperson. Any desirable attention that talents' misbehavior might offer to a movie studio or television network is undercut by the risks of meaning transference: a spokesperson's controversial persona becoming irrevocably intertwined with the contracting company's image.

Darren Rovell, *Bryant Is NBA's Most Marketable Again*, CNBC (June 15, 2009, 9:34 AM), <http://www.cnbc.com/id/31367376>.

¹⁵¹ Pinguelo & Cedrone, *supra* note 8, at 375. Although Vick suffered a “catastrophic and very public fall’ from sports stardom,” and had to “climb a steep hill to repair his tarnished image,” he has appeared to have fully recovered. *See* Taylor, Pinguelo & Cedrone, *supra* note 120, at 103. In 2011, nearly four years after they cancelled his contract, Nike signed him to a new deal. *See Nike Re-signs Vick*, N.Y. TIMES, July. 2, 2011, at D3, *available at* <http://www.nytimes.com/2011/07/02/sports/football/nike-re-signs-vick.html>.

¹⁵² Nike, Woods’ biggest endorser since he went pro in 1996, stood by the golfer. Will Wei, *Tiger Woods Lost \$22 Million in Endorsements in 2010*, BUSINESS INSIDER (July 21, 2010, 1:19 PM). <http://www.businessinsider.com/tiger-woods-lost-22-million-in-2010-endorsements-2010-7>. Despite the fallout suffered by Woods in the wake of the scandal, he seems to have recovered, signing his biggest deal since with Hero Motorcorp in December 2014. Bob Harig, *Tiger’s New Deal Biggest in Years*, ESPN (Dec. 3, 2014, 6:55 PM), <http://abcnews.go.com/Sports/tigers-deal-biggest-years/story?id=27349217>.

¹⁵³ “The termination of Armstrong as an endorser of the Nike brand was likely simplified by the inclusion of a broadly worded ‘morals clause’ within the cyclist’s endorsement contract with Nike. Morals clauses are typically worded in such a way as to allow a brand to immediately terminate an endorsement contract, without any penalty, should the athlete endorser act in a certain manner that would tarnish the reputation of the brand.” Darren Heitner, *Nike’s Disassociation from Lance Armstrong Makes Nike a Stronger Brand*, FORBES (Oct. 17, 2012, 10:22 AM), <http://www.forbes.com/sites/darrenheitner/2012/10/17/nikes-disassociation-from-lance-armstrong-makes-nike-a-stronger-brand/>.

IV TALENT'S RESPONSE: REVERSE MORALS CLAUSES

Recent developments in the corporate realm have encouraged performers to seek the protection afforded by a morals clause for themselves by using reverse morals clauses. This “reciprocal contractual warranty . . . [is] intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or purchaser of talent's endorsement,” and give talent, “the reciprocal right to terminate an endorsement contract based on such defined negative conduct.”¹⁵⁴ Such a clause seeks to protect talent from vulnerability they would otherwise have, even if they are aware of the company's misconduct prior to any public scandal.¹⁵⁵ The history and drafting considerations of reverse morals clauses are essential to understanding their function.

A. History of Reverse Morals Clauses

The first example of a reverse morals clause was between Pat Boone and Bill Cosby's record label, Tetragrammaton Records, in 1968.¹⁵⁶ Boone was a religious man with a clean image, and he was concerned about signing a deal with Tetragrammaton due to the provocative cover art featured on the label's new release “Two Virgins,” which depicted John Lennon and Yoko Ono nude. Tetragrammaton was “sympathetic to his religious concerns and agreed to a ‘reverse morals clause – Boone's contract would lapse if the record company . . . did something unseemly.’” Ultimately, no formal contract was drawn up.¹⁵⁷ Boone's “novel advocacy of a reverse-morals clause was most likely achievable due to his iconic stature in the entertainment world and his integrity aura in arguably a more conservative era in American history.”¹⁵⁸

Although reverse morals clauses originated with Boone in the 1960s, they have become more relevant due to the financial instability of recent years. The Enron case provides a compelling example of the need for reverse morals clauses in certain cases.¹⁵⁹ In 1999, Enron signed a \$100 million, 30-year deal, with the

¹⁵⁴ Taylor, Pinguelo & Cedrone, *supra* note 119, at 66–67.

¹⁵⁵ Mark Kesten, *Reputation Insurance: Why Negotiating for Moral Reciprocity Should Emerge as a Much Needed Source of Protection for the Employee*, CORNELL HUM. RESOURCE REVIEW, Nov. 23, 2012, <http://www.cornellhrreview.org/reputation-insurance-why-negotiating-for-moral-reciprocity-should-emerge-as-a-much-needed-source-of-protection-for-the-employee/>.

¹⁵⁶ Taylor, Pinguelo & Cedrone, *supra* note 119, at 80.

¹⁵⁷ *See id.* at 80; *see also* Joseph Reiner, *Pat Boone*, ENCYCLOPEDIA.COM (1995), http://www.encyclopedia.com/topic/Pat_Boone.aspx-2-1G2:3493100014-full.

¹⁵⁸ Taylor, Pinguelo & Cedrone, *supra* note 119, at 80.

¹⁵⁹ *Id.* at 66.

Houston Astros to name the team's new ballpark Enron Field.¹⁶⁰ Two years later, "Enron filed what was then the largest bankruptcy in American history [and] . . . [s]ince then, the word 'Enron' has been embedded in the national psyche and lexicon as being the icon of corporate avarice and the perpetuation of a Ponzi-type scheme on the public."¹⁶¹ Because many Astros fans had lost their jobs as a result of the Enron scandal, the Astros spent the next two months trying to buy the balance of the contract for over \$2 million to remove Enron's name from the stadium.¹⁶² Even though the Astros secured a new naming rights sponsor, Minute Maid, this change caused it further pecuniary damages because naming rights decrease with rebranding.¹⁶³

Although Enron is a landmark example of the need for a reverse morals clause, it was certainly not the last.¹⁶⁴ In 2009, professional golfer Vijay Singh signed a five-year \$8 million endorsement deal with Stanford Financial Group, just one month before allegations that Stanford had participated in a large scale Ponzi scheme surfaced.¹⁶⁵ In 2011, Dior terminated its creative director John Galliano after he was videotaped while shouting anti-Semitic slurs, angering the public and Israeli-born Dior spokesmodel Natalie Portman.¹⁶⁶ These examples illustrate the importance of endorsees protecting themselves with reverse morals clauses.

Because reverse morals clauses are a relatively new development, there is little scholarship and no case law regarding their use, and parties who have drafted them have not released them to the public.¹⁶⁷ However, these clauses are increasingly requested by talent in their contracts, and they serve an important

¹⁶⁰ *Id.* at 68.

¹⁶¹ *Id.*

¹⁶² *Id.* at 68–69.

¹⁶³ *Id.* at 69; *see also* Ric Jensen & Bryan Butler, *Is Sport Becoming Too Commercialised? The Houston Astros Public Relations Crisis*, 9 INT'L J. SPORTS MARKETING & SPONSORSHIP 23, 27, 29-30 (2007).

¹⁶⁴ Additionally, "in less scandalous cases, where companies that bought the rights for the stadia of the Baltimore Ravens (PSI Net), St. Louis Rams (Trans-World Airlines), St. Louis Blues (Savvis), and Carolina Panthers (National Car Rental) went bankrupt or out of business, the teams were compelled to buy back the naming rights, which can be costly, as reflected in the Baltimore Ravens having to pay \$5.9 million to the bankrupt PSI Net in 2002." Taylor, Pinguelo & Cedrone, *supra* note 119, at 70.

¹⁶⁵ Oliver Herzfeld, *Why Jay-Z and Other Talent Should Seek Morals Clause Mutuality*, FORBES (Jan. 2, 2014, 9:24 AM), <http://www.forbes.com/sites/oliverherzfeld/2014/01/02/why-jay-z-and-other-talent-should-seek-morals-clause-mutuality>.

¹⁶⁶ *Id.*

¹⁶⁷ *See* Taylor, Pinguelo & Cedrone, *supra* note 119, at 71.

function in times of financial uncertainty.¹⁶⁸ Given that talent have been subject to traditional morals clauses for so long, it seems appropriate they are afforded mutuality.

V DRAFTING MORALS CLAUSES

In order to ensure that a morals clause is enforceable and inclusive, it is essential that it is properly drafted. Because of the obstacles posed by the modern and evolving moral climate, phrasing is key in both express and reverse morals clauses.

There are several important elements to an effective morals clause. First, the term of the clause must be stipulated. Some clauses only apply to future conduct, while others apply to past conduct.¹⁶⁹ Second, clauses may include acts that have the mere potential to bring harm to the employer, in addition to acts that cause actual injury.¹⁷⁰ If potential injury language is included, the fact finder must examine the facts objectively and subjectively, and stipulate termination if this future injury can be proved.¹⁷¹ Third, a clause can protect related parties, as opposed to just the employer.¹⁷² Fourth, employers should consider language that both reserves rights not expressed in the contract, and also does not give talent a right to cure.¹⁷³ Fifth, the scope of the language of the clause is essential; employers prefer expansive language, while talent prefers narrow language, creating a potential sticking point in contract negotiations.¹⁷⁴ Finally, and most importantly, ambiguity must be minimized to the greatest extent possible.¹⁷⁵

Even given proper care in drafting, clauses vary widely in breadth. The major issue is the type of transgression covered by the clause. While some clauses protect against only crimes, felonies, or convictions, others are comprehensive enough to encompass any conduct breeding adverse moral sentiment. Charlie Sheen's weak "moral turpitude" clause is an example of the former and the strong

¹⁶⁸ "Citigroup, the largest government bailout recipient in November 2008, precipitated a scandal of sorts, when it announced that it would charge ahead with the costliest naming-rights deal in sports history with the New York Mets, even though the financial giant had just laid off 52,000 employees and was trading water with almost \$20 billion in losses for 2008." *Id.* at 89.

¹⁶⁹ Kressler, *supra* note 9, at 254.

¹⁷⁰ *Id.* at 255.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 255–56.

¹⁷⁵ Katz, *supra* note 10, at 212.

clause in Williams' contract represents the latter. Some agreements are so broad that even alleged violations that turn out to be false,¹⁷⁶ or conduct that "may be considered" a violation, can trigger the clause.¹⁷⁷ If a person has done something in the past that might fall into the categories of conduct included in the clause, the morals clause can be triggered if the past conduct is publicized during the contract term.¹⁷⁸ Remedies can also vary, and can include termination of the agreement and/or the right to remove or withhold credit.¹⁷⁹ Therefore, based on variations in drafting, clauses can differ greatly in their force.

The drafting process for reverse morals clauses differs slightly from that of express morals clauses. As an initial matter, talent must determine the necessity of a reverse morals clause by searching the corporate history of the contracting company.¹⁸⁰ However, not all talent has the leverage to bargain for inclusion of a reverse morals clause, and companies may resist the imposition of moral reciprocity.¹⁸¹ In addition, drafting concerns are reversed: talent will want a broadly-phrased reverse morals clause, while the employer will desire a narrowly-phrased clause.¹⁸² Finally, talent is concerned with limiting who can invoke the clause and stipulating which corporate entities are bound by it.¹⁸³ This will prevent contracting companies from purposely engaging in the proscribed conduct to activate the clause or escaping unscathed when entities violate the agreement.

VI

IMPLICATIONS FOR MORALS CLAUSES IN CONTEMPORARY SOCIETY

The rise of the Internet and development of social media has made morals clauses more important in today's society. "Due to the proliferation of new forms of media, which has greatly increased the speed with which information is disseminated to the public, talented individuals are now significantly more

¹⁷⁶ Nicolas Cage was accused of being arrested twice for drunk driving and stealing a dog, allegations that turned out to be false, but that could have triggered a morals clause. Pinguelo & Cedrone, *supra* note 8, at 353; *see also* Fox News, *Kathleen Turner Apologizes to Nicolas Cage Over Dog Theft Allegation*, FOX NEWS (Apr. 4, 2008), <http://www.foxnews.com/story/2008/04/04/kathleen-turner-apologizes-to-nicolas-cage-over-dog-theft-allegation.html>.

¹⁷⁷ SELZ ET AL., *supra* note 26, at § 9:107.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ Taylor, Pinguelo, & Cedrone, *supra* note 119, at 92.

¹⁸¹ *Id.* at 99, 105.

¹⁸² *Id.* at 105.

¹⁸³ *Id.* at 105-06.

scrutinized than they have been in the past.”¹⁸⁴ An examination of the current moral climate and social media restrictions demonstrate this phenomenon.

A. *The State of Morals Today*

What constitutes “morality” can be hard to define. “The concept of moral behavior, insofar as it relates to the law, is constantly in a state of flux as it reacts to changes in community standards and incorporating natural evolutionary advancements associated with the growth and development of a society.”¹⁸⁵

American culture has become significantly less concerned with morality. Not only has talent gotten away with misbehavior in the court of public opinion, but contracting companies have also expressed less concern about the moral missteps of talent. Employer leniency can be attributed to the recognition that in the current moral climate, nearly any publicity is good publicity.¹⁸⁶ Christian Slater, Robert Downey Jr., and Charlie Sheen are just a few stars whose misconduct has been tolerated by the industry.¹⁸⁷ Robert Downey Jr. exacted a stunning recovery, going from felon and drug addict to star of one of Hollywood’s most lucrative franchises, Ironman.¹⁸⁸

Different industries have diverse views on morality, which accounts for the discrepancies in morals clause enforcement. Although a newscaster’s reputation hinges upon his or her intellectual credibility, a rap artist’s depends only on his street credibility, or “street cred.”¹⁸⁹ While the former entails avoiding damaging public actions and statements, the latter demands the precise opposite. In the sports and radio industries, morality of the individual athletes and on-air talent seems less of a concern. In radio, provocative statements can be the key to success. Howard

¹⁸⁴ Pinguelo & Cedrone, *supra* note 8, at 367.

¹⁸⁵ *Id.* at 352; *see generally* Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784 (1989) (examining the circumstances that have contributed to attitudes regarding the relationship between law and morality); Robert P. Burns, *On the Foundations and Nature of Morality*, 31 HARV. J. L. & PUB. POL’Y 7 (2008) (discussing historical observations and arguments relevant to contemporary moral debates).

¹⁸⁶ SELZ ET AL., *supra* note 26, at § 9:107.

¹⁸⁷ *See id.* Each of the stars has had highly-publicized brushes with the law involving drugs and violence. *See, e.g., Actor Christian Slater Gets Jail for Drunk Driving*, L.A. TIMES, Apr. 3, 1990, at B2; *Charlie Sheen Hospitalized in Fair Condition After Overdose*, L.A. TIMES, May 22, 1998, at B4; *Drug Charges Filed Against Robert Downey Jr.*, L.A. TIMES, July 17, 1996, at B4.

¹⁸⁸ Lacey Rose, *Will Charlie Sheen Ever Work Again?*, HOLLYWOOD REPORTER (Feb. 28, 2011, 6:38 PM), <http://www.hollywoodreporter.com/news/will-charlie-sheen-ever-work-162554>.

¹⁸⁹ *See* RONN TOROSSIAN & KAREN KELLY, FOR IMMEDIATE RELEASE: SHAPE MINDS, BUILD BRANDS, AND DELIVER RESULTS WITH GAME-CHANGING PUBLIC RELATIONS 219 (2011).

Stern made a career out of his outlandish radio behavior, until the FCC imposed formidable fines on the “shock jock,” and Stern announced he would leave traditional radio for Sirius Satellite Radio, a medium free of FCC regulation.¹⁹⁰ In sports, being violent is occasionally part of the job description, but athletes struggle to sequester this behavior to the playing field. Players’ violent off-field antics have resulted in public criticism of the NFL in recent years. Because each industry has unique concerns, each has a different conception of morality.

Despite the diverse views on morality across industries, public opinion has placed more emphasis on comments than actions. Comments that are homophobic, racist, anti-Semitic, or sympathetic to terrorism have elicited substantial public backlash. For instance, after admitting past use of racial slurs in a deposition, The Food Network dropped celebrity chef Paula Deen and a slew of sponsors.¹⁹¹ Deen’s image has yet to recover from the incident, and she has recently incited controversy again for a racist social media post.¹⁹² Meanwhile, offensive public actions seem to have far less impact. Lindsay Lohan, notorious for her drug use, car accidents, and arrests for driving under the influence, cashed in on her controversial image by advertising car insurance during the Superbowl.¹⁹³ Similarly, the public has been largely ambivalent toward Florida State Quarterback Jameis Winston, despite public rape allegations against him. In fact, most of the news surrounding the NFL hopeful centers upon the “risk” of drafting him, rather than disapproval of his actions.¹⁹⁴

¹⁹⁰ Sheila Marikar, *Howard Stern’s Five Most Outrageous Offenses*, ABC NEWS (May 14, 2012), <http://www.abcnews.go.com/Entertainment/howard-sterns-outrageous-offenses/story?id=16327309>.

¹⁹¹ “The Food Network, owned by Scripps Networks Interactive (SNI), let Deen’s contract run out, and she was dumped by a slew of sponsors and business partners, including pork producer Smithfield Foods, the casino chain Caesars (CZR), the diabetes drugmaker Novo Nordisk (NVO) and retailers Wal-Mart (WMT), Target (TGT), Home Depot (HD), Sears (SHLD) and JCPenney (JCP).” Aaron Smith, *Paula Deen’s Coming Back*, CNN MONEY (Feb. 12, 2014, 3:13PM) <http://money.cnn.com/2014/02/12/news/companies/paula-deen-najafi/>.

¹⁹² Deen posted a photo of her son in brownface. She later blamed her “Social Media Manager” who was fired after the incident. Emanuella Grinberg, *Paula Deen Under Fire for Photo of Son in Brownface*, CNN (July 7, 2015, 4:05 PM), <http://www.cnn.com/2015/07/07/living/paula-deen-brownface-feat/>.

¹⁹³ *Lindsay Lohan -- I'm the Queen of Car Crashes ... So I'm Selling Insurance!*, TMZ (Jan. 18, 2015, 12:55 AM), <http://www.tMZ.com/2015/01/18/lindsay-lohan-esurance-commercial/-ixzz3QnNcOAQd>.

¹⁹⁴ E.g., Bill Pennington, *The Tricky Calculus of Picking Jameis Winston*, NY TIMES, Jan. 30, 2015, at D1, available at http://www.nytimes.com/2015/01/31/sports/football/no-1-debate-in-tampa-whether-to-draft-jameis-winston.html?_r=0.

B. Morals Clauses and Social Media

There are a growing number of contractual provisions aimed at promoting confidentiality and prohibiting disparaging remarks on social media platforms, which might fall within the purview of a morals clause. “The virtually instantaneous exposure and, in some cases, embarrassment that can accompany a celebrity’s missteps thanks to social networking tools is yet another reason to address and manage that individual’s activity through a contractual provision.”¹⁹⁵

Due to this trend, social media restrictions will likely be an increasing presence in morals clauses.¹⁹⁶ For example, ABC guidelines encourage “tweeting”, but list seven specific prohibited practices surrounding this activity, including “making disparaging remarks about the show.”¹⁹⁷ These restrictions and guidelines are not intended to ban social media, but instead to make talent more mindful of their expression and statements on these platforms.¹⁹⁸ The proliferation of such clauses, and the important role they play in a technologically advancing society has led an industry expert to say, “[e]very celebrity endorsement contract of any kind in the future must have a Twitter/Social Media clause . . . I will be so bold as to state that the failure to not have such a clause would be tantamount to endorsement contract drafting malpractice.”¹⁹⁹

The relationship between morals clauses and social media is complex.²⁰⁰ First of all, “[e]mployer restrictions on off-duty speech and conduct are troubling in that they squelch expression and individual autonomy and may compromise the employee's right to a private life, especially when restrictions are unilaterally imposed after employment commences.”²⁰¹ Although there has not been an obvious backlash against these restrictions yet, this is likely due to their novelty. Furthermore, clauses limiting social media expression are in direct tension with

¹⁹⁵ John G. Browning, *The Tweet Smell of Success: Social Media Clauses in Sports & Entertainment Contracts*, 22 TEX. ENT. AND SPORTS LAW J. 5, 6 (2013).

¹⁹⁶ See Taylor, Pinguelo & Cedrone, *supra* note 119, at 111.

¹⁹⁷ Andrew Wallenstein & Matthew Belloni, *Hey, Showbiz Folks: Check Your Contract Before Your Next Tweet*, HOLLYWOOD REPORTER (Oct. 15, 2009, 1:19 PM), <http://www.reporter.blogs.com/thresq/2009/10/check-your-contract-before-your-next-tweet.html>.

¹⁹⁸ *Id.*

¹⁹⁹ Browning, *supra* note 195, at 20–21.

²⁰⁰ Katz, *supra* note 10, at 226.

²⁰¹ Patricia Sánchez Abril, Avner Levin & Alissa Del Riego, *Blurred Boundaries: Social Media Privacy and the Twenty-First-Century Employee*, 49 AM. BUS. L. J. 63, 90 (2012) (“Some organizations have restricted their employees’ off-duty use of social networking sites or have prohibited using them altogether. For example, the National Football League has prohibited players’ access to social media immediately before, during, and after football games.”).

another studio practice, leveraging the social media popularity of talent to promote a project.²⁰² In fact, social media postings have replaced traditional advertising in some talent contract negotiations.²⁰³

Ensuring that the parties specify what mediums of communication are covered is essential to promoting the proper operation of morals clauses without unfairly trammeling talents' freedom of expression.²⁰⁴ As social media becomes more prominent and varied in today's society, platforms such as Facebook, Twitter, and Instagram have significantly expanded the scope of what parties must address in talent contracts. Celebrities use these mediums to express themselves, and it is unlikely that they would respond favorably to contractual social media censorship. However, these platforms offer increased, direct contact between celebrities and the public, and create more opportunities for talent to get into trouble.

An offensive post on Instagram takes only moments to complete but could take years to live down. James Franco learned this the hard way when he faced public embarrassment after trying to seduce an underage girl on Instagram.²⁰⁵ This contrasts starkly with times past, when contact talent had with the public was limited to pre-scripted television and radio appearances or transient personal encounters. Restrictions seem necessary given the dangers these platforms engender; a misstep on any one of them could mean the instantaneous destruction of an entire project, employment relationship, or public persona if the conduct rouses the public enough.

1. Case Study: Twitter

Twitter provides a useful case study of the risks of social media usage and the value of such restrictive clauses. Twitter has become a popular way for celebrities to communicate with fans, but the instantaneous nature of the site begets

²⁰² For example, Rihanna was cast in "Battleship" partially because of the exposure she offered through her extensive fan base on social media, including 26 million twitter followers. Browning, *supra* note 195, at 21; *see also* Wallenstein & Belloni, *supra* note 197.

²⁰³ Peter Hess, the co-head of commercial endorsements for Creative Artists Agency said, "We're starting to have in negotiations, 'We'd like to include X number of tweets or Facebook postings.' It's similar to traditional advertising – instead of two commercials, now we want two tweets." Browning, *supra* note 195, at 21.

²⁰⁴ *See* Katz, *supra* note 13, at 225.

²⁰⁵ Jay Hathaway, *James Franco Apparently Tried to Hook Up with a Teenager on Instagram*, GAWKER (Apr. 3, 2014, 9:29 AM), <http://gawker.com/james-franco-tried-to-hook-up-with-a-17-year-old-on-ins-1557491436>.

significant risks of misuse and reputational damage.²⁰⁶ “Armed with Twitter, talent are just possibly one tweet away from scandal or a morals clause violation.”²⁰⁷

There are numerous examples of the destructive effects of Twitter use, specifically with regard to its potential to terminate talents’ endorsement deals. For example, after the voice of the AFLAC duck, Gilbert Gottfried, tweeted insensitive jokes about a tsunami in Japan, the insurance company terminated his contract.²⁰⁸ Olympic swimmer Stephanie Rice was dropped from her endorsement deal with Jaguar after she tweeted a homophobic comment.²⁰⁹ Hanesbrands terminated Rashard Mendenhall, Steelers running back and Champion brands spokesman, for violating his morals clause after he tweeted controversial commentary relating to 9/11.²¹⁰ Mendenhall brought a \$1 million suit against Hanesbrands for breach of the implied covenant of good faith and fair dealing.²¹¹ “Mendenhall’s attorneys began building what will henceforth be known here as the ‘Charlie Sheen defense’: pointing to another celebrity who has said outrageous things and putting the onus on the other party to explain why one endorsement deal was terminated and another wasn’t.”²¹² Although the suit survived a motion to dismiss, the parties eventually settled.²¹³ Thus, Twitter presents a compelling example of the destructive effects of social media upon morals clauses.

²⁰⁶ Courtney Love, Alice Hoffman, Mark Cuban, and Michael Beasley are among the many celebrities who have experienced backlash from comments made on the social media site. Taylor, Pinguelo & Cedrone, *supra* note 119, at 109–10.

²⁰⁷ *Id.* at 110–11.

²⁰⁸ Browning, *supra* note 195, at 20.

²⁰⁹ *Id.*

²¹⁰ Mendenhall tweeted about Osama Bin Laden, “[w]hat kind of person celebrates death? It’s amazing how people can HATE a man they never even heard speak. We’ve only heard one side . . .” And of the 9/11 attacks, the player tweeted, “[w]e’ll never know what really happened. I just have a hard time believing a plane could take a skyscraper down demolition style.” Browning, *supra* note 195, at 20. Hanesbrands claimed that these tweets fell within the purview of the morals clause within Mendenhall’s endorsement agreement, because they “concluded that his actions meet the standards set forth in the Agreement of bringing Mr. Mendenhall ‘into public disrepute, contempt scandal or ridicule, or tending to shock, insult or offend a majority of the consuming public or any protected class or group thereof . . .’” Because of these actions, he was considered no longer an effective spokesperson for Champion. Katz, *supra* note 10, at 227.

²¹¹ *Id.*; see also *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D. N.C. 2012).

²¹² Eriq Gardner, *Settlement Reached in Lawsuit Filed by NFL Star Fired as Pitchman for 9/11 Conspiracy Tweets*, HOLLYWOOD REPORTER (Jan. 15, 2013, 3:20 PM), <http://www.hollywoodreporter.com/thr-esq/settlement-reached-lawsuit-filed-by-412750>.

²¹³ *Id.*; Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013, 12:02 PM), <http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/>.

CONCLUSION

You breathe a sigh of relief. Fred Fabricate has been released from his contract based on his morals clause violation. Unfortunately, your enthusiasm is short lived; Fabricate's replacement is not as popular, and the network experiences marked drops in ratings. Were you too hasty in your decision to invoke the morals clause? Is this decline in popularity due to the bad press from the incident, or does America just want their favorite anchor back? You have minimized your financial liability, but at what expense? Will Fabricate's image ever recover, and if so, will you lose out on the profit?

This hypothetical presents many of the same concerns surrounding morals clauses today. Companies use the clauses to temper the link between themselves and talent, controlling their unpredictable behavior and protecting themselves from their potential missteps. Nonetheless, it is often unclear when these clauses have been triggered, when they should be invoked, and the potential repercussions that may occur.

Diverse conceptions of morality and opposition to inhibiting freedom of expression present distinct obstacles to morals clauses today. Although morals clauses have played an important role in motion picture, television, athletics, and advertising contracts for over a century, it is unclear what effect they will have in the future.

On the one hand, morals clauses may lose their relevance entirely due to the increasingly lax moral climate. Under this view, morals matter far less, and there is no sense in attempting to censor them. An initial criticism of this argument is that although cosmopolitan regions of the country have relaxed views on morality, there are still many sectors of the population with a strong religious consciousness and correspondingly rigorous conception of moral conduct. Because these individuals also form a captive audience for the industries in question, their attitudes must also be considered by both courts and employers in enforcing morals clauses. The deeply imbedded cultural opposition to stigmatized concepts of racism, homophobia, anti-Semitism, terrorism and violence also contradict this trend.

In the alternative, morals clauses may only become more important as social media and the speed with which information is disseminated increases public awareness of and contact with talent. The consistent scandal surrounding celebrity expression on social media and the upswing of contractual clauses addressing these issues evidences this inclination.

Despite the merits of the argument that the morals clause is in decline, the clauses remain relevant, effectual, nuanced, and flexible. Even in the case of Brian Williams, a context in which a morals clause is not the most obvious recourse, the provision has demonstrated its pervasive power. Given the proliferation of social media and the backlash of talent through reverse morals clauses, this dynamic area of contract law shows no sign of fading into obscurity.