

1-1-2017

## Contracting Correctness: A Rubric for Analyzing Morality Clauses

Patricia Sánchez Abril  
*University of Miami*

Nicholas Greene  
*University of Miami*

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### Recommended Citation

Patricia Sánchez Abril and Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 Wash. & Lee L. Rev. 3 (), <http://scholarlycommons.law.wlu.edu/wlulr/vol74/iss1/3>

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# Contracting Correctness: A Rubric for Analyzing Morality Clauses

Patricia Sánchez Abril\*

Nicholas Greene\*\*

## *Abstract*

*Morality clauses give a contracting party the right to terminate if the other party behaves badly or embarrassingly. A curious product of twentieth-century Hollywood, these contract clauses have traditionally been used to control the antics of entertainers and athletes. The current politically-sensitive historical moment, combined with the internet's ability to broadcast widely and permanently, has put everyone's off-duty speech, conduct, and reputation under the microscope. Media reports detailing people's digital falls from grace abound. For fear of negative association, businesses are more attuned than ever to the extracurricular acts of their agents and associates—and are increasingly binding them to morality clauses that allow for abrupt separations.*

*However, morality clauses have largely escaped judicial and academic scrutiny. Perhaps due to the hefty bargaining power of their traditionally famous parties, most courts have generally found these clauses enforceable with fleeting analysis. Outside of the sports and entertainment industries, academic literature on the morality clause is scant.*

*We ignore morality clauses at our peril. Like non-compete clauses, which suffer from well-documented overuse and overbreadth, morality clauses can be socially harmful. Their unrestricted use allows and invites unpredictability, bad faith, and broad limitations on expression, privacy, and other liberties.*

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\* Associate Professor of Business Law, University of Miami School of Business Administration.

\*\* Lecturer of Business Law, University of Miami School of Business Administration.

*This is especially true when imposed on low-profile agents with little bargaining power.*

*Unlike the well-trodden area of non-competes, there is no uniform rubric for assessing whether and to what extent morality clauses are enforceable, fairly imposed, and lawfully interpreted. This Article addresses this gap, offering to courts and jurists alike a five-factor test by which to determine the validity of morality clauses in a world where reputation pervades and the line between home and office is blurred.*

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*I. Introduction*

Since the beginning of time, people have sought to get out of deals because they no longer wanted to be associated with the other party in the public’s view. Maybe the offending party broke the law, embarrassed himself, or stated an unpopular political opinion. Or perhaps the desired rupture had more to do with a soured relationship, bad faith, or even discrimination.

Morality clauses<sup>1</sup> generally grant a contracting party the right to terminate if the other party behaves in an objectionable manner or attracts disrepute.<sup>2</sup> These unilateral contract provisions are usually broadly drafted, allowing for expansive and often highly-subjective interpretations.<sup>3</sup> A product of the twentieth century, morality clauses found their genesis with

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1. Morality clauses are sometimes referred to as morals, moral turpitude, public image, role model, personal conduct, behavioral or good conduct clauses. For consistency, we refer to them as morality clauses throughout.

2. See Seth William Stern, *The IRS’ Double-Bogey: Goosen v. Commissioner Remains a Fairway to Characterize Endorsement Income for Nonresident Alien Athletes in Garcia v. Commissioner*, 20 JEFFREY S. MOORAD SPORTS L.J. 605, 622 (2013) [hereinafter Stern, *The IRS’ Double-Bogey*] (explaining how morality clauses protect endorsed parties in endorsement contracts from damage to their reputation caused by the endorsee’s disreputable behavior as well as from subsequent devaluation of the endorsement caused by the endorsee’s damaged image).

3. See 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, 370 (2009) [hereinafter Pinguelo & Cedrone, *Morals? Who Cares About Morals?*] (describing the broad provisions preferred by employers such as companies and major sports leagues).

libertine actors in the Roaring Twenties<sup>4</sup> and have grown to near-universality in the sports and entertainment industries today.<sup>5</sup>

To date, almost all of the legal scholarship on morality clauses focuses on high-profile personalities in endorsement-related agreements.<sup>6</sup> However, these contract

4. See *id.* at 354 (explaining how declining film attendance rates, attributed to actors' off-screen misbehavior, led to early examples of morality clauses in talent contracts).

5. See *id.* at 363–64 (describing the prevalence of morality clauses in the contracts of professional athletes, entertainers, and corporate executives).

6. See generally *id.* (discussing morality clauses in talent agreements); Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1 (2005) [hereinafter Auerbach, *Morals Clauses as Corporate Protection*] (discussing morality clauses in athlete endorsement agreements); Porcher L. Taylor, III, et al., *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 (2010) [hereinafter Taylor, III, et al., *The Reverse-Morals Clause*] (discussing reverse-morals clauses in talent agreements); Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS SPORT 5 (2011) [hereinafter Epstein, *An Exploration of Interesting Clauses in Sports*] (discussing morality clauses in professional sports); Paul A. Czarnota, *Athlete Privacy Rights and Endorsement Contracts: An Analysis of U.S., U.K., and Australian Law*, 11 VA. SPORTS & ENT. L.J. 460 (2012) (same); Joshua S.E. Lee & Jaimie K. McFarlin, *Sports Scandals from the Top-Down: Comparative Analysis of Management, Owner, and Athletic Discipline in the NFL & NBA*, 23 JEFFREY S. MOORAD SPORTS L.J. 69 (2016) (same). Morality clauses have been a popular topic for student notes and practitioner literature. See generally Stern, *supra* note 2 (discussing morality clauses in professional sports); Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235 (2005) [hereinafter Kressler, *Using the Morals Clause*] (discussing morality clauses in talent agreements); Andrew Zarriello, *A Call to the Bullpen: Alternatives to the Morality Clause as Endorsement Companies' Main Protection Against Athletic Scandal*, 56 B.C. L. REV. 389 (2015) (discussing morality clauses in athletic endorsement agreements); Kira N. Buono, *Athletes Sacked by Moral Turpitude Clauses: Presumed Guilty Unless Proven Innocent*, 41 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 367 (2015) [hereinafter Buono, *Athletes Sacked by Moral Turpitude Clauses*] (discussing morality clauses in professional sports); Caroline Epstein, *Morals Clauses: Past, Present and Future*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 72 (2015) [hereinafter Epstein, *Morals Clauses*] (discussing morality clauses in entertainment industries); Sarah D. Katz, Note, *"Reputations . . . A Lifetime to Build, Seconds to Destroy": Maximizing the Mutually Protective Value of Morals Clauses in Talent Agreements*, 20 CARDOZO J. INT'L & COMP. L. 185 (2011) [hereinafter Katz, Note, *Reputations*] (discussing morality clauses in talent agreements); Lauren Rosenbaum, *140 Characters or Less: A Look at Morals Clauses in Athlete Endorsement Agreements*, 11 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 129 (2015) [hereinafter Rosenbaum, *140 Characters or Less*] (discussing morality clauses in athletic endorsement agreements); Nathan Law, *Manufacturing a*

clauses have slowly and quietly found their way into contracts and enforceable employee handbooks at all levels.<sup>7</sup> As one author put it, “any talented individual who is or may become associated with a company or organization in the minds of the public is likely to have a morals clause included in his or her contract.”<sup>8</sup> And given the ubiquity of social media and the ease and permanence of digital information, virtually anyone can become associated with a company or organization in the minds of the public. Authors, teachers, executives, board members, donors, franchisors, and even rank-and-file employees are often subject to contractual restrictions on off-duty behavior and potential ensuing embarrassment.<sup>9</sup>

Morality clauses have generally been held to be valid and enforceable as applied to high-profile figures.<sup>10</sup> One could rightly argue that the precept of freedom of contract allows parties the latitude to bargain and create the terms of their own agreements. Moreover, few can dispute the laudable ends of curtailing someone’s right to behave badly.

However, it does not follow that these curious contract clauses should escape scrutiny. Any contract clause that broadly and vaguely restricts civil liberties deserves close inquiry,

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*Run: How Major League Baseball Can Use the Morals Clause to Clean Up Baseball*, 48 J. MARSHALL L. REV. 539 (2015) (discussing morality clauses in professional baseball); Sarah Osborn Hill, *How to Protect Your Brand When Your Spokesperson Is Behaving Badly: Morals Clauses in Spokesperson Agreements*, 57 FED. LAW. 14 (2010) (discussing morality clauses in endorsement agreements).

7. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 365–66 (describing morality clauses for models, authors, multimedia designers, and others).

8. *Id.* at 366.

9. Some professions charged with public trust and safety have morality requirements made explicit by statute or governing rules. Lawyers are an obvious example. Other examples include air transport pilots, who are required by the Federal Aviation Regulations to maintain “good moral character.” 14 C.F.R. § 61.153(c). Police officers are another example, and are required by state law to maintain good moral character generally. See, e.g., FL. STAT. § 943.13(7) (2013). These examples are beyond the scope of this Article, as they are not contractual in nature.

10. See RESTATEMENT (SECOND) OF AGENCY § 380 (AM. LAW INST. 1958) (discussing an agent’s duty not to bring disrepute upon the principal); Taylor, III, et al., *supra* note 6, at 105 n.237 (describing the enforceability of morality clauses against television actors, directors, and screenwriters).

especially when imposed on parties with little bargaining power. Non-compete clauses, which restrain trade in the name of a principal's business interest, suffer from similar overuse and overbreadth.<sup>11</sup> Both clauses have gained popularity in the modern business environment, as employers grasp for more control in a globalized and interconnected world.<sup>12</sup> Unlike morality clauses, however, the law of non-competes is well-trodden—their use is strictly regulated by state legislatures and examined by courts with well-established tests for their validity.<sup>13</sup> Recent reports of their overuse have even elicited White House response.<sup>14</sup>

Morality clauses, on the contrary, have been largely ignored. There is much that current law leaves unanswered. Under what circumstances should a court invalidate a morality clause? Are the current rules—formulated throughout almost a century of cases about famous people—applicable to a clerk, a product manager, or a baggage handler? In the age of social media and political correctness, how should courts measure the dauntingly slippery concepts of “public disrepute” or “public scandal”? When is enforcing a morality clause necessary for protecting a legitimate business interest? When is it simply a pretext for bad faith or discrimination?

A review of the extant case law and literature reveals an obvious gap in this highly-subjective area of contract law—there

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11. See Jonathan L. Israel, *State Attorneys General on the Attack Against Noncompete Overuse*, NAT'L L. REV. (Aug. 15, 2016), <http://www.natlawreview.com/article/state-attorneys-general-attack-against-noncompete-overuse> (last visited Mar. 4, 2017) (describing enforcement reactions against the overuse of non-compete agreements) (on file with the Washington and Lee Law Review).

12. See Epstein, *An Exploration of Interesting Clauses in Sports*, *supra* note 6, at 78 (explaining the enhanced demand for morality clauses in the modern era of social media and reduced privacy).

13. See generally Michael J. Garrison & John T. Wendt, *The Evolving Law of Employee Noncompete Agreements: Recent Trends and an Alternative Policy Approach*, 45 AM. BUS. L.J. 107 (2008) (providing an overview of state and federal systems of regulating non-compete agreements).

14. See generally *Non-Compete Agreements: Analysis of the Usage, Potential Issues, and State Responses*, THE WHITE HOUSE (May 2016), [https://www.whitehouse.gov/sites/default/files/non-competes\\_report\\_final2.pdf](https://www.whitehouse.gov/sites/default/files/non-competes_report_final2.pdf) (“These agreements currently impact nearly a fifth of U.S. workers, including a large number of low-wage workers. This brief delineates issues regarding misuse of non-compete agreements and describes a sampling of state laws and legislation to address the potentially high costs of unnecessary non-competes to workers and the economy.”).

is no uniform rubric for assessing whether and to what extent morality clauses are enforceable, fairly imposed, and lawfully interpreted.

This Article proposes to address this gap, offering to courts and jurists alike an organizational lens through which to analyze morality clauses. Part II provides an overview of the history and justifications of morality clauses. It also discusses the impact of the democratization of information flow on the market for morality clauses. The internet, and particularly social media, has expanded the reach of the average person's speech and behavior. Any individual with company ties can ostensibly affect a company's reputation negatively, at least by association. A second aggravating factor affecting the implementation and interpretation of modern morality clauses is the current sensitivity in public discourse, commonly referred to as political correctness. Part III of the Article discusses the legal and public policy issues inherent in morality clauses, especially as applied to non-public figures. In Part IV, we present a multi-factor test to ascertain to what extent morality clauses are enforceable. Each factor of the proposed analysis is buttressed by established legal principles and social science. Looking at morality clauses through the lens of this five-pronged analysis will allow for their more efficient, balanced, and just use and enforcement as against a variety of contracting parties.

## *II. Morality Clauses: Taxonomy and Evolution*

A "morality clause"<sup>15</sup> 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

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15. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 351 n.10 ("The term 'morals clause'... has several alternative formulations. These analogous counterparts include... 'morality clauses.'" (quoting Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 3 (2005))).



contracting company.<sup>16</sup> Such clauses can prohibit a variety of behaviors and consequences depending on the breadth of the language used.<sup>17</sup>

### A. Taxonomy

For ease of reference, we will refer to two general types of morality clauses: those prohibiting certain behavior outright (“Bad Behavior clauses”) and those prohibiting the backlash or reputational consequences of bad acts, sometimes measured by a public outcry, scandal, or ridicule (“Reputational Impact clauses”).<sup>18</sup> Although these terms are neither technical nor widely used, they are helpful for our purposes in distinguishing the two most common types of restrictions in morality clauses.<sup>19</sup> One should also note that they are not mutually exclusive, as some contracts may contain both prohibitions.<sup>20</sup>

#### 1. Bad Behavior Clauses

At their most narrow and defined, some morality clauses contain outright prohibitions on certain unwanted behavior, irrespective of the act’s impact or association.<sup>21</sup> For instance, a narrowly drafted clause could cover behavior such as failing a drug test, an arrest, or conviction of a crime.<sup>22</sup> Broader morality

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16. *Id.* at 351.

17. *See* Rosenbaum, *140 Characters or Less*, *supra* note 6, at 132 (explaining that morality clauses “cover illegal drug use, drug dependency, criminal conduct, and public criticism injuring the athlete or endorser’s reputation or the value of the endorser,” among a plethora of other behaviors).

18. *See* Katz, Note, *Reputations*, *supra* note 6, at 224–26 (providing a comprehensive classification of the various examples of morality clauses in different industries).

19. *See id.* at 189 (discussing the “inefficacy of the two morals clause models currently used in U.S. and international talent agreements: (1) the ‘morality’ trigger; and (2) the ‘disrepute’ trigger”).

20. *See id.* at 218 (describing that talent agreements that use morality and disrepute triggers fail to “maximize the protective value of morals clauses”).

21. *See id.* at 202 (stating that “during the heyday of the Hollywood studio system,” standard contracts encompassed basically everything pursuant to a contract signee’s life).

22. *See id.* at 202–03 (discussing that a clause prohibiting interracial

clauses may encompass any conduct that is outside of public morals or decency or acceptable social norms.<sup>23</sup>

One example is found in the 1918 case of *Ackerman v. Siegel*<sup>24</sup>—the earliest reported morality clause case.<sup>25</sup> In this case, an employer included a provision in an employee’s written contract that simply prohibited the employee’s “bad behavior or fast living.”<sup>26</sup> When the employer discovered that the employee secretly charged an extra fee to customers, the employer terminated the contract.<sup>27</sup> The employee brought a claim for unlawful discharge, and the New York Supreme Court found that the employer rightfully terminated the agreement under the morality clause.<sup>28</sup>

## 2. Reputational Impact Clauses

Instead of forbidding certain definite acts or, much more generally—indecent or bad behavior at large—some morality clauses are even less self-defining. That is, the act triggering termination is not measured by its own substance, but rather by the effect that it produces in the community, or, more specifically, on the other contracting party.<sup>29</sup> These clauses generally contain language prohibiting acts that offend the community, or that reflect unfavorably on either of the contracting parties<sup>30</sup> or bring

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dating once existed).

23. See Stern, *The IRS’ Double-Bogey*, *supra* note 2, at 622 (discussing clauses concerning athletes who compete in tournaments, such as clauses reflecting that athlete’s image and mandatory attendance of particular tournaments).

24. 170 N.Y.S. 522 (App. Term 1918).

25. See *id.* at 523 (“The conduct of the plaintiff in soliciting the alleged commission was certainly behavior tending to imperil the morals and success of defendant’s shop.”).

26. *Id.* at 522.

27. *Id.* at 522–23.

28. *Id.* at 523.

29. See Katz, Note, *Reputations*, *supra* note 6, at 213 (discussing actor Michael Nader’s suit against ABC when ABC terminated Nader’s contract because of his arrest for selling cocaine to an undercover police officer that ABC claimed tainted its programs (citing *Nader v. ABC Television, Inc.*, 150 Fed. App’x 54, 55 (2d Cir. 2005))).

30. See Rosenbaum, *140 Characters or Less*, *supra* note 6, at 132 (“In

the offending party “into public disrepute, contempt, scandal, or ridicule, or tend to shock, insult or offend the majority of the consuming public or any protected class or group thereof.”<sup>31</sup> A public outcry, scandal or adverse reaction is evidence that the act has negatively affected the reputation of one or both parties.<sup>32</sup>

Other contracts adopt a broader approach, requiring no evidence of a scandal, only a unilateral assessment that reputational harm has occurred.<sup>33</sup> The morals clause found in NFL player contracts is an example: it allows a team to unilaterally fire a player if he has engaged in conduct *deemed* to adversely affect, or reflect on, the team.<sup>34</sup> Based on the language, it is plausible to conclude that a team could terminate a player if in its sole discretion it *believes* his behavior could adversely affect or reflect on the team, regardless of actual damage.

### *B. The Logic and Evolution of Morality Clauses*

However worded or classified, the logic behind morality clauses is relatively straightforward and intuitive: organizations want to be able to disassociate from reputational hazards for fear of the negative spillover effect caused by an actor’s bad

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general, a morals clause may include behavior that ‘(a) is not ‘with due regard’ to ‘social conventions and public morals and decency’; (b) ‘shocks, insults or offends’ the community; or (c) ‘reflects unfavorably’ on the person, the financier, the producer, the employer, or the distributor.’” (quoting THOMAS D. SELZ, MELVIN SIMENSKY & PATRICIA NASSIF ACTON, ENTERTAINMENT LAW 3D: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:107 (2013)).

31. *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 720 (M.D.N.C. 2012).

32. *See id.* at 719–23 (discussing that due to Mendenhall’s tweets, he received public scrutiny regarding the words that he was putting on the internet).

33. *See Auerbach, Morals Clauses as Corporate Protection*, *supra* note 6, at 10 (“The parties should determine ahead of time whether a unilateral decision on the part of the company is sufficient for termination.”).

34. *See* NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT 260 (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> (explaining that 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 the Club . . . [the] Player has engaged in personal conduct reasonably judged by the Club to adversely affect or reflect on [the] Club . . .”).

behavior.<sup>35</sup> The underlying assumption, of course, is that an individual with ties to the organization—whether an official endorser or an employee wearing the company uniform—represents the organization in the public’s eyes.<sup>36</sup> Thus, their acts and reputation are attributable to the company and its products.<sup>37</sup>

The power of association is well documented in philosophy and psychology. Consumer behavior research also supports the notion. In the late 1980s, consumer studies professor, Grant McCracken, articulated this phenomenon as “meaning transfer.”<sup>38</sup> His theory suggests that an endorser’s cultural meaning flows through consumer goods and ultimately transfers to the consumer’s life.<sup>39</sup> That is, celebrity endorsers carry cultural meanings (i.e., allusions to status, class, gender, lifestyle, and values).<sup>40</sup> The advertising system enables a metaphoric transference of these meanings to products.<sup>41</sup> Consumers then “take possession of these meanings and put them to work in the construction of their notions of self and the world.”<sup>42</sup> More recent

35. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 352 (describing that morality clauses “protect the contracting company from the immoral behavior of the talent with whom it contracts” (citing Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005))).

36. See *id.* at 349 (“[T]oday’s increasingly public society, where the proliferation of tabloids, celebrity gossip blogs, and news magazines inundate the public with information on talent’s personal lives . . .”).

37. See Katz, Note, *Reputations*, *supra* note 6, at 191 (“[T]he non-talent’s industry determines the manner in which the talent’s image will be used to generate beneficial value for non-talent . . .”).

38. Grant McCracken, *Culture and Consumption: A Theoretical Account of the Structure and Movement of the Cultural Meaning of Consumer Goods*, 13 J. CONSUMER RES. 71, 74 (1986) [hereinafter McCracken, *Culture and Consumption*].

39. See *id.* at 71 (“Cultural meaning flows continually between its several locations in the social world, aided by the collective and individual efforts of designers, producers, advertisers, and consumers.”).

40. See *id.* at 76 (“Motion picture and popular music stars, revered for their status, their beauty, and sometimes their talent . . . [I]nvent and deliver a species of meaning that has been largely fashioned from the prevailing cultural coordinates established by cultural categories and cultural principles.”).

41. See *id.* (“These opinion leaders are permeable to cultural innovations, changes in style, value, and attitude, which they then pass along to the subordinate parties who imitate them.”).

42. Grant McCracken, *Who Is the Celebrity Endorser? Cultural*

elaborations on this theory suggest that negative associations are more likely to transfer to a brand than positive ones.<sup>43</sup> It is through these natural associations that consumers come to approve or reject products as symbolic of their own lives.<sup>44</sup> It stands to reason then, that a company representative who behaves badly will engender negative associations in consumers' minds, and these will likely be reflected onto the company's product.

It was exactly this fear of a negative association—and impact on the bottom line—that became the first major catalyst for the use of morality clauses in the early 1920s.<sup>45</sup> As the media increasingly reported on the debaucherous behavior of Hollywood stars, the American public began to condemn their allegedly wild lifestyles.<sup>46</sup> As ticket sales decreased considerably, the movie industry blamed the actors' behavior and the subsequent media reports for their downturn and, as a result, started including Bad Behavior Clauses in movie contracts.<sup>47</sup>

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*Foundations of the Endorsement Process*, 16 J. CONSUMER RES. 310, 314 (1989).

43. See Margaret Campbell & Caleb Warren, *A Risk of Meaning Transfer: Are Negative Associations More Likely to Affect Transfer Than Positive Associations?*, 7 SOC. INFLUENCE & CONSUMER BEHAV. 172, 172 (2012) (“Three studies show that brands are more likely to acquire the negative than the positive personality traits associated with a celebrity endorser and that negative associations transfer even under conditions that inhibit the transfer of positive associations.”).

44. See *id.* (“[B]rands acquire associations through links with other cultural entities, including . . . products . . .”).

45. See Buono, *Athletes Sacked by Moral Turpitude Clauses*, *supra* note 6, at 378 (“The moral turpitude clause originated during the Roaring ‘20s in Hollywood, California.” (citing Mark Kesten, *Reputation Insurance: Why Negotiating for Moral Reciprocity Should Emerge as a Much Needed Source of Protection for the Employee*, CORNELL HR REV. (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/> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review))).

46. See *id.* at 378–79 (discussing that since there was an “increase in the media’s interest in reporting” the illicit acts of movie stars, certain movie studios “promulgated morals clauses” to “shield” themselves from imputed negative reputation).

47. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 354 (“Much of the focus of the press was on the individual movie stars, whose ‘garish and scandalous’ behavior was often blamed for declines in film attendance.” (quoting Auerbach, *Morals Clauses As Corporate Protection*, *supra* note 6, at 3)).

In 1921, shortly after signing a three million dollar contract with Paramount Pictures, comedian Roscoe “Fatty” Arbuckle was accused of the rape and murder of a young female guest of one of his parties.<sup>48</sup> The state brought charges after a witness told police she had heard screaming coming from a room in which Arbuckle had gone with the guest.<sup>49</sup> Although he was later acquitted of the crimes, his public image was irreparably damaged.<sup>50</sup> As a result, the benefit Paramount stood to gain from his lucrative contract diminished greatly.<sup>51</sup> The case has since been said to have inspired production companies to include morality clauses in talent agreements.<sup>52</sup> In fact, later that same year, Universal Studios began inserting the following clause into all of its actor and director contracts:

The actor (actress) agrees to conduct himself (herself) with due regard to public conventions and morals and agrees that he (she) will not do or commit anything tending to degrade him (her) in society or bring him (her) into public hatred, contempt, scorn or ridicule, or tending to shock, insult or offend the community or outrage public morals or decency, or tending to the prejudice of the Universal Film Manufacturing Company or the motion picture industry. In the event that the actor (actress) violates any term or provision of this paragraph, then the Universal Film Manufacturing Company has the right to cancel and annul this contract by giving five (5) days’ notice to the actor (actress) of its intention to do so.<sup>53</sup>

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48. See Epstein, *An Exploration of Interesting Clauses in Sports*, *supra* note 6, at 76 (discussing that Fatty hosted a party where a female guest was “found severely injured in his hotel suite,” and that she later died).

49. Kressler, *Using the Morals Clause*, *supra* note **Error! Bookmark not defined.**, at 236 (citing Sam Stoloff, *Fatty Arbuckle and the Black Sox: The Paranoid Style of American Popular Culture, 1919–1922*, in HEADLINE HOLLYWOOD: A CENTURY OF FILM SCANDAL 56 (Adrienne L. McClean & David A. Cook eds., 2001)).

50. See *id.* (“Public opinion quickly turned against the comedian as newspapers nationwide gave the story front-page coverage.” (citing ROBERT H. STANLEY, *THE CELLULOID EMPIRE: A HISTORY OF THE AMERICAN MOVIE INDUSTRY* 180 (Hastings House Pub. 1978))).

51. *Id.*

52. See *id.* at 237 (discussing how studios started adding morality clauses “to quickly disassociate from” scandalous behaviors deemed reprehensible by the public and media).

53. Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 355 n.30.

The next major historical phase for morality clauses occurred between the late 1940s and early 1960s. At this time, the United States was in the midst of the McCarthy era—a period known for its extreme fear and condemnation of Communism.<sup>54</sup> In 1947, as part of the government’s phobia of the far left, the congressional House Un-American Activities Committee (HUAC) held nine days of hearings to investigate the alleged Communist infiltration of Hollywood’s motion picture industry.<sup>55</sup> Throughout the hearings, HUAC cited ten “unfriendly” witnesses for contempt of Congress when they refused to answer questions relating to whether they had ever associated with the Communist party.<sup>56</sup>

No one wanted to be associated with an alleged Communist. Studios fired the witnesses based on their alleged involvement in Communist activities.<sup>57</sup> Subsequently, three of the witnesses sued their respective employers, alleging that their terminations were based on unjustly expansive readings of the morality clauses in their contracts.<sup>58</sup> One was Lester Cole, who had been employed as a screenwriter for Loew’s, Inc., doing business as Metro-Goldwyn-Mayer films (MGM).<sup>59</sup> Cole’s employment was pursuant to a written agreement, which included the following morality clause:

The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him 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

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54. See Robert M. Lichtman, *McCarthyism and the Court: The Need for “an Uncommon Portion of Fortitude in the Judges,”* 39 J. SUP. CT. HIST. 107, 108 (2014) (“The Court’s McCarthy era, which (in this reading) spanned the October 1949 through 1961 Terms . . .”).

55. *Id.* at 109.

56. See *Loew’s, Inc. v. Cole*, 185 F.2d 641, 645 (9th Cir. 1950) (“When Cole was called to the stand he was asked ‘Are you now or have you ever been a member of the Communist Party?’ The statement he then made was interpreted by the committee as a refusal to answer . . .”).

57. See *id.* (stating that after Cole was called as a witness he “was sent a notice of suspension” that discussed his refusal “to answer certain questions put to [him] by such committee”).

58. See *id.* at 641 (summarizing that plaintiff did not believe that his testimony warranted a violation of the employment agreement).

59. *Id.* at 644–45.

the producer or the motion picture, theatrical or radio industry in general.<sup>60</sup>

After Cole was cited for contempt of Congress, MGM terminated his agreement.<sup>61</sup> In his breach of contract case, the Ninth Circuit held that MGM properly terminated Cole under the agreement for two reasons. First, the court concluded that Cole's misdemeanor conviction was within the scope of the morality clause.<sup>62</sup> Second, the court reasoned that Cole's refusal to answer questions regarding his alleged association with Communists could be—and was publicly—interpreted as affirming his belief in Communism.<sup>63</sup> The Ninth Circuit concluded that because “a large segment of the public did look upon Communism and Communists as things of evil, . . . it cannot be said, as a matter of law, that in acting as he did Cole did not breach [the] agreement.”<sup>64</sup>

The Ninth Circuit subsequently heard cases from two more of the ten convicted witnesses who were employed and terminated pursuant to very similar morality clauses.<sup>65</sup> In each case, the court affirmed its reasoning in *Cole* and found that the alleged Communists violated their employment contracts and were rightfully terminated.<sup>66</sup>

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60. *Id.* at 645.

61. *See id.* (“Cole was . . . sent a notice of suspension reading as follows: ‘Dear Mr. Cole . . . you refused to answer certain questions put to you . . . . By your failure to answer these questions . . . . [T]his is to notify you that we have elected to suspend your employment . . . .’”).

62. *See id.* at 648 (“We think it rather elementary that one who, for whatever motive, chooses to conduct himself in such manner as to be guilty of a misdemeanor as serious as this one can hardly be said to be doing so ‘with due regard to public conventions.’”).

63. *See id.* at 649 (“We think that a jury might well find as a fact that the natural result of Cole’s refusal to say whether he was . . . a member of the Communist party . . . was for the purpose of concealing his actual membership in the party.”).

64. *Id.*

65. *See Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 91 (9th Cir. 1957) (“We are confident that the morals clause in Scott’s contract was no weaker from management’s position than Lardner’s. If there be shades of the two, Scott’s clause was the stronger or stricter.”); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 848 (9th Cir. 1954) (“One may observe that Lardner’s contract said everything that Cole’s said and a little more.”).

66. *See Scott*, 240 F.2d at 91 (citing both Cole’s and Lardner’s contracts, the court went on to say that an “opposite result in two companion cases so nearly



In more recent years, morality clauses have become *de rigeur* in endorsement agreements involving advertisers, television personalities, movie stars, models, authors, and athletes.<sup>67</sup> While a 1997 survey found that less than half of all endorsement contracts included morals clauses, in 2003 that number had risen to at least 75%.<sup>68</sup> The National Football League, National Basketball Association, National Hockey League, and Major League Baseball now all have standard player agreements that include morality clauses.<sup>69</sup>

The increasing popularity of morality clauses has spread beyond the realm of the sports and entertainment industries and into the corporate world.<sup>70</sup> Today, high-level corporate officers have also become frequent subjects of media spotlight.<sup>71</sup> One recent study found that of 375 CEO employment contracts, 271 included such clauses.<sup>72</sup> Further, moral turpitude has become one of the most commonly listed reasons for a company terminating a CEO.<sup>73</sup>

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alike would discredit the law”); *Lardner*, 216 F.2d at 850 (“The law of this circuit having been established by Cole’s case . . . it is appropriate that the implication of the same condition be made here.”).

67. See Auerbach, *Morals Clauses as Corporate Protection*, *supra* note 6, at 3 (“As important as the selection and negotiation process is for companies, they can never be entirely certain that an endorser’s image is bulletproof. To hedge against much of this risk, corporate employers are more often insisting on stricter contractual protections, primarily through the inclusion of so-called ‘morals clauses.’”).

68. Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 356.

69. *Id.* at 356–57.

70. See *id.* at 364 (“Morals clauses are also commonly employed in agreements between corporations and their most talented executives, such as ‘C-level’ executives.”).

71. See Patricia Sanchez Abril & Ann M. Olazabal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 HOUS. L. REV. 1545, 1551 (2010) (“We posit that it is the confluence of three historical trends that has thrust CEOs onto center stage: higher levels of investment by average folk, dramatically increased availability of detailed personal information, and the reemergence of controversial business issues in popular debate.”).

72. Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 364 (citing Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 248 (2006)).

73. See Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of*

The increasing incidence of morality clauses is no accident. Several external factors, which we discuss in turn below, have led to the rise of such clauses, as well as their use to terminate agreements: (1) the rebirth of political correctness,<sup>74</sup> (2) the ubiquity of social media and a reputation-centric economy,<sup>75</sup> and (3) the increasing political and values-based engagement of businesses.<sup>76</sup>

### 1. Political Correctness and Sensitivity

In early 2016, professional boxer Manny Pacquiao ran for a senate seat in his native Philippines.<sup>77</sup> During his campaign, he publicly described homosexuals as “worse than animals.”<sup>78</sup> Subsequently, the sports apparel brand, Nike, terminated a nearly eight-year endorsement agreement with Pacquiao—presumably pursuant to a morality clause.<sup>79</sup> Today, offensive, insensitive, and otherwise unpopular statements seem to land celebrities and everyday people in hot water on a regular basis, bringing about a long and widespread debate on tolerance, free speech, and the merits of political correctness.<sup>80</sup>

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*CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 248 (2006) (noting that 271 out of 375 terminations of employment contracts were for moral turpitude, showing that it was part of the “most common contractual bases” for terminating a CEO).

74. See *infra* Part II.B.1 (arguing that the rise in political correctness has led to the promulgation of certain morality clauses that allow companies to avoid guilt by association when such scrutiny arises).

75. See *infra* Part II.B.2 (discussing that due to the ability to reach a mass audience much easier today via the internet and social media, which can have severe dire consequences for both an employer and the employee).

76. See *infra* Part II.B.3 (stating that since businesses may also get involved in political speech, and express values of their own, morality clauses have been made to allow such business to terminate and separate from views or speech that is antithetical to their stance on certain issues).

77. Darren Rovell, *Nike Cuts Ties with Manny Pacquiao After Derogatory Comments*, ESPN (Feb. 18, 2016), [http://espn.go.com/boxing/story/\\_id/14793389/nike-ends-endorsement-contract-manny-pacquiao](http://espn.go.com/boxing/story/_id/14793389/nike-ends-endorsement-contract-manny-pacquiao) (last visited Mar. 4, 2017) [hereinafter Rovell, *Nike Cuts Ties with Manny Pacquiao*] (on file with the Washington and Lee Law Review).

78. *Id.*

79. *Id.*

80. “Political Correctness” has been defined in multiple ways. See

Political correctness has gained new momentum in the past few years, as the American public has become increasingly socially liberal. While a 1996 Gallup Poll found that just 27% of Americans felt that the government should recognize same-sex marriages, a 2016 poll found that number had risen to 61%.<sup>81</sup>

But a rise in tolerance has also ushered a rise in sensitivity.<sup>82</sup> Society has become increasingly sensitive, with many now going so far as to recognize “microaggressions” as a new form of intolerance.<sup>83</sup> One article noted that racial discrimination now often surfaces as microaggressions or “brief, every day, often unconsciously delivered exchanges that send denigrating messages to people of color because they belong to a racial minority group.”<sup>84</sup> For example, a teacher telling a student of

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*Politically Correct*, MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2015) (agreeing with the idea that people should be careful to not use language or behave in a way that could offend a particular group of people); see also Michael Kilian, *Warning on Political Correctness: Endowment Head Sees Liberal McCarthyism on Campuses*, CHICAGO TRIB. (July 31, 1991), [http://articles.chicagotribune.com/1991-07-31/news/9103240473\\_1\\_humanities-endowment-chairman-lynn-cheney-liberal](http://articles.chicagotribune.com/1991-07-31/news/9103240473_1_humanities-endowment-chairman-lynn-cheney-liberal) (last visited Mar. 2, 2017) (“The term ‘political correctness’ is used—especially by conservatives—to refer to a liberal orthodoxy that includes support for affirmative action programs, outlawing hate speech and downplaying European and male influence on Western civilization.”) (on file with the Washington and Lee Law Review); James B. Clark, III, *Political Correctness and the First Amendment: An Untenable Conflict*, 8 NAT’L B. ASS’N MAG. 12, 12 (1994)

Though difficult to define precisely, “political correctness” might accurately be described as a movement guided, indeed energized, by the tenet that the traditional Western/European culture and values are inherently oppressive and must be challenged at every opportunity in an effort to lift all of its victims from their traditionally oppressed state.

81. *Marriage*, GALLUP, INC., <http://www.gallup.com/poll/117328/marriage.aspx> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

82. See Judith Shulevitz, *In College and Hiding from Scary Ideas*, N.Y. TIMES (Mar. 21, 2015), <http://www.nytimes.com/2015/03/22/opinion/sunday/judith-shulevitz-hiding-from-scary-ideas.html> (last visited Mar. 4, 2017) (“[K]eeping college-level discussions ‘safe’ may feel good to the hypersensitive, [but] it’s bad for them and for everyone else.”) (on file with the Washington and Lee Law Review).

83. See Daniel Solórzano et al., *Keeping Race in Place: Racial Microaggressions and Campus Racial Climate at the University of California, Berkeley*, 23 CHICANO-LATINO L. REV. 15, 16 (2002) (explaining that “racial microaggressions” are a “subtle form of racism” that “causes stress”).

84. Adina B. Appelbaum, *Challenging Crimmigration: Applying Padilla*

foreign descent that she speaks English well could potentially make that student feel excluded, as the teacher's underlying assumption is that English was not her first language.<sup>85</sup>

On one hand, political correctness promotes empathy and equality for traditionally disenfranchised groups.<sup>86</sup> In the words of one academic, “[w]e embrace the commitment to equity that underlies political correctness, and we applaud the shifts in norms wrought by that commitment.”<sup>87</sup> Indeed, the vast majority of Americans would now likely agree that overt racism and sexism are unacceptable, and it is common to object to violators of these societal norms.<sup>88</sup> This public shaming of discrimination and insensitivity has done a great deal for tolerance—or at least the appearance thereof—in the workplace, politics, and the entertainment industry, among other places.<sup>89</sup> While many argue, likely correctly, that prejudice is still very much alive in American culture,<sup>90</sup> something can be said for an era in which

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*Negotiation Strategies Outside the Criminal Courtroom*, 6 GEO. J.L. & MOD. CRITICAL RACE PERSP. 217, 241 (2014).

85. See Kathy Wyer, *UCLA Ed Professors Carola Suárez-Orozco and Daniel Solorzano Share Insights on Subtle, Often Unintentional Slights on Race, Gender, Status*, UCLA ED. & IS, (June 2, 2015), <https://ampersand.gseis.ucla.edu/micro-aggressions-what-you-need-to-know/> (last visited Mar. 4, 2017) (“Oftentimes unconscious and automatic, microaggressions (MAs) are brief, subtle verbal or non-verbal exchanges that send denigrating messages to the recipient because of his or her group membership (such as race, gender, age or socio-economic status.)” (on file with the Washington and Lee Law Review).

86. See Paul Richard Kuehn, *Is Political Correctness Good for Everyone?*, HUBPAGES, <http://hubpages.com/politics/Does-Being-Politically-Correct-Make-Everyone-a-Winner> (last updated Aug. 18, 2016) (last visited Mar. 4, 2017) (detailing how, over the years, political correctness has manifested into “new politically correct words” that are used “in referring to ethnic groups, races, jobs, and people with disabilities”) (on file with the Washington and Lee Law Review).

87. Robin J. Ely et al., *Rethinking Political Correctness*, 84 HARV. BUS. REV. 79, 80 (2006).

88. See Mike LaBossiere, *Ad Baculum, Racism & Sexism*, TALKING PHILOSOPHY: THE PHILOSOPHERS’ MAG. BLOG (May 9, 2014), <http://blog.talkingphilosophy.com/?p=7932> (last visited Mar. 4, 2017) (“[O]vert racism and sexism are regarded as unacceptable and those who make racist or sexist claims sometimes find themselves the object of public disapproval.”) (on file with the Washington and Lee Law Review).

89. See *id.* (“In some cases, making such claims can cost a person his job.”).

90. See Clark, *supra* note 80, at 13 (stating that the political correctness movement embraces “simple-minded solutions to deep-rooted historical

people are encouraged to be tolerant of others—at least at the surface level.

Still, the political correctness movement has more than its share of critics.<sup>91</sup> The term political correctness itself is often said with a negative connotation, and it is frequently thought to refer to language that is not just tolerant but excessively inoffensive.<sup>92</sup> Critics of political correctness argue that simply using different words in everyday discourse does not solve the deep-rooted problems of marginalized groups.<sup>93</sup> Additionally, these skeptics claim, perhaps accurately, that by publicly demonizing the politically incorrect, proponents of the movement leave little room for dissent.<sup>94</sup> The political correctness movement has also been chastised as conflicting with the spirit of the First Amendment—that optimal solutions are the result of free public debate and the uninhibited exchange of ideas.<sup>95</sup>

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problems”); Alicia Luke, *Employment Discrimination Litigation: Social Science Evidence and a Solution for the Problem of Presumptions*, 29 TEMP. J. SCI. TECH. & ENVTL. L. 75, 94 (2010) (“While it appears that discrimination is still alive and well, it often manifests in a more nuanced kind of discrimination than that which occurred during the Civil Rights Era.” (citing *Reid v. Lockheed Martin Aeronautics Co.*, 205 F.R.D. 655, 660 (N.D. Ga. 2001))).

91. See David Limbaugh, *Political Correctness Doesn't Only Threaten Speech*, PEOPLE'S PUNDIT DAILY: INDEP. DATA JOURNALISM (Sept. 20, 2016), <https://www.peoplespunditdaily.com/opinion/2016/09/20/political-correctness-doesnt-threaten-speech-2/> (last visited Mar. 4, 2017) (explaining that political correctness not only adversely affects free speech, but race relations on college campuses and the messages that it sends) (on file with the Washington and Lee Law Review).

92. See Jonathan Chait, *Not a Very P.C. Thing to Say*, N.Y. MAG.: DAILY INTELLIGENCER/NAT'L INT. (Jan. 27, 2015, 8:00 AM), <http://nymag.com/daily/intelligencer/2015/01/not-a-very-pc-thing-to-say.html> (last visited Mar. 4, 2017) [hereinafter Chait, *Not a Very P.C. Thing to Say*] (discussing that individuals such as Bill Maher, Ayaan Hirsi Ali, and Condoleeza Rice were the subject of protests on college campuses based on their recently voiced opinions) (on file with the Washington and Lee Law Review).

93. See Clark, *supra* note 80, at 13–14 (discussing that some of the problems faced by marginalized groups are “poverty, lack of education and societal ignorance”).

94. *Id.* at 12.

95. See *id.* (saying that political correctness is a new “insidious” challenge to the First Amendment’s principles because “it has allied itself” with the First Amendment’s traditional friends: “the poor, the downtrodden and the different”).

Regardless of one's personal philosophy on political sensitivity and correctness, it is inarguable that the movement is supported by a large and vocal portion of the American public and that refusal to conform can lead to serious economic consequences.<sup>96</sup> Consider once-beloved A-list actor turned infamous anti-Semite Mel Gibson.<sup>97</sup> In 2006, Gibson was arrested by a Los Angeles Sheriff's Department Officer for driving under the influence of alcohol.<sup>98</sup> During his arrest, a drunken, belligerent Gibson demanded to know whether the officer was Jewish and alleged that "the Jews are responsible for all the wars in the world."<sup>99</sup> That police report was made public, and Gibson has since landed very few movie roles and has struggled to escape the stigma related to those comments.<sup>100</sup> Or recall former Los Angeles Clippers owner Donald Sterling, who was nationally scorned after a recording was made public in which he complained to his girlfriend that she spent too much time associating with black people.<sup>101</sup> Sterling's statements

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96. See Conor Friedersdorf, *Stripping a Professor of Tenure Over a Blog Post*, THE ATLANTIC (Feb. 9, 2015), <https://www.theatlantic.com/education/archive/2015/02/stripping-a-professor-of-tenure-over-a-blog-post/385280/> (last updated Feb. 10, 2015) (last visited Mar. 2, 2017) (discussing a Marquette professor that had his tenure terminated when he wrote a blog post pursuant to a discussion between a student and another professor regarding gay marriage) (on file with the Washington and Lee Law Review).

97. See Allison Hope Weiner, *Mel Gibson Apologizes for Tirade After Arrest*, N.Y. TIMES (Jul. 30, 2006), <http://www.nytimes.com/2006/07/30/us/30gibson.html> (last updated Aug. 3, 2006) (last visited Mar. 2, 2017) (discussing Mel Gibson's anti-Semitic remarks) (on file with the Washington and Lee Law Review).

98. *Id.*

99. *Id.*

100. See Ethan Sacks, *Mel Gibson's Career Never Recovered, 10 Years After Anti-Semitic Rant*, DAILY NEWS: ENT. (July 26, 2016, 6:00 AM), <http://www.nydailynews.com/entertainment/gossip/mel-gibson-career-recovered-anti-semitic-rant-article-1.2725688> (last visited Mar. 2, 2017) ("Thursday marks a decade since Gibson's drunken rant . . . and his career still hasn't recovered.") (on file with the Washington and Lee Law Review).

101. See Ben Golliver, *NBA Investigating Clippers Owner Donald Sterling for Alleged Racist Comments*, SPORTS ILLUSTRATED (Apr. 26, 2014), <http://www.si.com/nba/point-forward/2014/04/26/donald-sterling-nba-investigation-racist-comments-clippers> (last visited Mar. 4, 2017) [hereinafter Golliver, *NBA Investigating Clippers*] (noting that Donald Sterling stated to V. Stiviano that he did not want her to bring black people to the basketball games, including former basketball player Earvin "Magic" Johnson) (on file with the Washington and Lee Law Review).

immediately became the center of attention for American news outlets, after which the National Basketball Association banned him for life.<sup>102</sup>

In a society in which insensitivity and intolerance are the subjects of widespread public shaming, the individual perpetrator is not the only party affected.<sup>103</sup> Associates of the politically incorrect often receive immense pressure to denounce the questionable behavior, or risk being perceived as condoning it.<sup>104</sup> To avoid such guilt by association, companies are quick to distance themselves from employees or corporate partners that become the center of such scrutiny.<sup>105</sup> For example, in 2013, celebrity chef Paula Deen lost a book deal as well as a contract with the Food Network after admitting in a deposition that she had used racist language and had tolerated racial jokes in the past.<sup>106</sup>

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102. Dan Hirschhorn, *NBA Bans Donald Sterling 'For Life' After Racist Rant*, TIME (Apr. 29, 2014), <http://time.com/81170/donald-sterling-los-angeles-clippers-nba-adam-silver/> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

103. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 352 (“The underlying purpose of a morals clause . . . is to protect the contracting company from the immoral behavior of the talent with whom it contracts.” (citing Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 235 (2005))).

104. See *Ten Athletes Who Lost Their Endorsements*, FOX SPORTS (Feb. 19, 2016, 2:07 AM), <http://www.foxsportsasia.com/news/ten-athletes-lost-endorsements/> (last visited Mar. 4, 2017) (discussing Michael Phelps’s lost endorsements when a video emerged on the internet of him smoking marijuana) (on file with the Washington and Lee Law Review).

105. See John Santucci, *The Companies that Have Dumped Donald Trump*, ABC NEWS (July 4, 2015, 3:00 PM), <http://abcnews.go.com/Politics/companies-dumped-donald-trump/story?id=32162703> (last visited Mar. 4, 2017) (providing that that companies such as Univision, NBC Universal, Macy’s, and others separated ties with Trump when he made comments about Mexico during the announcement of his running for President) (on file with the Washington and Lee Law Review).

106. Katie Rogers, *Paula Deen Faces Backlash Over 'I Love Lucy' Posting*, N.Y. TIMES (July 8, 2015), <http://www.nytimes.com/2015/07/09/nytnow/paula-deen-faces-backlash-over-i-love-lucy-posting.html> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

## 2. *The Role of the Internet and Social Media*

In addition to the public's increased scrutiny of controversial statements, through the rise of social media, such statements now reach larger audiences than ever, and they are doing so much faster.<sup>107</sup> This is true not only for celebrities but for the general public as well.<sup>108</sup> In the third quarter of 2016, Facebook alone had over 1.79 billion active users worldwide, continuing a decade-long upward trend.<sup>109</sup> Although online connections often “reflect pre-existing offline connections, social media also brings together strangers with similar hobbies, interests, and political views.”<sup>110</sup>

Consequently, individuals' comments, photos, videos, and other actions on social media can often reach broad, unintended audiences.<sup>111</sup> Information on Facebook, for instance, is public by default unless the user manually increases his or her security settings.<sup>112</sup> Thus, a common person's well-timed Facebook or Twitter comment can be seen by millions of people around the world.<sup>113</sup> In fact, the Facebook post that received the most

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107. See Doug Cross, *5 Ways Twitter Changed How We Communicate*, CNN (Mar. 21, 2011, 11:41 AM), <http://www.cnn.com/2011/TECH/social.media/03/21/twitter.birthday.communication/> (last visited Mar. 4, 2017) (discussing how Twitter removed the celebrity filter and made the flow of information faster, among other things) (on file with the Washington and Lee Law Review).

108. See *id.* (claiming that if it was not for Twitter, little known bloggers, journalists, and podcasters would not have as big an audience).

109. *Number of Monthly Active Facebook Users Worldwide as of 3rd Quarter 2016 (in Millions)*, STATISTA, <http://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

110. Mary-Rose Papandrea, *Social Media, Public School Teachers, and the First Amendment*, 90 N.C. L. REV. 1597, 1607 (2012).

111. *Id.* at 1607 (citing Lance Ulanoff, *Your Digital Debris Is Haunting You*, PC MAG. (June 9, 2011), <http://www.pcmag.com/article2/0,2817,2386635,00.asp> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review)).

112. *Id.* at 1608–09 (citing Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUND. (Apr. 28, 2010), <https://www.eff.org/deeplinks/2010/04/facebook-timeline> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review)).

113. See Kurt Opsahl, *Facebook's Eroding Privacy Policy: A Timeline*, ELECTRONIC FRONTIER FOUND. (Apr. 28, 2010), <https://www.eff.org/deeplinks/2010/04/facebook-timeline> (last visited Mar. 4, 2017) (arguing that Facebook's growth came from communicating with a group of your choice to “where much of your information is public” and that there is always going to be a certain



interaction in 2015 was not that of any celebrity at all, but a photo of a child holding a sign reading: “Can I get 1 million likes? I BEAT CANCER.”<sup>114</sup> The photo received over 10 million likes, as well as thousands of shares and comments.<sup>115</sup>

While there is no shortage of positive, heartfelt energy on social media, more negative or risqué activity often receives a great deal of attention as well—causing trouble for employees of all levels. For example, a part-time stadium guard for the Philadelphia Eagles dispatched the following tweet after the team let safety Brian Dawkins sign with the Denver Broncos in 2009: “Dan is [expletive] devastated about Dawkins signing with Denver . . . Dam Eagles R Retarded!”<sup>116</sup> He was terminated nearly immediately after his employer was informed of the offensive and politically incorrect comment.<sup>117</sup> This employee is just one of many disciplined for posting what their employers considered inappropriate content on social media.<sup>118</sup> Some businesses have even gone so far as to conduct social media background checks through third-party companies, which scour the internet for, among other things, “online evidence of racist remarks.”<sup>119</sup> Before the advent of social media, such activities would likely have remained among friends and family and would

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amount of information that is public) (on file with the Washington and Lee Law Review).

114. Tessa Berenson, *These Are the Top Facebook Posts of 2015*, TIME (Dec. 31, 2015), <http://time.com/4164895/top-facebook-posts-2015/> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

115. *Id.*

116. *Facebook Post Gets Worker Fired*, ESPN (Mar. 9, 2009), <http://espn.go.com/nfl/news/story?id=3965039> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

117. *See id.* (noting that the employee was fired merely days after his comment).

118. *See* Papandrea, *supra* note 110, at 1604 (explaining that teachers in public schools can face severe punishments if they use social media in a way that is “otherwise inappropriate or unprofessional”).

119. Jennifer Preston, *Social Media History Becomes a New Job Hurdle*, N.Y. TIMES (July 20, 2011), [http://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html?\\_r=0](http://www.nytimes.com/2011/07/21/technology/social-media-history-becomes-a-new-job-hurdle.html?_r=0) (last updated July 25, 2011) (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

have never have come to the attention of employers, much less the general public.<sup>120</sup>

Social media can be particularly risky for users because through features such as “liking,” “sharing,” and “retweeting,” one can be connected to statements he or she did not even make.<sup>121</sup> For instance, in April 2016, former MLB All-Star pitcher and ESPN baseball analyst, Curt Schilling, was terminated by ESPN—likely pursuant to a morality clause—after he shared an arguably transphobic photo on Facebook.<sup>122</sup> Schilling later defended his comments by arguing that he did not post the photo himself but merely shared it.<sup>123</sup> Nonetheless, the ability to be so clearly tied to the speech or actions of another person forces social media users to be thoughtful and defensive in all of their online activity.

The permanence of the internet further increases the potential for negative attention.<sup>124</sup> While in-person comments

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120. See Mike Simpson, *Social Networking Nightmares: Cyberspeak No Evil*, NAT'L EDUC. ASS'N, <http://www.nea.org/home/38324.htm> (last visited Mar. 4, 2017) (“Thanks to Facebook . . . what used to be private is now very public.”) (on file with the Washington and Lee Law Review).

121. See James Parsons, *What Exactly Does Liking a Tweet Do on Twitter?*, FOLLOWS.COM (Jan. 23, 2016), <http://follows.com/blog/2016/01/tweet-likes-twitter> (last visited Mar. 4, 2017) (stating that liking tweets can be a bookmarking tool, used for expressing appreciation, showing acknowledgement, and even mean automatic support) (on file with the Washington and Lee Law Review).

122. See Richard Sanomir, *Curt Schilling, ESPN Analyst, Is Fired Over Offensive Social Media Post*, N.Y. TIMES (Apr. 20, 2016), [http://www.nytimes.com/2016/04/21/sports/baseball/curt-schilling-is-fired-by-espn.html?\\_r=1](http://www.nytimes.com/2016/04/21/sports/baseball/curt-schilling-is-fired-by-espn.html?_r=1) (last updated Apr. 20, 2016) (last visited Mar. 4, 2017) [hereinafter Sanomir, *Curt Schilling*] (“Schilling . . . was dismissed after sharing a Facebook post . . . that appeared to respond to the North Carolina law that bars transgender people from using bathrooms . . .”) (on file with the Washington and Lee Law Review).

123. See Andrew Joseph, *Curt Schilling Defends His Anti-Transgender Facebook Post: ‘I Didn’t Post That Ugly Looking Picture’*, USA TODAY SPORTS (Apr. 19, 2016), <http://ftw.usatoday.com/2016/04/curt-schilling-anti-transgender-face-book-post-denies-defends-post-espn-mlb> (last visited Mar. 4, 2017) (“Schilling may not have been the original poster of the meme—he technically shared it. But he still posted and endorsed the message it promoted.”) (on file with the Washington and Lee Law Review).

124. See Linda Criddle, *What Teens Should Know About Online Reputations*, WEBROOT, <https://www.webroot.com/us/en/home/resources/tips/managing-your-online-reputation/reputation-what-teens-should-know-about-online-reputations> (last visited Mar. 4, 2017) (“Each drop of information is collected into personal virtual buckets. The information rarely disappears; instead, it accumulates,

may be forgotten or explained away, Tweets can be analyzed word-for-word and clearly displayed for the public long after they are written, and often with little context.<sup>125</sup> Online activity can be saved by others even if the original commenter later deletes a post.<sup>126</sup> This concrete evidence of one's actions adds yet another layer of concern.

It is worth noting that in addition to social media, other technological advances have made the public's actions subject to higher scrutiny than ever before.<sup>127</sup> For one, the ubiquity of smartphones equips nearly everyone with a camera as well as a high-quality recording device.<sup>128</sup> This caused the fall from grace of former Los Angeles Clippers owner Donald Sterling, discussed above, whose ex-girlfriend secretly recorded his racist comments on her cellphone.<sup>129</sup> Moreover, the low prices of cameras in general have ensured that a high percentage of our seemingly private actions are memorialized.<sup>130</sup> This was a hard lesson for former NFL running back Ray Rice, who was caught hitting his

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slowly building a comprehensive picture of your identities and lives.”) (on file with the Washington and Lee Law Review).

125. *See id.* (“Shedding an earlier image to move in new directions can be harder in a digitally recorded world as your previous postings may make it difficult.”).

126. *See id.* (“Comments, actions, or images once posted online may stay long after you delete the material from your site.”).

127. *See* Mike Laurie, *7 Technologies Shaping the Future of Social Media*, MASHABLE (June 01, 2009), <http://mashable.com/2009/06/01/social-media-future-tech/#CkzzzOK3EkqA> (last visited Mar. 4, 2017) (discussing new technologies and that by “2019, when you look back at the social media landscape ten years earlier, you might laugh at how hard you had to work”) (on file with the Washington and Lee Law Review).

128. *See The Impact of Technology on Your Social Media*, DIGITALSOLUTIONS, <http://ds6.net/the-impact-of-technology-on-your-social-media/> (last visited Mar. 4, 2017) (comparing an iPhone with an eight megapixel camera to a Nokia Lumia 1020 that boasts a forty-one megapixel camera) (on file with the Washington and Lee Law Review).

129. *See* Golliver, *supra* note 101 (detailing how Donald Sterling did not want his ex-girlfriend to associate with black people and bring them to the basketball games).

130. *See* Tom de Castella, *Five Ways the Digital Camera Changed Us*, BBC (Feb. 28, 2012), <http://www.bbc.com/news/magazine-16483509> (last visited Mar. 4, 2017) (explaining that the advent of the smartphone “brought digital photography to the masses” and allowed people to take large numbers of pictures at “almost no consequence or cost”) (on file with the Washington and Lee Law Review).

fiancée by an elevator security camera.<sup>131</sup> Rice subsequently lost an endorsement deal with sports equipment company Vertimax.<sup>132</sup>

### 3. *Businesses' Increased Political and Values-Based Engagement*

Increasingly, companies are involved in political speech and expressing specific values of their own.<sup>133</sup> They are highly engaged in the political process and have a constitutionally protected right to their corporate identities.<sup>134</sup> Like members of the general public, they can be conservative or liberal, religious or secular. Naturally then, those companies seek employees and partners that will fall in line with those views and values and want to be able to cut ties with those who contradict them.<sup>135</sup>

Unlike the political correctness movement, which is consistently socially liberal,<sup>136</sup> businesses fall all over the

131. See Daniel Roberts & Benjamin Snyder, *Ray Rice and 11 Other Athletes Who Lost Their Endorsements*, FORTUNE (Sept. 20, 2014), <http://fortune.com/2014/09/20/ray-rice-adrian-peterson-tiger-woods-athletes-drop-endorsements/> (last visited Mar. 4, 2017) (“TMZ released video of Rice hitting his fiancé. It set off the floodgates. Dick’s Sporting Goods and Modell’s pulled his jerseys from stores. The next day, Nike said it would end its endorsement, and EA Sports said it would scrub Rice from the Madden NFL 15 video game.”) (on file with the Washington and Lee Law Review).

132. *Id.*

133. See Leighton Walter Kille, *Corporate Speech and the First Amendment: History, Data and Implications*, JOURNALIST’S RESOURCE, <http://journalistsresource.org/studies/politics/finance-lobbying/corporate-speech-first-amendment-history-data-implications> (last updated Mar. 26, 2015) (last visited Mar. 4, 2017) (“While the First Amendment was intended to protect individual freedom of religion, speech and assembly, as well as a free press, corporations have begun to displace individuals as its direct beneficiaries. This ‘shift from individual to business First Amendment cases is recent but accelerating.’”) (on file with the Washington and Lee Law Review).

134. See *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 361 (2010) (finding unconstitutional a federal law that prohibited independent corporate expenditures for electioneering).

135. See Will Staney, *How to Hire People Who Fit a Company’s Culture*, ENTREPRENEUR (Sept. 2, 2014), <https://www.entrepreneur.com/article/236975> (last visited Mar. 4, 2017) (“Hiring employees who understand and exemplify company values serves to reinforce the organization’s mission and vision . . . .”) (on file with the Washington and Lee Law Review).

136. See Amanda Hess, *How ‘Political Correctness’ Went from Punch Line to Panic*, N.Y. TIMES, (July 19, 2016) <http://www.nytimes.com/2016/07/24/>

spectrum with regard to social issues.<sup>137</sup> One particularly well-known example is fast-food chain Chick-fil-A, which has long been known for its conservative leanings and traditional stance on marriage—although the company has recently strived to soften its appearance.<sup>138</sup> Similarly, in 2014, arts and crafts retailer Hobby Lobby went to the United States Supreme Court to defend its refusal to provide contraceptives to employees in accordance with the company’s religious beliefs.<sup>139</sup> Being that most morality clauses are broad and subject to significant interpretation,<sup>140</sup> socially conservative organizations such as these might use such a clause to break ties with the maker of socially progressive speech.<sup>141</sup>

Meanwhile, a company with opposing views could use an identical clause to distance itself from a speaker advocating for traditional marriage laws or some similarly right-wing

magazine/how-political-correctness-went-from-punch-line-to-panic.html?r=0 (last visited Mar. 4, 2017) (describing the political correctness movement as a “shorthand for liberal politics”) (on file with the Washington and Lee Law Review).

137. See Peter Gasca, *Businesses Must Make a Stand on Important Social Issues*, ENTREPRENEUR, (Apr. 20, 2016) <https://www.entrepreneur.com/article/274335> (last visited Mar. 4, 2017) (noticing that “corporations have been taking a larger role in supporting and influencing popular social ideas”) (on file with the Washington and Lee Law Review).

138. See Bruce Horowitz, *Chick-fil-A Wings in New Direction After Gay Flap*, USA TODAY (Apr. 7, 2014, 7:07 PM), <http://www.usatoday.com/story/money/business/2014/04/07/chick-fil-a-fast-food-dan-cathy/7250871/> (last updated Apr. 8, 2017, 2:53 PM) (last visited Mar. 4, 2017) (“It wants to go from old school to almost cool. It wants to evolve from a place where gays once picketed to a place where they’ll feel comfortable going to eat.”) (on file with the Washington and Lee Law Review).

139. See *Burwell v. Hobby Lobby Stores, Inc.* 134 S. Ct. 2751, 2785 (2014) (finding by a five-to-four majority that the Religious Freedom Restoration Act allows a for-profit employer to deny employees contraceptives to which they would otherwise be entitled under the Patient Protection and Affordable Care Act of 2010 based on religious convictions).

140. See Matthew Philips, *Morals Clauses and Ms. Spears*, NEWSWEEK (Dec. 19, 2007, 7:00 PM) <http://www.newsweek.com/morals-clauses-and-ms-spears-94295> (last visited Mar. 4, 2017) (indicating that morality clauses “usually fall along the vague lines”) (on file with the Washington and Lee Law Review).

141. See MICHAEL P. ZWEIG, 11 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §126:46 (3d ed. 2015) (noting that a morality clause “typically gives the employer the right to terminate the contract or otherwise sanction the [employee] if the individual behaves in a way that . . . damages the image of the employer by association”).

position. On Valentine's Day 2016, sportswear brand Adidas shared a photo on social media featuring two women wearing Adidas shoes with the caption, "The love you take is equal to the love you make."<sup>142</sup> Adidas is thus one of many American companies that have taken a stand in favor of sexual orientation equality.<sup>143</sup> As discussed, Nike recently broke ties with Manny Pacquiao over his comments against same-sex couples,<sup>144</sup> and Adidas would likely use a morality clause in the same way.

Regardless of the political position or values that a company adopts, such a company is highly motivated to act in accordance with that position and would want the power to do so in a contractual relationship.<sup>145</sup> In sum, the resurgence of political correctness,<sup>146</sup> the advent of social media,<sup>147</sup> and the

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142. See Dominique Mosbergen, *Adidas Shuts Down Homophobic Commenters in the Best Way Possible*, HUFFINGTON POST (Feb. 18, 2016, 2:24 AM), [http://www.huffingtonpost.com/entry/adidas-valentines-day-ad-same-sex-couple\\_us\\_56c56250e4b08ffac127b0eb](http://www.huffingtonpost.com/entry/adidas-valentines-day-ad-same-sex-couple_us_56c56250e4b08ffac127b0eb) (last visited Mar. 4, 2017) ("After attracting controversy for an ad featuring a same-sex couple, Adidas responded to haters with an unequivocal message: Love is love.") (on file with the Washington and Lee Law Review).

143. See Phil Wahba, *Corporate America Comes Out Swinging Against 'Religious Freedom' Laws*, FORTUNE (Mar. 31, 2015), <http://fortune.com/2015/03/31/corporate-america-religious-freedom/> (last visited Mar. 4, 2017) ("The recently passed 'religious freedom' law in Indiana has elicited an unprecedented torrent of criticism of major companies, from Apple and Marriott International to Indianapolis-based Eli Lilly and Angies List.") (on file with the Washington and Lee Law Review).

144. See Rovell, *Nike Cuts Ties with Manny Pacquiao*, *supra* note 77 (reporting that Nike terminated its endorsement contract with Manny Pacquiao because of homophobic remarks).

145. See Lou Gerstner, *The Culture Ate Our Corporate Reputation*, WALL ST. J., <http://www.wsj.com/articles/the-culture-ate-our-corporate-reputation-1475445084> (last updated Oct. 2, 2016, 6:29 PM) (last visited Mar. 4, 2017) (suggesting that corporations have an interest in ensuring that employees are adhering to a company's culture) (on file with the Washington and Lee Law Review).

146. See Chait, *Not a Very P.C. Thing to Say*, *supra* note 92 ("After political correctness burst onto the academic scene in the late '80s and early '90s, it went into a long remission. Now it has returned.")

147. See Simeon Edosomwan et al., *The History of Social Media and Its Impact on Business*, 16 J. APPLIED MGMT. & ENTREPRENEURSHIP 79, 79 (2011) (explaining that many social media websites were created in the 1990s and 2000s).

escalation of company values<sup>148</sup> have all fueled the popularity of the morality clause.

### *III. Legal and Policy Challenges to Morality Clauses*

Since the days of Blackstone,<sup>149</sup> the cornerstone of contract law is that a competent person may make her own bargain.<sup>150</sup> Under common law, “[t]he general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and fairly made shall be held valid and enforced in the courts.”<sup>151</sup> Thus, freedom of contract doctrine provides people with the ability to bargain away rights to which they would otherwise be entitled.<sup>152</sup>

However, the freedom of contract has its limitations.<sup>153</sup> The Restatement provides that some agreements are unenforceable to ensure elemental fairness, protect weaker parties, and secure social order.<sup>154</sup> Contracts lacking in mutual assent or consideration are void.<sup>155</sup> Agreements are unenforceable when either party lacks capacity,<sup>156</sup> they are tinged with

148. See David Mielach, *Strong Company Culture Predicts Long-Term Success*, BUS. NEWS DAILY (May 31, 2013, 10:35 AM), <http://www.businessnewsdaily.com/4568-company-culture-benefits.html> (last visited Mar. 4, 2017) (revealing that “[c]ompanies that focus on company culture may create not only a positive work environment; new data has also found that those companies are also setting themselves up for long-term success”) (on file with the Washington and Lee Law Review).

149. See 2 WILLIAM BLACKSTONE, COMMENTARIES \*442–49 (discussing the ability of a person to enter an agreement as long as that person has sufficient ability to make such a contract).

150. See RESTATEMENT (SECOND) OF CONTRACTS §§ 1–3 (AM. LAW INST. 1981) (defining what makes a contract).

151. *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931).

152. See Robert Braucher, *Freedom of Contract and the Second Restatement*, 78 YALE L.J. 598, 599–600 (1969) (describing how the term bargain in contract law means “an agreement to exchange”).

153. See RESTATEMENT (SECOND) OF CONTRACTS § 17 cmt. b (AM. LAW INST. 1981) (“The governing principle in the typical case is that bargains are enforceable unless some other principle conflicts.”).

154. See *id.* § 178(1) (setting forth that a term of a contract will be unenforceable on public policy grounds if the legislator so chooses or enforcing the contract is “clearly outweighed in the circumstances by a public policy”).

155. *Id.* § 17.

156. *Id.* § 12(1).

unconscionability<sup>157</sup> or illegality,<sup>158</sup> and when the contract is against public policy.<sup>159</sup>

Non-competes are one such example.<sup>160</sup> For reasons of public policy, the law limits the enforceability of covenants not to compete,<sup>161</sup> in which an often-weaker party agrees not to participate in a competing business at the end of a business relationship.<sup>162</sup> When not entirely prohibited by law,<sup>163</sup> non-compete agreements are enforceable only if the restrictions imposed are reasonably necessary for the protection of the employer.<sup>164</sup> A restrictive covenant must also: (1) provide a reasonable time limit; (2) provide a reasonable territorial limit; (3) not be too harsh or oppressive on the employee; and (4) not be contrary to public policy.<sup>165</sup>

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157. See Melissa T. Lonegrass, *Finding Room for Fairness in Formalism: The Sliding Scale Approach to Unconscionability*, 44 LOY. U. CHI. L.J. 1, 9–11 (2012) (exploring both procedural and substantive unconscionability and pointing out that both are needed to invalidate a contract).

158. See *Party's Unlawful Acts in Performance Held to Bar His Recovery Under a Lawful Contract*, 61 COLUM. L. REV. 119, 120 (1961) (“As a general principle, courts will not enforce illegal bargains.”).

159. RESTATEMENT (SECOND) OF CONTRACTS, § 178 (AM. LAW INST. 1981).

160. See, e.g., *Valley Med. Specialists v. Farber*, 982 P.2d 1277, 1278 (Ariz. 1999) (concluding that a covenant not to compete will not be enforced against a physician on public policy grounds).

161. See RESTATEMENT (SECOND) OF CONTRACTS, § 188 (AM. LAW INST. 1981) (specifying the factors that need to be met for non-competes to be enforced).

162. See Michael Sean Quinn & Andrea Levin, *Post Employment Agreements Not to Compete: A Texas Odyssey*, 33 TEX. J. BUS. L. 71, 73 (1996) (arguing that “enforcing covenants not to compete does not allow the weaker employee to play on the same field as the stronger employer”).

163. See Hui Shangquan, *A Comparative Study of Non-Compete Agreements for Trade Secret Protection in the United States and China*, 11 WASH. J.L. TECH. & ARTS 405, 411 n.28 (2016) (listing California, Hawaii, North Dakota, Montana, and Oklahoma as states that prohibit non-compete agreements altogether); *id.* (“Montana and Oklahoma permit the enforcement of non-competes in certain circumstances, while Colorado and Oregon limit non-competes to managers and professional workers.”).

164. See *Lakeside Oil Co. v. Slutsky*, 98 N.W.2d 415, 419 (Wis. 1959) (explaining that “the rule requires that a restrictive covenant not to compete after a term of employment should be reasonably necessary for the protection of the legitimate interests of the employer”).

165. See *id.* at 418–21 (setting forth the requirements that must be met for a restrictive covenant to be valid).



Courts have traditionally analyzed non-competes closely along these analytical lines because of their effects on employee mobility and freedom.<sup>166</sup> Where they were initially designed for high-level employees and company founders, businesses have broadened their reach to lower-level, low-wage, and entry-level employees,<sup>167</sup> including sandwich-makers,<sup>168</sup> hairstylists,<sup>169</sup> sanitation workers,<sup>170</sup> and camp counselors.<sup>171</sup> This expansion

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166. See Maureen B. Callahan, Comment, *Post-Employment Restraint Agreements: A Reassessment*, 52 U. CHI. L. REV. 703, 705–06 (1985) (advancing that courts historically have justified examining non-compete agreements on three grounds: restrictions on the mobility of skilled workers, employee sophistication, and removal of a productive person from the work force).

167. See Lydia DePillis, *The Rise of the Non-Compete Agreement, from Tech Workers to Sandwich Makers*, WASH. POST (Feb. 21, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/02/21/the-rise-of-the-non-compete-agreement-from-tech-workers-to-sandwich-makers/> (last visited Mar. 4, 2017) (noticing that non-competes are normally reserved for executives but lately they have been “popping up in more and more low-wage sectors too”) (on file with the Washington and Lee Law Review).

168. A 2014 press report found that sandwich chain Jimmy John’s required its sandwich makers and delivery drivers to sign non-compete agreements. The non-compete agreements prohibited sandwich makers, for a period of two years after leaving a job with Jimmy John’s, from working at any establishment within a two-mile radius of a Jimmy John’s location that made more than 10% of its revenue from sandwiches. In 2016, the company entered into an agreement with New York’s Attorney General to cease the use of the contract in New York. Press Release, Eric T. Schneiderman, N.Y. Attorney Gen. (June 22, 2016) (on file with the Washington and Lee Law Review); see also Samantha Bomkamp, *Illinois AG Sues Jimmy John’s Over Noncompete Pacts; Chain ‘Disappointed’*, CHI. TRIB. (June 9, 2016, 9:59 AM), <http://www.chicago.tribune.com/business/ct-jimmy-johns-illinois-lawsuit-0609-biz-20160608-story.html> (last visited Mar. 4, 2017) (observing that Illinois’s Attorney General also filed suit against Jimmy John’s for the same reason) (on file with the Washington and Lee Law Review).

169. See *King v. Head Start Family Hair Salons, Inc.*, 886 So.2d 769, 772 (Ala. 2004) (finding that a “noncompetition agreement prohibiting King from working in the hair-care industry within a two-mile radius of any of Head Start’s 30 locations is unduly burdensome”).

170. See *DCS Sanitation Mgmt., Inc. v. Castillo*, 435 F.3d 892, 897 (8th Cir. 2006) (concluding that the district court properly held that a non-compete agreement against a sanitation worker was overly broad and unenforceable).

171. See Steven Greenhouse, *Noncompete Clauses Increasingly Pop Up in Array of Jobs*, N.Y. TIMES (June 8, 2014), <http://www.nytimes.com/2014/06/09/business/noncompete-clauses-increasingly-pop-up-in-array-of-jobs.html?smid=pl-share> (last visited Mar. 4, 2017) (reporting that Colette Buser, a summer camp counselor, signed a non-compete agreement that forbade her from working at a competing camp within ten miles) (on file with the

has caught the critical eyes of both state and federal legislatures, and the White House, which has advocated for their further restriction on public policy grounds.<sup>172</sup>

In fact, morality clauses have much in common with non-competes: they are often tangential to personal services contracts;<sup>173</sup> they purport to protect the stronger party's business interests;<sup>174</sup> they restrain the subject's rights;<sup>175</sup> they can be aggressively broad and lacking in consideration;<sup>176</sup> and they may sometimes be imposed in inherently-coercive settings.<sup>177</sup> Like non-competes, morality clauses have experienced a democratization as of late.<sup>178</sup>

However, unlike non-competes, morality clauses have thus far escaped judicial scrutiny. They have not been the subject of strict inquiry on legal or public policy grounds. In fact, other than in the celebrity context,<sup>179</sup> they have been largely ignored. In

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Washington and Lee Law Review).

172. See THE WHITE HOUSE, NON-COMPETE AGREEMENTS: ANALYSIS OF THE USAGE, POTENTIAL ISSUES, AND STATE RESPONSES 3 (2016) (revealing that both state and federal legislation is looking to further limit non-compete agreements).

173. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 353 (pointing out that morality clauses in talent contracts have been around since the 1920s).

174. See Kressler, *Using the Morals Clause*, *supra* note 6, at 235 (“[T]he ‘morals clause’ generally allows buyers, such as advertisers, to terminate a talent agreement when an actor’s conduct is detrimental to the buyer’s interests or otherwise devalues the performance due.”).

175. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 350 (“As a general proposition, talent needs to know that a morals clause is powerful enough to impact important aspects of one’s career, ranging from one’s compensation and continued employment to restrictions upon his or her personal behavior.”).

176. See *id.* at 371 (describing how companies will try to include broadly-worded morals clauses).

177. See Donald J. Smythe, *Liberty at the Borders of Private Law*, 49 AKRON L. REV. 1, 53–54 (2016) [hereinafter Smythe, *Liberty at the Borders of Private Law*] (contending that some employees that care about the restrictions imposed by morality clauses still sign the employment contract because they need the job).

178. See Taylor, III. et al., *The Reverse Morals Clause*, *supra* note 6, at 79–80 (presenting the birth of the reverse-morals clause, which allows a celebrity to bow out of a deal if the company engages in certain type of immoral behavior).

179. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 357–62 (examining seminal cases involving morality clauses and

light of the increasing breadth and use of morality clauses across many ranks,<sup>180</sup> the time is right to examine these restraints closely, taking into account their potential legal failings and adverse consequences on public policy grounds.

### A. Mutual Assent and Definiteness

The law requires contractual terms to be reasonably certain and definite.<sup>181</sup> That is, they must supply “a basis for determining the existence of a breach and for giving an appropriate remedy.”<sup>182</sup> This principle does not require absolute certainty; rather, only the quantum that is “reasonable” under the circumstances.<sup>183</sup> In general, ambiguous language will be interpreted in favor of the non-drafting party.<sup>184</sup>

Typically, both Bad Behavior and Reputational Impact morality clauses are broad, indefinite, and at worst, tautological.<sup>185</sup> A Bad Behavior clause might ban acts that just generally offend notions of “decency” and “morality.”<sup>186</sup> Some Reputational Impact clauses may be so indefinite as to be illusory, effectively prohibiting any conduct that the enforcing party deems to be unacceptable or potentially tarnishing.<sup>187</sup> Most

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celebrities).

180. See DePillis, *supra* note 167 (reporting on the rise of morality clauses in all areas of employment).

181. RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (AM. LAW INST. 1981).

182. *Id.* § 33(2).

183. See *id.* § 33 cmt. a (explaining that for a contract to be enforceable the terms of the contract need not be definitively certain).

184. See Raymond H. Srp, *Survey of Ohio Law: 2011 Supreme Court of Ohio Decisions: II. Contract Interpretation: A. Insurance Policies: Westfield Insurance Co. v. Hunter*, 38 OHIO N.U. L. REV. 1211, 1223 (2012) (“Both courts simply interpreted an ambiguity in a contract by construing the language against the drafting party.”).

185. See Philips, *supra* note 140 (observing morality clauses as “usually fall[ing] along vague lines of not doing anything that might bring about public disrepute, contempt, scandal or ridicule, or reflecting unfavorably on” the company).

186. See Katz, Note, *Reputations*, *supra* note 6, at 201–12 (pointing out that the earliest morals clauses “contained triggers defined by notices of ‘decency’ and ‘morality’” (citations omitted)).

187. See *id.* at 213–18 (mentioning that disrepute triggers in morality clauses give companies great latitude in determining when a morals clause is

contracts do not define these vague terms, choosing to adopt Justice Stewart’s “I-know-it-when-I see-it” standard.<sup>188</sup> By their very nature, these concepts—and the behavior they ban—are indistinct.<sup>189</sup> In practice, these concepts are relative to time, place, and historical moment—often dependent on the code of conduct currently acceptable to society.<sup>190</sup>

Despite the obvious ambiguity and breadth of the actions conceivably covered by a ban on generally immoral or even “bad” behavior, courts have upheld even the most ambiguous morality clauses.<sup>191</sup> In *Knox-Pipes v. Genesee Intermediate School District*,<sup>192</sup> the plaintiff, who was terminated for conduct involving moral turpitude, argued that because the term was not defined, no legal obligation was created.<sup>193</sup> The court rejected the argument, concluding that the dictionary definition of the term could be used to ascertain the word’s plain and ordinary meaning.<sup>194</sup> Similarly, in *Nader v. ABC TV, Inc.*,<sup>195</sup> ABC terminated a soap opera star’s contract pursuant to a morality clause after he was arrested for selling cocaine to an undercover police officer.<sup>196</sup> The morality clause at issue disallowed any conduct that “might tend to reflect unfavorably on ABC” or any of its sponsors, licensees, series, or programs.<sup>197</sup> In a breach of

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breached).

188. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (defining “I know it when I see it” as the threshold test when determining whether a motion picture is obscene under an Ohio statute that convicted people for possessing and exhibiting an obscene film).

189. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 352 (“By their very nature, morals are subjective concepts . . .”).

190. See *id.* (declaring that “[a]t the very least, moral behavior refers to behavior that comports to an existing code of conduct put forward by society”).

191. See *Nader v. ABC TV, Inc.*, 150 F. App’x. 54, 56 (2d Cir. 2005) (pronouncing that ABC could fire the plaintiff, and the plaintiff’s claim that ABC’s morality clause was unenforceable because of vagueness was not supported).

192. No. 322295, 2015 WL 5657396 (Mich. Ct. App. Sept. 24, 2015), *appeal denied*, 499 Mich. 915 (2016).

193. *Id.* at \*8.

194. *Id.*

195. 330 F. Supp. 2d 345 (S.D.N.Y. 2004), *aff’d*, 150 F. App’x. 54 (2d Cir. 2005).

196. *Nader*, 150 F. App’x. at 55.

197. *Id.* at 54.

contract claim for wrongful termination, Nader argued that the clause was “too ambiguous or vague,” and that his actions did not fall within its confines.<sup>198</sup> The Second Circuit rejected this argument and, in affirming the district court’s grant of summary judgment, held that Nader’s arrest and the resulting media attention brought his conduct “well within any reasonable interpretation of the [morality] clause.”<sup>199</sup>

Despite these examples, it is undisputed that a party needs to know (either implicitly or expressly) what behavior or conduct will trigger termination under a morality clause.<sup>200</sup> In *Dias v. Archdiocese of Cincinnati*,<sup>201</sup> a Catholic school fired its technology coordinator for becoming pregnant through artificial insemination.<sup>202</sup> The morality clause in her contract required the employee to abide by Catholic doctrine,<sup>203</sup> even though she was a non-ministerial employee.<sup>204</sup> In her suit for breach of contract, the plaintiff claimed the morality clause was invalid and illegal because it was a pretext for pregnancy discrimination.<sup>205</sup> The court found that the contract lacked a “meeting of the minds” because the clause did not address artificial insemination, and there was a question of fact as to whether the plaintiff knew she was barred from such action.<sup>206</sup>

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198. *Id.* at 56.

199. *Id.*

200. *See* Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 369–79 (discussing what talent needs to know about morality clauses).

201. No. 1:11-CV-00251, 2012 WL 1068165 (S.D. Ohio Mar. 29, 2012).

202. *Id.* at \*1.

203. *Id.*

204. *Id.* at \*8.

205. *Id.* at \*2.

206. *Id.* at \*6. *But see* *Dias v. Archdiocese of Cincinnati*, No. 1:11-CV-00251, 2013 WL 360355, at \*1 n.1 (S.D. Ohio Jan. 30, 2013) (“Such clause stated generally that Plaintiff would ‘comply with and act consistently in accordance with the stated philosophy and teaching of the Roman Catholic Church.’”). In addressing the parties’ subsequent cross motions for summary judgment, the court did not address the plaintiff’s contract claim because it found she had unclean hands. Although she did not know artificial insemination was prohibited, she did know that homosexuality was, and she testified to keeping her long-term homosexual relationship secret because she knew it was a breach of her contract. *See id.* at \*14 (determining the plaintiff knew this would be a violation of the morals clause).

Nonetheless, there is no shortage of highly ambiguous morality clauses between employers and employees of all levels.<sup>207</sup> Although the majority of employee contracts are not publicly available, some published employee handbooks give guidance as to the stances employers are taking.<sup>208</sup> In some situations, courts have recognized these manuals as implied contracts, which are binding upon employers.<sup>209</sup> Los Angeles County, California, which employs over 100,000 people,<sup>210</sup> has included the following clause in its employee handbook: “The rule is simple, we are accountable for what we do—we do not engage in any behavior that would compromise the County, or be an embarrassment to the County.”<sup>211</sup> In a particularly outstanding morality clause, Lee University requires all of its administration and staff to “mirror a Christ-like example for students on a daily basis,” while refraining from “homosexual practices and other forms of sexual behavior which violate Scripture.”<sup>212</sup> Schools, universities, religious institutions, and other non-profit organizations all regularly include morality provisions in

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207. See *supra* notes 167–171, 191 (highlighting that low-level employees and actors both sign contracts that contain morality clauses).

208. See Mike the Inkman, *Hobby Lobby Adds ‘Abstinence Policy’ To Employee Handbooks*, EMPIRE NEWS, <http://empirenews.net/hobby-lobby-adds-abstinence-policy-to-employee-handbooks/> (last visited Mar. 4, 2017) (“Hobby Lobby . . . announced that they are adding new rule to their ‘Employee Code of Conduct,’ which will now include a passage that says the company expects all of their non-married workers to practice abstinence.”) (on file with the Washington and Lee Law Review).

209. See Rachel Leiser Levy, Comment, *Judicial Interpretation of Employee Handbooks: The Creation of a Common Law Information-Eliciting Penalty Default Rule*, 72 U. CHI. L. REV. 695, 701 (2005) [hereinafter Levy, *Judicial Interpretation*] (“Beginning in the early 1980s, however, virtually every state supreme court reconsidered its treatment of employee handbooks and concluded that under the right conditions a handbook could be transformed into a unilateral contract.”).

210. *LA County Employees*, CTY. OF L.A. [http://portal.lacounty.gov/wps/portal/!ut/p/b0/04\\_Sj9CPykyssy0xPLMnMz0vMAfGjzOItdCDAyMIk0M3AyMfVItTT1NjIINRAvyDbUREACWv94w!!/](http://portal.lacounty.gov/wps/portal/!ut/p/b0/04_Sj9CPykyssy0xPLMnMz0vMAfGjzOItdCDAyMIk0M3AyMfVItTT1NjIINRAvyDbUREACWv94w!!/) (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

211. CTY. OF LOS ANGELES, EMPLOYEE HANDBOOK 24 (2003), [http://file.lacounty.gov/SDSInter/lac/113484\\_Employee\\_Handbook.pdf](http://file.lacounty.gov/SDSInter/lac/113484_Employee_Handbook.pdf).

212. LEE UNIVERSITY, ADMINISTRATIVE/SUPPORT STAFF HANDBOOK 14 (2015), <https://www.leeuniversity.edu/uploadedFiles/Content/human-resources/staff-handbook.pdf>.

employment contracts.<sup>213</sup> Clauses like these give an employer tremendous discretion in determining whether an employee's conduct was "Christ-like" or "embarrassing."<sup>214</sup>

### *B. Subjective Enforcement and Bad Faith*

The question of whether a morality clause correctly triggers termination is one of fact, premised upon the clause's language and whether the allegedly offending behavior falls within its ambit.<sup>215</sup> As discussed above, the breadth of morality clauses encompasses wide-ranging behaviors that are often ill-defined.<sup>216</sup> Given the inherent ambiguity, how can courts distinguish exacting, and perhaps prudish, enforcers from those using morality clauses as a pretext to act in bad faith?

With Bad Behavior clauses, courts have the unenviable task of assessing whether the behavior is normatively offensive enough to the community to trigger a contractual discharge.<sup>217</sup> Courts commonly make these fact-intensive assessments in other areas of law, such as obscenity,<sup>218</sup> privacy,<sup>219</sup> and tort law

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213. Smythe, *Liberty at the Borders of Private Law*, *supra* note 177, at 57.

214. See Katz, Note, *Reputations*, *supra* note 6, at 202 ("Given the vast universe of conduct this definition [of morality] might encompass, non-talent had exceedingly broad latitude to determine when talent's conduct failed to meet the standard set by the contemporaneous society.").

215. See Kressler, *Using the Morals Clause*, *supra* note 6, at 245 ("Determining whether an express morals clause is breached is a question of fact dependent upon the wording of the morals clause and the conduct at issue.").

216. See *supra* notes 185–190 and accompanying text (defining types of morality clauses and the broad conduct they seek to regulate).

217. See Kressler, *Using the Morals Clause*, *supra* note 6, at 246 (highlighting that under California and New York law, a breach of an express morals clause is proper when an "actor's conduct is viewed by a large segment of the public as shocking, insulting or offensive").

218. See *Jacobellis v. Ohio*, 378 U.S. 184, 187 (1964) ("We are told that the determination whether a particular motion picture, book, or other work of expression is obscene can be treated as a purely factual judgment on which a jury's verdict is all but conclusive . . .").

219. See JULIA LANE, VICTORIA STODDEN, STEFAN BENDER & HELEN NISSENBAUM, *PRIVACY, BIG DATA, AND THE PUBLIC GOOD* 9 (2014) (clarifying that privacy law in the realm of intrusion upon seclusion and the public disclosure of private facts is a factual determination based on the activities of "both subjects and acquirers of personal information").

(emotional distress cases).<sup>220</sup> In the case of Reputational Impact clauses, the assessment of a breach often depends on public perception and awareness, which is less subjective but no less slippery a concept.<sup>221</sup>

For instance, in the 2012 case of *Mendenhall v. Hanesbrands*,<sup>222</sup> a North Carolina district court had to determine if an athlete's tweets plausibly caused sufficient uproar to cancel an endorsement deal.<sup>223</sup> There, former Pittsburgh Steelers running back Rashard Mendenhall entered into an agreement with clothing manufacturer Hanesbrands, Inc., in which he promised to promote the company's athletic apparel branded Champion Apparel.<sup>224</sup> The agreement included the following clause:

If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence . . . tending to bring Mendenhall into public disrepute, contempt, scandal, or ridicule, or tending to shock, insult or offend the majority of the consuming public or any protected class or group thereof, then [Hanes] shall have the right to immediately terminate this Agreement.<sup>225</sup>

Mendenhall was an active user of the social media platform, Twitter, where he commonly expressed views on many issues ranging from Islam to parenting.<sup>226</sup> At one point he even compared the NFL to the slave trade.<sup>227</sup> Hanesbrands never commented on Mendenhall's tweets, nor did it ask him to limit his controversial comments.<sup>228</sup> When President Barack Obama announced the death of Osama bin Laden, Mendenhall posted

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220. See Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1735, 1741 (1985) (discussing that causation in tort law is a factual inquiry).

221. See Katz, Note, *Reputations*, *supra* note 6, at 214–15 (“The Court of Arbitration for Sport (CAS) . . . has defined bringing a person into disrepute as lowering the reputation of the person in the eyes of ordinary members of the public to a significant extent.” (internal quotation marks omitted)).

222. 856 F. Supp. 2d 717 (M.D.N.C. 2012).

223. See *id.* at 727–28 (denying Hanesbrands' motion for summary judgment and finding that there was a dispute of facts that existed between the parties to the public's response to Mendenhall's tweets).

224. *Id.* at 719.

225. *Id.* at 720.

226. *Id.*

227. *Id.*

228. *Id.*



various comments on Twitter.<sup>229</sup> One such tweet read, “What 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.”<sup>230</sup>

Within two weeks, Hanes terminated Mendenhall’s agreement pursuant to the morality clause and issued a statement on ESPN that it did not agree with his controversial, but legitimately-held, beliefs.<sup>231</sup>

Mendenhall brought a claim for breach of contract, and Hanes later moved for judgment on the pleadings.<sup>232</sup> Interpreting the clause narrowly, the court concluded that Mendenhall could be terminated only if he created a public scandal, as specified by the agreement.<sup>233</sup> Because the pleadings alone did not establish any actual scandal and even included facts suggesting that the comments garnered some positive responses, the court denied Hanes’s motion.<sup>234</sup> However, in ruling as such, the court simply found that discovery was necessary to determine whether Hanes could prove that Mendenhall’s statements did create a scandal.<sup>235</sup> The parties settled prior to any further ruling.<sup>236</sup>

If employers and other contracting parties are given unlimited discretion to interpret broad, all-encompassing morals clauses, they could quite easily use these clauses to terminate an economically disappointing relationship under the pretense of moral objection. Consider a situation in which a company enters into a two-year contract with an independent marketing consultant, hoping for a large increase in profits. Therein, the consultant agrees to a broad morality clause prohibiting, among other things, “all behavior likely to offend the company’s

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229. *Id.* at 720–21.

230. *Id.* at 721.

231. *Id.*

232. *Id.* at 719.

233. *Id.* at 726.

234. *Id.*

235. *Id.* at 727–28.

236. 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/#16a1021c6c87> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review)

customers.” Although the consultant performs as promised, after six months, the company realizes that returns have been modest. The company subsequently discovers that the consultant recently made an insensitive comment regarding affirmative action on an online political forum. Should the retailer now be entitled to terminate the agreement? And should the law permit contract language that is so clearly ripe for abuse? That is, with such unlimited discretion to terminate an agreement, has the contracting party really bound itself to anything at all? Situations like these illustrate the lack of predictability surrounding the broadly-drafted morality clauses seen in so many modern agreements.<sup>237</sup> In this way, such clauses essentially grant a blank check for abuse by the imposing party.<sup>238</sup>

### *C. Concerns of Free Speech and Expression*

Broad morality clauses chill speech and free expression,<sup>239</sup> particularly when applied expansively through all levels of employees and corporate partners. And these repercussions could be significant.<sup>240</sup> If all of the Fortune 500 companies were to bind their employees and agents to morality clauses, the speech and behavior of over 17% of the nation’s workforce would be constrained and controlled.<sup>241</sup> At first blush, forcing almost a fifth

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237. See *supra* notes 167–171, 191 and accompanying text (observing the growing trend of morality clauses in employment contracts).

238. See *supra* notes 140–141 and accompanying text (contending that broad morality clauses give employers the right to unilaterally terminate an employment contract).

239. See 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) (“Employer 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 . . .”).

240. See Marka B. Fleming, Amanda Harmon Cooley & Gwendolyn McFadden-Wade, *Morals Clauses for Educators in Secondary and Postsecondary Schools: Legal Applications and Constitutional Concerns*, 2009 BYU EDUC. & L.J. 67, 67–68 (noting that discipline for violation of a morality clause by a teacher can result in suspension or revocation of a teaching certificate).

241. Claire Zillman & Stacy Jones, *7 Fortune 500 Companies with the Most Employees*, FORTUNE (June 13, 2015, 10:00 AM), <http://fortune.com/2015/06/13/fortune-500-most-employees/> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

of the country to behave in accordance with the prevailing social norms would not be harmful. However, the consequences can be ill and far-reaching.

If the clauses used in the hypothetical were Bad Behavior clauses, 17% of American workers would then be required to keep both their on and off-duty actions in line with the undefined and ever-changing public morals and social norms.<sup>242</sup> A large portion of the populous would thus be held to perpetual, innocuous boardroom behavior. The result would be widespread uniformity and a significant reduction of free expression and challenges to the status quo. Similarly, if those same businesses imposed Reputational Impact clauses, employees would all need to refrain from offending the community at large.<sup>243</sup> One could therefore expect the same result under either clause, both of which would essentially serve as a ban on unpopular speech.<sup>244</sup>

To be clear, most American workers are employed on an at-will basis outside of any express contract.<sup>245</sup> The at-will doctrine relies on the assumption that absent a contract specifically stating otherwise, an employment relationship is mutually consensual, and an employee may resign or be terminated at any time for any or no reason without liability to either party, unless an enumerated statutory or judicially-created exception applies.<sup>246</sup> Courts have long examined cases in which

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242. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 352 (arguing that morality clauses are largely governed by the prevailing societal values at the time).

243. See Katz, Note, *Reputations*, *supra* note 6, at 213–19 (discussing how Reputational Impact morality clauses usually ban conduct by an employee that brings disrepute as perceived in the public eye to a company).

244. See Fleming, Cooley & McFadden-Wade, *supra* note 240, at 89 (specifying that the freedom of speech is implicated in cases enforcing morals clauses on teachers).

245. See *The At-Will Presumption and Exceptions to the Rule*, NAT'L CONF. ST. LEGISLATURES, <http://www.ncsl.org/research/labor-and-employment/at-will-employment-overview.aspx> (last visited Mar. 4, 2017) (“Employment relationships are presumed to be ‘at-will’ in all U.S. states except Montana.”) (on file with the Washington and Lee Law Review).

246. See Stanley J. Brown & Henry Morris, Jr., *Employment at Will*, 10 DISTRICT LAW. 42, 42 (1985) (mentioning that “[u]nder the traditional ‘employment-at-will’ doctrine, employers had an absolute right to terminate their employees absent violation of a statute” and further noting that many state courts have recently found exceptions to the “at-will” rule).

at-will employees seek relief for termination based on their speech, and those courts have generally found that free speech protection is guaranteed only from government and not private employers.<sup>247</sup> With regard to employees under contract, however, a morality clause should not serve as a “get out of jail free card,” turning a contractual relationship into at-will employment<sup>248</sup> and here, courts should consider how the unfettered use of broad morality clauses can significantly chill free expression.

Admittedly, some states do already impose some limits on how much an employer can intrude on the off-duty actions of an employee.<sup>249</sup> For instance, sixteen states and the District of Columbia have enacted statutes prohibiting employers from punishing employees for off-duty tobacco use.<sup>250</sup> Meanwhile, eight states protect employees’ use of any legal products, and four states protect all legal off-duty activities.<sup>251</sup> However, these latter

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247. See *Griffith v. Bell-Whitley Cmty. Action Agency*, 614 F.2d 1102, 1110 (6th Cir. 1980) (applying Kentucky law to dismiss employee’s claims against their employer when they were discharged for opposing the election of a certain individual as the agency’s executive director); *Korb v. Raytheon Corp.*, 574 N.E.2d 370, 372–73 (Mass. 1991) (concluding that an employee’s free speech rights did not protect him from discharge when he spoke out against his company’s economic interests); *Shovelin v. Cent. N.M. Elec. Coop., Inc.*, 850 P.2d 996, 1009–10 (N.M. 1993) (finding that an employer did not violate an employee’s free speech rights when it terminated him for running for local office); Charles Glick, Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 525–26 (1982) (pointing out that neither the common law nor statutes provide freedom of speech protections for employees). *But see* *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 898–99 (3d Cir. 1983) (administering Pennsylvania law to find that when an employer terminated an employee for refusing to lobby state congress in favor of no-fault insurance reform, the employee could establish a case for wrongful discharge, as the termination violated a recognized public policy created by the First Amendment).

248. Even with regard to at-will employees, an employer may be bound to the terms of a morality clause included in an employee handbook or code of conduct. See Levy, *Judicial Interpretation*, *supra* note 209, at 696 (explaining that the terms of an employee handbook can form an implied contract between an employer and an employee).

249. See Kayleigh McNelis, *Off-Duty Statutes and Social Media: The Need for Protection Regardless of Whether Speech Is Concerted*, 33 REV. LITIG. 219, 237–42 (2014) (listing and analyzing states that have off-duty statutes that protect employees).

250. *Id.* at 237.

251. *Id.*

statutes are drafted somewhat vaguely and have been applied quite narrowly.<sup>252</sup>

As to speech specifically, the National Labor Relations Board has held that concerted complaints about an employer (those made with an intention to enact change) on social media may be protected.<sup>253</sup> Thus, an employer may not make a broad rule prohibiting all negative speech against an employer, which would necessarily include protected concerted activity.<sup>254</sup> The problem with these limited protections, however, is that they do little to protect employees and other contracting parties from the potential abuses discussed above.<sup>255</sup> Essentially, unless the employee is protesting her employer<sup>256</sup> or smoking a cigarette,<sup>257</sup> she is on her own.

#### *D. Bargaining Power and Unilaterality*

The typical justification for a morality clause is preventative: businesses want to avoid any situation in which their associates embarrass them or tarnish their products.<sup>258</sup> Additionally, in such an event, they want a solid justification to terminate the

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252. See *id.* at 240–42 (noticing that a New York court interpreted their off-duty statute narrowly and that Colorado’s off-duty statute is overly vague).

253. See *id.* at 229 (“In recent years, the NLRB has extended further protection to employees making online comments about work.”).

254. See *id.* at 226–27 (declaring that the NLRA restricts an employer’s right to restrict an employee’s concerted speech efforts).

255. See Fleming, Cooley & McFadden-Wade, *supra* note 240, at 67–68 (“In general, morals clauses in employment contracts allow an employer to terminate employment when an employee’s conduct is potentially detrimental to the employer’s interest.”).

256. See McNelis, *supra* note 249, at 227 (“[T]he employer must ensure the company’s social media policy is carefully crafted to prevent discriminatory conduct and unauthorized revelations without ‘chilling’ speech to which employees have a right under the NLRA.”).

257. See *id.* at 237 (writing that a certain level of protection is offered to employees in states that have off-duty statutes that prevent employers from discriminating against the use of tobacco).

258. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 352 (“The underlying purpose of a morals clause in an agreement is to protect the contracting company . . .”).

offending associate—whether it is an employee, an independent contractor, or a business partner.<sup>259</sup>

Nonetheless, the ambiguous nature of many morality clauses combined with their presentation in the context of unequal bargaining power may lead to situations in which the weaker party accepts without knowing the boundaries of the prohibited behavior or, perhaps more commonly, accepts without knowing the implications or intended enforcement of the clause.<sup>260</sup> Research in the area of non-competes suggests that the overwhelming majority of employees blindly accept employment restrictions without front-end negotiation or understanding of their potential implications.<sup>261</sup> The same is likely true for morality clauses, whose inherent ambiguity lends them to confusion.

Moreover, most morality clauses do not provide a mutuality of obligation.<sup>262</sup> In the majority of clauses canvassed, the business imposed a duty on the other contracting party, but the duty to be moral, or more specifically, the duty to refrain from embarrassing was not reciprocal.<sup>263</sup> Consider a situation in which a business is tainted by massive recall or a corporate scandal. It is foreseeable

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259. See ZWEIG, *supra* note 141 (divulging that morality clauses usually allows the employer to unilaterally terminate a contract if an employee's acts in a way that damages the employer).

260. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 352 (unveiling that morality clauses are highly subjective).

261. See OFFICE OF ECON. POLICY, U.S. DEP'T OF THE TREASURY, NON-COMPETE CONTRACTS: ECONOMIC EFFECTS AND POLICY IMPLICATIONS 13 (2016), <https://www.treasury.gov/resource-center/economic-policy/Documents/UST%20Non-competes%20Report.pdf> (“[O]nly 10% of workers with non-competes report bargaining over their non-compete, with 38% of the non-bargainers not realizing that they could even negotiate.”).

262. See 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-see-morals-clause-mutuality> (last visited Mar. 4, 2017) (asserting that with the rise of corporate scandals high-profile people should seek a reverse morals clause) (on file with the Washington and Lee Law Review).

263. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 6, at 353–57 (outlining various contracts with morality clauses). *But see* Taylor, III. et al., *The Reverse-Morals Clause*, *supra* note 6, at 80 (clarifying that in some high-profile agreements, individuals have negotiated for “reverse-morals clauses,” protecting them from the bad actions of the company, but these clauses are less common than traditional morality clauses and likely require high bargaining power).

that an endorser or even an employee would want to sever ties with the company based on its diminished reputation.<sup>264</sup> In most morality clauses today, a company can terminate an agent for bad behavior, but the individual cannot do the same.<sup>265</sup> As a result, the stronger parties benefit from morality clauses in that they can control the other party's behavior and terminate for a broad and vague range of reasons, but the other party receives no benefit.<sup>266</sup>

Due to the lack of mutuality, many morality clauses, standing alone, may be void for lack of consideration.<sup>267</sup> Consideration may also be lacking when the clause contains a promise to perform an existing legal obligation, or to forgo illegality.<sup>268</sup> The pre-existing duty rule holds that a promise to do what one is legally obligated to do is not valid consideration.<sup>269</sup> The rule is grounded in the notion that courts will not suppose that the promisor had any alternative but to conform to the law, and that therefore his promise to do so involves no detriment or forbearance.

### *E. Privacy Rights*

By their very nature, Bad Behavior clauses restrict some legal acts that are deemed private.<sup>270</sup> Assessing their breach will

264. See Herzfeld, *supra* note 262 (highlighting several examples of corporate scandals).

265. See *id.* (setting forth that there is a need for reverse morality clauses in which a high profit person can hold a company accountable for immoral behavior).

266. See Epstein, *An Exploration of Interesting Clauses in Sports*, *supra* note 6 at 75 (“[A] morals clause allows the contracting company to swiftly sever its relationship with troublesome talent . . .”).

267. See RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. LAW INST. 1981) (instructing that the formation of a contract requires an exchange of consideration).

268. See *id.* § 73 (“Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration . . .”).

269. See Edwin W. Patterson, *An Apology for Consideration*, 58 COLUM. L. REV. 929, 938 (1958) (“The rule that the consideration for a promise cannot be legally sufficient if it consists merely of the performance of, or a promise to perform, a pre-existing contractual duty to a third person is likewise indefensible as a part of the doctrine of consideration.”).

270. See Czarnota, *supra* note 6, at 461–62 (discussing implicit waiver of

also necessarily involve intrusion into the subject's private life.<sup>271</sup> Did the athlete commit adultery? Did the employee post a racist meme on his private Facebook page? Did the donor have a substance abuse problem?

Although the spirit of morality clauses prevents the ill-effects of a negative association, on their face many Bad Behavior clauses prohibit off-duty conduct and speech regardless of ensuing public impact.<sup>272</sup> It is not inconceivable that an employer, acting on rumor or suspicion or nothing at all, could peer into the private life of an employee to search for something "objectionable" to toll the morality clause. Recall the use of social media background checks discussed above.<sup>273</sup> In light of the breadth of most morality clauses, he who seeks will likely find some skeleton to trigger the morality clause in most cases. Allowing powerful contracting parties—especially employers—unfettered access into the lives of others is unsound policy.

Reputational Impact clauses, on the other hand, may be less invasive because they are premised on the notion that the offending act is public or otherwise known. This will certainly affect non-public figures more than public ones, as the law is clear that anything that occurs in the public eye is not private. At least one scholar has argued that it is an open question whether traditionally-worded morality clauses contain an implicit waiver of privacy rights.<sup>274</sup>

Although they purport to limit immoral behavior and protect reputation—which at first glance are good things—morality clauses can be socially harmful and should be duly scrutinized. The following section offers a framework for their analysis that balances their legitimate justifications against their potential for abuse.

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privacy rights by athletes).

271. See *id.* at 462 (considering public prying into personal lives of athletes).

272. See Katz, Note, *Reputations*, *supra* note 6, at 209–11 (describing the exceedingly low bar required to breach a morals requirement).

273. See *supra* Part II.B.2 (discussing social media background checks).

274. See *id.* at 471 (noting it remains unsettled whether morality clauses carry express or implied waivers of privacy).



#### IV. A Model Test for Morality Clauses

Scrutiny of morality clauses will necessarily involve a two-step determination. First, courts should analyze the clause itself to see if it is enforceable. Morality clauses might be deemed unenforceable for vagueness, lack of consideration, duress, or any other contract fault.<sup>275</sup> We contend that they should also be vetted for public policy considerations, such as restraint on legal speech and the burden on the promisee. Second, courts must determine whether, in the case of an otherwise enforceable morality clause, such clause was violated by the acts of the allegedly offending party. This is a highly subjective assessment, involving a keen understanding of dominant mores, the impact (or foreseeability of the impact) of the offending behavior, and the terminating party's true intent.

Because the determination of the validity and applicability of morality clauses is fraught with legal, normative, and moral issues, we offer a factored approach to their analysis. The following five factors will guide courts in establishing the enforceability and fair disposition of morality clause cases.<sup>276</sup> Each factor, as well as the rubric's structure, is influenced by well-established legal tests in other comparable areas, such as employment law, the law of non-competes, intellectual property law, and psychology. Employment law informs the proper balancing of employer and employee rights with regard to employee off-duty behavior. The common law limitations on restraints of trade provide a relevant logic and structure in assessing morality clauses.<sup>277</sup> Finally, concepts borrowed from trademark law and psychology instruct on the reasonableness of associations between an individual and a business or product.<sup>278</sup>

Like other legal factor tests, we propose that each factor is assessed on a sliding scale. Although the preponderance of factors can be determinative, a sliding scale approach allows for

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275. See RESTATEMENT (SECOND) OF CONTRACTS §§ 33(2), 71, 174–77 (AM. LAW INST. 1981) (identifying foundational principles of contracts).

276. See *infra* Part IV (outlining a five-factor test).

277. See *infra* Part IV.C (comparing to non-compete agreements).

278. See *infra* Part IV.B (relating brand association of trademarks to brand associations with immoral behavior).

increased reliance on a single factor at the discretion of the courts.

The following framework submits that a valid morality clause must be justified by a business interest and that there must be a reasonable connection in the public's minds between the restricted party and the imposing party.<sup>279</sup> A strong public association between the individual and the business can legitimize a morality clause; a weak one should not. We propose a practicable standard for its measure. Next the test considers the scope and definiteness of the restriction, with the logic that contracting parties should be aware of the behavior that will toll the clause's termination rights.<sup>280</sup> A third factor explores the impact of the offending behavior to study whether a termination is warranted and in good faith.<sup>281</sup> Finally, the rubric gauges the burden on the contracting party.<sup>282</sup> A contract restricting legal rights and speech should be carefully balanced against the business's rights and take into account the mutuality of the obligation and the role and relative bargaining power of the parties.

#### *A. Nexus Between Misconduct and Business Interest*

A basic tenet of agency law is that the nature of the business and the position of the agent determine what conduct can be expected from him.<sup>283</sup> It follows that a morality clause should be reasonably tailored to protect a legitimate interest or mission of the business. Of course, every business has a general interest in maintaining a good reputation. While reasonable, this alone should not be enough to restrict the legal behavior and speech of

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279. For purposes of clarity, our framework will use the term "imposing party" to refer to the party the morality clause is designed to protect, usually a business. We will use the term "restricted party" to refer to the party whose behavior is controlled by the clause, usually an individual. While these terms are not commonplace in the law, their use will avoid confusion here.

280. See *infra* Part IV.C (considering the scope of definiteness requirement).

281. See *infra* Part IV.D (discussing impact of offending behavior).

282. See *infra* Part IV.E (considering burden upon restricted party).

283. See RESTATEMENT (SECOND) OF AGENCY § 380 cmt. a (AM. LAW INST. 1958) ("The nature of the business and the position of the agent determine . . . what conduct can be expected from [the agent].").

its agents. Businesses seeking the enforceability of their morality clauses should further justify the nexus between the misconduct and their business interest or mission.

Our proposed nexus requirement is consistent with the standards reflected in state wrongful discharge statutes and federal government employment.<sup>284</sup> While these laws do not involve private contracts and the federal rules do not govern the private sector, their spirit, which is to prevent capricious and pretextual acts, is instructive.<sup>285</sup>

Some employment-at-will states have wrongful discharge statutes to protect employees from being fired for legal, off-duty conduct that is unrelated to their job.<sup>286</sup> Similarly, the federal government prohibits removal from a civil service position where private misconduct does not implicate “official responsibilities in any direct and obvious way.”<sup>287</sup> A federal agency may remove an employee “only for such cause as will promote the efficiency of the service.”<sup>288</sup> Before removing an employee for off-duty misconduct, an agency must make two determinations: (1) that the employee actually committed the conduct; and (2) that removal will promote the efficiency of the service.<sup>289</sup> The agency must show

284. See, e.g., 5 U.S.C. § 7513(a) (2012) (“[A]n agency may take action . . . against an employee only for such cause as will promote the efficiency of the service.”); COLO. REV. STAT. § 24-34-402.5 (2016) (requiring relation to a bona fide occupational requirement).

285. See, e.g., 5 U.S.C. § 7513(a) (2012) (omitting private contracts); COLO. REV. STAT. § 24-34-402.5 (same).

286. By way of example, Colorado statute provides:

(1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee’s engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction: (a) Relates to a bona fide occupational requirement or is reasonably and rationally related to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or (b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

COLO. REV. STAT. § 24-34-402.5 (2016).

287. *Brown v. Dep’t of the Navy*, 229 F.3d 1356, 1360 (Fed. Cir. 2000).

288. 5 U.S.C. § 7513(a) (2012).

289. *Sherman v. Alexander*, 684 F.2d 464, 468 (7th Cir. 1982) (citing *Young v. Hampton*, 568 F.2d 1253, 1257 (7th Cir. 1977)).

that the off-duty conduct has some connection to the employee's or agency's overall performance.<sup>290</sup> To determine whether such nexus exists, courts and arbitrators focus on (1) harm to an employer's reputation or product, (2) the ability of an offending employee to perform assigned duties or to appear at work, or (3) the refusal or reluctance of other employees to work with the person charged with off-duty misconduct.<sup>291</sup> Cases are the hardest when a good, low-level employee does something off-duty of which the employer disapproves.

Reported cases add flesh to these rules. Where there is little connection between the agency's mission or the job description and the misconduct, courts generally reject discharges for off-duty conduct. In one case, a NASA employee who was fired for homosexual off-duty conduct was reinstated because the record established no "ascertainable deleterious effect on the efficiency of the service."<sup>292</sup> In another, a court found that the Postal Service's dismissal of a letter carrier after his conviction of possession of a small amount of illegal drugs in no way affected his job.<sup>293</sup> Courts have even required a nexus in cases involving grossly immoral conduct. In one case the Navy dismissed a civilian diesel mechanic with strong on-the-job performance after his conviction of child molestation.<sup>294</sup> The Navy contended that, even though it had not been a source of notoriety or public shame, the former employee's behavior dampened the Navy's "confidence in his judgment" and cast doubts on his moral standards.<sup>295</sup> In finding insufficient nexus, the Ninth Circuit concluded that "[c]onclusory statements of distrust fall far short of the

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290. *See id.* ("The nexus determination requires a showing of 'that vital connection between the employee's complained of activities and some identifiable detriment to the efficiency of the service . . . .'").

291. Carlton J. Snow, *The Long Arm of the Boss: Employee Off-Duty Conduct and the Reputation of the Employer*, 15 LERC MONOGRAPH SER. 9, 12 (1998) [hereinafter Snow, *The Long Arm of the Boss*] (citing W.E. Caldwell Co., 28 Lab. Arb. 434 (1957)).

292. Norton v. Macy, 417 F.2d 1161, 1165 (D.C. Cir. 1969).

293. *See* Grebosz v. U.S. Civil Serv. Comm'n, 472 F. Supp. 1081, 1089 (S.D.N.Y. 1979) ("[The employer] has failed to offer any evidence whatsoever that its discharge of [employee] will promote the efficiency of the service.").

294. D.E. v. Dep't of the Navy, MSPB, 721 F.2d 1165, 1165 (9th Cir. 1983).

295. *Id.* at 1169.

substantial evidence required to remove” the employee.<sup>296</sup> A Fifth Circuit case with similar facts reached the same conclusion: A postal worker charged with indecency with a child kept his job because it did not involve interaction with children and the agency could not prove more than the generalized reprehensibility of the conduct.<sup>297</sup>

Courts reach a different conclusion in cases in which the offending conduct undermines the mission of the agency. The Federal Circuit found that the Marine Corps was justified in firing a recreational manager for having an affair with a serviceman’s wife.<sup>298</sup> Since the manager’s job involved supporting military personnel and their families, his off-duty misconduct, although personal, affected the very mission of his division and lessened the confidence that departing military spouses might have in the program.<sup>299</sup> The Seventh Circuit determined that the Department of Housing and Urban Development (“HUD”) could legitimately fire an otherwise effective employee who was a known slumlord.<sup>300</sup> In a commonsensical evaluation arguing that behavior inconsistent with mission justifies termination, Judge Posner stated as follows:

If an employee of a manufacturer of safes moonlighted as a safe cracker, his days as an employee of that manufacturer would be numbered, even if he scrupulously avoided cracking safes manufactured by his employer. If an officer of a musicians’ union owned a nightclub that employed non-union musicians, because their wages were lower, his days as an employee of the union would be numbered. A customs officer caught smuggling, an immigration officer caught employing illegal aliens, an IRS employee who files false income tax returns, a HUD appraiser moonlighting as a “slumlord”—these are merely the public counterparts of a form of conflict of interest that is not less serious for not being financial, that would not be tolerated in the private sector, and that we do not believe Congress meant to sanctify in the public sector.<sup>301</sup>

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296. *Id.*

297. *Bonet v. U.S. Postal Serv.*, 661 F.2d 1071, 1079 (5th Cir. 1981).

298. *Brown v. Dep’t of the Navy*, 229 F.3d 1356, 1364 (Fed. Cir. 2000).

299. *Id.* at 1363.

300. *Wild v. U.S. Dep’t of Hous. & Urban Dev.*, 692 F.2d 1129, 1134 (7th Cir. 1982).

301. *Id.* at 1133.

Measuring the nexus between the nature of the misconduct and the business interest or mission is easiest when the interest or mission is definite. A law firm has a business interest in ensuring that its lawyers do not embezzle client funds or cheat the government. However, it has less of a business interest in meddling into the extramarital affairs of its lawyers because absent an office scandal, the nexus is significantly attenuated.

*B. Degree of Meaning Transfer: What is the Likelihood of Association?*

Not every agent has the same degree of representative power. In assessing the fairness and enforceability of a morality clause, courts should examine the degree that the agent is or can be associated with the business in the minds of the public. We referenced this theory above as “meaning transfer,”<sup>302</sup> or the attachment and flow of cultural meanings from one person to a product or organization.<sup>303</sup> An individual with little or no public association with a business is unlikely to have the power to publicly shame it. In this case, restrictions on off-duty conduct are less justifiable.

We can measure the degree of association by borrowing a tenet of trademark law. Like morality clauses, trademark law looks to protect a business’s established goodwill and reputation from those who may tarnish it.<sup>304</sup> Trademark law assesses infringement by asking “what is the likelihood of consumer confusion?”<sup>305</sup> Here, we may determine the legitimacy of the morality clause by asking “what is the likelihood of consumer association?” That is, would the consuming public associate the individual and his off-duty antics with the business? A high likelihood of consumer association is direct evidence of a protectable business interest in reputation and also indicative of

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302. McCracken, *Culture and Consumption*, *supra* note 38, at 71–84.

303. *See supra* Part II.B (discussing meaning transfer).

304. *See* Eric A. Prager, *The Federal Trademark Dilution Act of 1995: Substantial Likelihood of Confusion*, 7 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 121, 124 (1996) (discussing the purpose of trademark protections).

305. *See id.* at 122–23 (discussing consumer confusion and trademark law).

the potential negative impact of the misconduct. We elucidate with categorization and examples.

In a class by themselves are professions with inherent morality requirements, which the public recognizes. Individuals charged with the care of children, money, and the public trust have a heightened morality requirement implicit in their professional duties; they are caretakers and must demonstrate good sense and judgment.<sup>306</sup> Journalists must maintain the appearance of neutrality.<sup>307</sup> Lawyers, judges, and police officers must respect the law. Religious leaders must practice what they preach.<sup>308</sup> Simply put, the misdeeds of those in certain professions are subject to higher public scrutiny because of their inherent symbolism, whether or not they are public figures. Judges represent the law as preachers represent the church. A rupture in any of these social performances diminishes the effectiveness of the individual and casts a negative light on both the associated establishment and the general institution.<sup>309</sup>

Endorsement or sponsorship relationships are another category of a heightened consumer association, as their very purpose is to create a positive meaning transfer. Athletes, artists, and other celebrities entering into these agreements are sophisticated contracting parties with high degrees of bargaining power and representation.<sup>310</sup> It is worth noting that endorsement relationships can also be found in company to company agreements. For instance, before the 2002 Winter Olympic Games, several corporate sponsors of the global event voiced

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306. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983) (requiring competent representation by attorneys); *AICPA Code of Professional Conduct*, AICPA, <http://www.aicpa.org/Research/Standards/CodeofConduct/Pages/default.aspx> (last visited Mar. 4, 2017) (describing professional standards for accountants) (on file with the Washington and Lee Law Review).

307. See *SPJ Code of Ethics*, SOCIETY OF PROFESSIONAL JOURNALISTS, <https://www.spj.org/pdf/ethicscode.pdf> (promoting fair and honest reporting practices).

308. See, e.g., MODEL RULES OF PROF'L CONDUCT r. 8.3 (AM. BAR ASS'N 1983) (requiring attorneys to not engage in criminal activity).

309. See Donald Nicolson, *Mapping Professional Legal Ethics: The Form and Focus of the Codes*, 1 LEGAL ETHICS 51, 52–53 (1998) (discussing the role and motivations for adopting professional codes).

310. See Robert S. Adler & Elliot M. Silverstein, *When David Meets Goliath: Dealing with Power Differentials in Negotiations*, 5 HARV. NEGOT. L. REV. 1, 23 (2000) (identifying celebrity status as a form of power in negotiation).

concerns regarding a prior bribery scandal.<sup>311</sup> As a result, those sponsors and the International Olympic Committee included morality clauses in each of their agreements.<sup>312</sup>

Other relationships carrying associative power are less clear, perhaps because their representative role is secondary to other duties. A CEO, for example, runs a company but also often serves as its public face.<sup>313</sup> A particularly charismatic or famous executive (like Martha Stewart, Lee Iacocca, or the late Steve Jobs) becomes synonymous with her or his company. An on-air personality's primary role is to entertain or report, but he can also be said to represent his employer. Recall the case of baseball analyst Curt Schilling, who was fired from ESPN for sharing an offensive photo about transgender people on Facebook.<sup>314</sup> Similarly, board members and major donors, when public, have the potential of high meaning transfer. Cases abound in which donations have been returned or naming rights revoked in fear of a negative association.<sup>315</sup>

Finally, there is the lowest level of meaning transfer: the low-profile agent. Businesses may legitimately have an interest in ensuring the decent, lawful behavior of all of their employees to ensure a good culture or to avoid negative press. However, when the behavior restriction constrains the legal off-duty conduct of agents with low meaning transfer, it may not be justifiable because there is a negligible foreseeable impact on the

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311. See Pinguelo & Cedrone, *Morals? Who Cares About Morals?*, *supra* note 3, at 366 (discussing bribery concerns).

312. See *id.* at 366 (discussing inclusion of morality clauses).

313. See Z. Jill Barclift, *Corporate Governance and CEO Dominance*, 50 WASHBURN L.J. 611, 612 (2011) (discussing charismatic and dominant CEO figures).

314. Sanomir, *Curt Schilling*, *supra* note 122 and accompanying text.

315. Seton Hall University named buildings and funds after Dennis Kozlowski, former CEO of Tyco International. In 2005, Kozlowski was convicted of grand larceny, conspiracy, securities fraud, and falsifying business records. Kozlowski voluntarily accepted the removal of his name, suggesting the presence of a morality clause. Similarly, prior to the Enron scandal, the University of Missouri named an economics chair position after Enron Executive Kenneth Lay in exchange for a large donation of Enron stock. The University subsequently removed his name from the position. See Adam Scott Goldberg, *When Charitable Gift Agreements Go Bad: Why a Morals Clause Should Be Contained in Every Charitable Gift Agreement*, 89 FLA. BAR J. 48, 49 (2015) (discussing the return of charitable gifts).



business's reputation. In other words, if the public does not associate a disgraced individual with his company, his bad behavior or its fallout should not be grounds for dismissal. This is necessarily a fact- and context-specific analysis because depending on the circumstances, agents at all levels can have representative power. Consider the fast food worker who appears in a shocking YouTube video in company uniform, or the delivery driver identified as a company employee in news reports detailing his drug arrest.<sup>316</sup>

### *C. The Scope and Definiteness of the Restrictive Clause*

Next, an enforceable morality clause should be sufficiently narrow and definite so as to allow a party to predict with reasonable certainty what conduct will trigger the clause. As discussed above, to be enforceable, a contract must be reasonably definite in its terms.<sup>317</sup> Beyond this relatively low standard, when a particularly restrictive clause is involved, there is a general interest in ensuring that parties have the ability to actually understand what it is they are agreeing to. For example, courts generally require that exculpatory clauses meet a higher level of clarity to be enforceable.<sup>318</sup> Likewise, in inspecting a morality clause, a party should be able to reasonably predict what conduct would violate the agreement.

A problem arises, however, when the majority of morality clauses are drafted very broadly and give the imposing party the power to interpret the clause. Recall the Los Angeles County morality clause, which prohibits any behavior that would “be an embarrassment to the County.”<sup>319</sup> The handbook gives no

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316. Snow, *The Long Arm of the Boss*, *supra* note 291, at 13–14 (citing Delta Beverage Group, Inc. and General Truck Drivers, Chauffeurs, Warehousemen and Helpers, Teamsters Local 270, 96 LA 454 (1991)).

317. See RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (AM. LAW INST. 1981) (requiring a contract to have reasonably definite terms).

318. See Mark Seiberling, “Icing” on the Cake: Allowing Amateur Athletic Promoters to Escape Liability In *Mohney v. USA Hockey, Inc.*, 9 VILL. SPORTS & ENT. L.J. 417, 429 (2002) (explaining the high level of scrutiny placed on exculpatory clauses by courts).

319. CTY. OF LOS ANGELES, EMPLOYEE HANDBOOK 16 (2003), [http://file.lacounty.gov/lac/cms1\\_113484.pdf](http://file.lacounty.gov/lac/cms1_113484.pdf).

direction as to what type of behavior would embarrass the county. Would commissioners be embarrassed by an employee's solicitation of a prostitute? What about an employee's gender reassignment surgery? Would an employee's extramarital affair be an embarrassment? Clauses of such breadth make this determination very difficult, if not impossible.

Further, while public morals are already quickly changing and difficult to follow, the morals of an individual company or supervisor could be even more fleeting. This requires the restricted party to determine at any given time who at the company would make the decision to terminate and whether that particular person would be offended by some certain action. By contrast, a morality clause that is interpreted under a community or reasonable person standard would be more concrete and predictable.

With regard to covenants not to compete, the majority of states have found that to be enforceable, the clause must be "narrowly tailored" to protect a legitimate business interest.<sup>320</sup> Similarly, businesses should be required to draft morality clauses in sufficiently definite terms so as to allow the restricted party to predict violating behavior with relative ease.

### *1. Legal Behavior*

Courts should analyze morality clauses that prohibit legal behavior with higher scrutiny than those that are triggered only by unlawful activity. Simply put, there is minimal public interest in preventing parties from discouraging illegal conduct. Note that as a basic tenant of contract law, a restricted party's promise not to engage in illegal behavior cannot even constitute valid consideration, as he is not giving up any existing rights.<sup>321</sup>

On the other hand, most employees and contracting parties would likely agree that while they are off the clock, their

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320. See Norman D. Bishara, *Fifty Ways to Leave Your Employer: Relative Enforcement of Covenants Not to Compete, Trends, and Implications for Employee Mobility Policy*, 13 U. PA. J. BUS. L. 751, 780 (2011) (discussing the level of specificity required of morality clauses).

321. See Patterson, *supra* note 269, at 938 (discussing clauses concerning illegal behavior).

employer's control over their legal conduct should be greatly limited, if not nonexistent. It is under this rationale that four states have made it unlawful for an employer to terminate an employee based on legal, off-duty conduct.<sup>322</sup> For instance, a California statute broadly prohibits adverse employment action "for lawful conduct occurring during nonworking hours away from the employer's premises."<sup>323</sup> In enacting the law, the California legislature recognized the public policy of "protecting the [civil] rights of individual employees . . . who could not otherwise afford to protect themselves."<sup>324</sup>

Overall, there is considerable worth in upholding the division between the home and the workplace, as employees should generally be free from their employers' restrictions outside of working hours. However, where a morality clause merely prohibits illegal behavior, the policy supporting this division is much more limited.

## 2. Prohibiting Speech

As to morality clauses prohibiting speech, courts should apply a heightened scrutiny. In a difficult economy, the need for gainful employment can make an employee quite willing to give up certain rights. But when a person seeks to surrender a right as paramount as the freedom of speech, public policy supports giving the agreement a closer look.

It is of course true that while the First Amendment protects the free-speech rights of government employees, no such protection exists as to private employees and contractors.<sup>325</sup> This

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322. See McNelis, *supra* note 249, at 238 (discussing state limitation on adverse action based on off-duty conduct).

323. CAL. LAB. CODE § 96(k) (West 2016); see also N.Y. LAB. LAW § 201-d (McKinney 2016) (making it illegal for an employer to terminate an employee based on off-duty political and recreational activities).

324. Marisa Anne Pagnattaro, *What Do You Do When You Are Not at Work?: Limiting the Use of Off-Duty Conduct As the Basis for Adverse Employment Decisions*, 6 U. PA. J. LAB. & EMP. L. 625, 647 (2004) (quoting CAL. LAB. CODE § 98.6 note (West 2003) (historical and statutory notes)).

325. See David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 20 (1998) (noting the lack of free speech protections in private workplaces).

would likely come as a surprise to a great percentage of American workers who believe their freedom of expression is more inclusive.<sup>326</sup> Some legal scholars have gone so far as to argue that First Amendment protections should be extended to employees of corporations.<sup>327</sup>

The policy supporting free speech is especially strong when the speech is political or religious in nature. Regardless of its lack of private protection, the First Amendment still gives valuable insight into the public policy surrounding free speech,<sup>328</sup> and as stated by former Supreme Court Justice Sandra Day O'Connor, “political speech [is] at the core of what the First Amendment is designed to protect.”<sup>329</sup> Accordingly, some states already explicitly recognize this public policy in protecting a private employee’s free speech rights.<sup>330</sup>

It is important to reiterate here that this Article does not argue that the mere fact that a morality clause restricts speech makes that clause invalid. Again, like all factors under this proposed test, the scope of the clause is part of a sliding scale. Still, a broad clause that prohibits significant legal activity and speech, particularly political speech, should slide ever closer towards unenforceability.

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326. See Aaron Kirkland, Note, “*You Got Fired? On Your Day Off?!: Challenging Termination of Employees for Personal Blogging Practices*,” 75 *UMKC L. REV.* 545, 550 n.45 (2006) (citing Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 *CORNELL L. REV.* 105, 133 (1997) (reporting that employees surveyed “reveal[ed] a striking level of misunderstanding among respondents of the most basic legal rules governing the [at-will] employment relationship”).

327. See, e.g., Adam S. Mintz, Note, *Do Corporate Rights Trump Individual Rights? Preserving an Individual Rights Model in a Pluralist Society*, 44 *COLUM. J.L. & SOC. PROBS.* 267, 309 (2011) [hereinafter Mintz, Note, *Do Corporate Rights Trump Individual Rights*] (discussing free speech rights in the private sector).

328. See *Novosel v. Nationwide Ins. Co.*, 721 F.2d 894, 898–99 (1983) (holding that concern for rights of political expression under the First Amendment is sufficient to state public policy applicable to private employers under Pennsylvania law).

329. *Virginia v. Black*, 538 U.S. 343, 365 (2003).

330. Mintz, Note, *Do Corporate Rights Trump Individual Rights*, *supra* note **Error! Bookmark not defined.**, at 273–74.

### *D. Impact of Offending Behavior*

Whether it is worded as a Bad Behavior or a Reputational Impact clause, fairly enforcing a morality clause should require a showing that the offending behavior (a) actually occurred, (b) is known or likely to be known, and (c) is likely to cause damage to the imposing party.<sup>331</sup> We address each assessment in turn.

#### *1. Actual Occurrence*

A grave injustice would ensue if the law allowed for the termination of an agent who was merely the victim of defamation. However, a rumor can cause reputational damage whether true or false—and companies can be quick to the trigger to distance themselves from possible scandal.<sup>332</sup> In the event that credible evidence contradicts allegations of misbehavior, the enforcement of a morality clause is weakened. After all, most morality clauses are premised on the actual happening of the offending event and even in circumstances where a falsity might injure an employer's reputation, it should be assumed that publication of the truth will repair any damage.

#### *2. Known or Likely to be Known*

If a tree falls in the forest and no one is around to hear it, does it make a sound? If a consultant tries cocaine and only his boss knows it, does it affect the business enough to justify termination? The answer to the second question depends in part on the publicity—or the *publicity potential*—of the information. In today's world, this is relatively easy element to prove, as anything posted online for more than one person to see would certainly meet the publicity requirement. Like established principles in defamation law, broad dissemination should not be

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331. See *Infra* Part IV.D (discussing different impacts of immoral employee behavior).

332. See Robert D. Highfill, *The Effects of News of Crime and Scandal upon Public Opinion*, 17 CRIM. L. & CRIMINOLOGY 40, 40–41 (1926) (discussing the impact of scandal on public opinion).

required.<sup>333</sup> Even knowledge spreading to one client can affect a business. Private misbehavior should be beyond the reach of meddling employers, but the more the information spreads, the more likely that it will have a noxious impact on the employer.

### 3. *Likely to Cause Damage to the Imposing Party*

A general morality clause should only be enforceable if the imposing party can prove that the offending behavior caused harm or that reputational harm is reasonably foreseeable given the facts. This is consistent with principles of employment law and with the spirit of most morality clauses.

It is often difficult for imposing parties to prove the negative impact of publicity. In some cases, the terminating party can offer evidence of customer complaints, adverse media coverage, a chorus of backlash on social media, or even a decrease in sales or a boycott. *Mendenhall v. Hanesbrands*, discussed above, involved this quantum of proof.<sup>334</sup> When the company's endorser—a well-known athlete—posted politically unpopular social media comments, Hanesbrands fired him immediately under a Reputational Impact clause giving it the right to terminate for a public scandal.<sup>335</sup> The athlete's arguments defeated the motion for judgment on the pleadings because, while there was evidence that the post offended some, there was also evidence that others supported his thinking.<sup>336</sup> With this in mind, the court held that it was necessary for the company to prove the existence of a verifiable public scandal in order to defeat a claim of breach of good faith and fair dealing.<sup>337</sup>

Given the realities of modern business and communications, requiring the showing of an actual adverse impact is too difficult a burden. Direct proof of adverse reaction or reputational harm is

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333. See DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 519 (2d ed. June 2016 Update) (discussing the elements of a defamation claim).

334. See 856 F. Supp. 2d 717, 720 (2012) (discussing reputational harms from social media postings).

335. *Id.* at 720.

336. *Id.* at 727–28.

337. *Id.*

always difficult to prove. In fact, most employment arbitrators generally reject such a requirement in the federal employment context.<sup>338</sup> Firms should not have to wait for negative consequences before firing an agent who is a ticking time bomb. But how far should a court go in inferring reputational damage?

Weighing the likelihood of disclosure, courts should assess the potential for future adverse impact by asking: If the public discovered the information, would the imposing party's reputation be negatively affected? This analysis hinges on the particular facts of the case and reasonably-based public perception.

### *E. Burden on the Restricted Party*

Finally, in analyzing a morality clause, courts should consider the burden the clause places upon the restricted party, balancing it against the interests of the imposing party. As discussed in detail with regard to scope and definiteness,<sup>339</sup> morality clauses often significantly restrain an employee's or associate's freedom of expression and freedom to engage in other legal activity outside of the workplace. Further, they can blur the already fading line between work and home life, when employees are constantly under the scrutiny of their employers.

#### *1. Parties' Relative Bargaining Power*

An additional concern for restricted parties is their relative lack of bargaining power when considering agreements containing morality clauses, particularly in the employment context.<sup>340</sup> While an employee could theoretically negotiate the terms of her employment to limit or eliminate the clause, in reality, most prospective employees lack such power.<sup>341</sup> As of

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338. Snow, *The Long Arm of the Boss*, *supra* note 291, at 14.

339. See *supra* Part IV.C (discussing scope and definiteness).

340. See Daniel D. Barnhizer, *Inequality of Bargaining Power*, 76 U. COLO. L. REV. 139, 143 (2005) (arguing that courts look to limited circumstances in regards to bargaining power, often failing to consider certain asymmetries like a constructive lack of choice rather than actual lack of choice).

341. *Id.*

early 2017, the U-6 rate (economists' preferred measure for unemployment in the United States) remained at around 9.4%.<sup>342</sup> In most cases today, employment is a buyer's market. While estimates vary, sources have reported that somewhere between 59 and 250 potential employees apply for the average job opening.<sup>343</sup>

Most people who have looked for work in recent years can attest that the process is lengthy.<sup>344</sup> One must search for position openings, draft cover letters, submit applications, attend interviews, wait for the completion of background checks, complete human resources documentation, etc. When considering the process and the above-cited employment statistics, it is not surprising that only around 10% of those offered jobs turn them down.<sup>345</sup> For most, it seems unlikely that after finally obtaining a sought-after position, the candidate would contest a contractual provision requiring him to exercise good behavior or avoid causing embarrassment. Most peoples' optimism bias would certainly convince them to believe they are not likely to behave badly—or suffer the ill-effects of a harshly-enforced morality clause.

As a general contract principle, such limited bargaining power can at times lead to the invalidation of agreements.<sup>346</sup> When invalidating agreements on the grounds of

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342. Nicholas Wells, *Unemployment Rose Slightly in January, but a More Realistic Rate is Even Higher*, CNBC (Feb. 3, 2017, 9:16 AM), <http://www.cnbc.com/2017/02/03/jobs-unemployment-rose-slightly-but-more-realistic-rate-is-higher.html> (last visited Mar. 4, 2017) (on file with the Washington and Lee Law Review).

343. See *How to Increase Your Odds of Getting an Interview*, U. MICH. CAREER CENTER, <https://careercenter.umich.edu/article/how-increase-your-odds-getting-interview> (last visited Mar. 4, 2017) (“Some say 118 applicants per job opening and others say up to 250.”) (on file with the Washington and Lee Law Review); Martha C. White, *Here's How Long It Really Takes to Get a Job*, TIME MAG. (Oct. 22, 2015), <http://time.com/money/4053899/how-long-it-takes-to-get-hired/> (last visited Mar. 4, 2017) (illustrating that on average fifty-nine people will apply for an open position, while only twelve percent will receive an interview) (on file with the Washington and Lee Law Review).

344. See White, *supra* note 343 (determining that the average job search process takes just over six weeks).

345. See *id.* (“[R]oughly one in 10 people who are offered a job turn it down.”).

346. See Lonegrass, *supra* note 157, at 5 (discussing the unconscionability of standardized forms between large corporations and consumers).



unconscionability, courts look to whether the contract was procedurally unconscionable, “indicating that the transaction lacked meaningful choice on the part of the complaining party.”<sup>347</sup> In terms of morality clauses, this highlights the important distinction between a high-profile party to an endorsement agreement (who has significant bargaining power) and the average employee (who has very little).<sup>348</sup>

## 2. *Employee’s Reputation*

While the purpose of a morality clause is to protect the image of the imposing party, it is also necessary to consider the reputation and future opportunities of the restricted party. While it is certainly true that any harm to the employee’s reputation is the result of events she herself set in motion, in some situations, the employee should be entitled to repose.

However, a morality clause may cause an ill-advised action or statement to follow an employee much longer than it would absent the clause.<sup>349</sup> An employee who is terminated from a long-term position pursuant to a morality clause based on some insensitive off-duty statement will likely be required to disclose this statement to his next potential employer, thereby harming his chances of future employment.<sup>350</sup>

In some jurisdictions, the law of defamation recognizes this concern in the employment context. In order to establish a claim for defamation, a plaintiff must show that the defendant made a statement tending to harm the plaintiff’s reputation.<sup>351</sup> The plaintiff must also show that the defendant somehow “published”

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347. *Id.* at 9.

348. *See id.* at 5 (emphasizing that form contracts may be inherently unfair because consumers are “virtually powerless to find better terms elsewhere in the market”).

349. *See infra* note 359 and accompanying text (discussing that actions taken by employees, when made on social media, may follow the employee after termination).

350. *See infra* note 359 (citing sources examining how insensitive statements made on social media may harm an employee’s future prospects).

351. *See* James B. Lake, *Restraining False Light: Constitutional and Common Law Limits on a “Troublesome Tort”*, 61 FED. COMM. L.J. 625, 628 (2009) (citing RESTATEMENT (SECOND) OF TORTS § 577 (AM. LAW INST. 1938)).

the statement or made it available to the public.<sup>352</sup> Over the past few decades, however, courts have begun to recognize the doctrine of compelled self-publication.<sup>353</sup> That is, a plaintiff/employee can establish the publication element if it is foreseeable that he himself would have to repeat the defamatory remarks when applying for future positions.<sup>354</sup>

For instance, in *Brown v. M. Caratan, Inc.*,<sup>355</sup> an employer terminated an employee, claiming she had lied on application documents.<sup>356</sup> In deciding that “it was foreseeable that [the employee] would be compelled in future interviews to explain her former employer’s proffered justification for firing her,” the Eastern District of California held that the employee had presented sufficient evidence to survive summary judgment on her self-defamation claim.<sup>357</sup>

The doctrine of self-publication thus recognizes that employees will likely be required to divulge details of a termination to future potential employers.<sup>358</sup> With regard to morality clauses, in the modern economy where businesses of all kinds are highly protective of their images, disclosure of a termination for some past unwise statement could significantly impact one’s employment prospects, even if that statement was relatively minor and made years earlier.<sup>359</sup> In sum, there are

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352. *Id.* at 627.

353. See Laureen K. Kuzur, *Torts—Defamation—Compelled Self-Publication*, *Sullivan v. Baptist Memorial Hospital*, 995 S.W.2d 569 (Tenn. 1999), 68 TENN. L. REV. 395, 395–96 (2001) (directing that a minority of courts have adopted the doctrine of compelled self-publication).

354. *Id.*

355. 142 F. Supp. 3d 1007 (E.D. Cal. 2015).

356. *Id.* at 1032–34.

357. *Id.* at 1035.

358. See *id.* at 1035 (noting that an employee who had previously been fired would have to self-publish a company’s defamatory statements in order to explain in interviews to potential employers the reason the employee had been terminated).

359. Particularly when considering the permanent nature of social media and the internet, it could be unduly burdensome on an employee to hold him accountable for statements made years earlier. The harm to the employer would likely be reduced based on the now minimal relevance of the statement. See *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 726 (M.D.N.C. 2012) (denying Hanesbrands’ motion to dismiss Mendenhall’s claim that Hanesbrands impermissibly terminated Mendenhall pursuant to a morality clause in response to Mendenhall’s controversial tweets). The case was subsequently

certain situations where the potential harm to an employee greatly outweighs the likely harm to her employer.<sup>360</sup>

### *F. Application of the Model Test*

An exercise in applying the factors is instructive in proving their logic and practicability. What follows are five illustrations based loosely on documented case law, media reports, and existing morality clauses. An analysis based on the five factors supplements.

#### ILLUSTRATION 1<sup>361</sup>

A marketing firm for lawyers hires a famous actor as its spokesperson. The morality clause provides that the firm can terminate the relationship if the endorser does anything to embarrass it. Later, the firm learns that the actor appeared on the internet in a comedy skit making fun of plaintiffs' attorneys. A quick internet search uncovers that he has recently engaged in a bar fight.

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settled without discussion, on the merits, of the relationship between morality clauses and the use of social media. See Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013), <http://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanesbrands-over-morals-clause/#5a322b076c87> (last visited Mar. 4, 2017) (“Just three days later, L. Lynette Fuller-Andrews, the acting general counsel for Hanesbrands, informed Mendenhall that Hanesbrands was terminating his endorsement contract. As grounds for termination, Fuller-Andrews referenced the morals clause in Mendenhall’s contract . . .”) (on file with the Washington and Lee Law Review); see also Jacquelyn Smith, *How Social Media Can Help (or Hurt) Your Job Search*, FORBES (Apr. 16, 2013, 4:20 PM), <http://www.forbes.com/sites/jacquelynsmith/2013/04/16/how-social-media-can-help-or-hurt-your-job-search/#cf8eb8e24fdb> (last visited Mar. 4, 2017) (detailing that about fifty percent of companies look to social media to determine whether a candidate is a good fit for the company) (on file with the Washington and Lee Law Review).

360. See *supra* notes 355–357 and accompanying text (citing sources to suggest the potential harm to employees for being fired pursuant to morality contracts because employees may be forced to disclose to new employers the reason for termination).

361. This illustration is loosely based on the facts of *Bernsen v. Innovative Legal Marketing, LLC*, 885 F. Supp. 2d 830 (E.D. Va. 2012).

- *Nexus*: The actor's participation in the skit has a strong nexus to his role as a proponent of legal services. That negative association undermines the purpose of the contract. The nexus is significantly more tenuous as it relates to the bar fight.
- *Meaning Transfer*: The primary purpose of an endorsement agreement is to achieve meaning transfer, thus meeting this factor.
- *Scope of Clause*: The wide breadth of the clause prohibits legal speech and expression; however, this may be justified in light of the party's bargaining power and purpose of the endorsement agreement.
- *Impact*: The offending acts are known because they were posted on the internet. The well-known actor is likely to garner attention on the internet due to his fame. Humiliating lawyers is reasonably going to embarrass legal marketers.
- *Burden*: This endorsement agreement is not the actor's primary employment and he enjoys a high degree of bargaining power.
- *RESULT*: The factors weigh heavily in favor of the enforceability of the clause.

ILLUSTRATION 2<sup>362</sup>

The employment contract between a college football coach and a major university provides that he will not engage in conduct "that brings the University into disrepute; or that reflects dishonesty, disloyalty, willful misconduct, gross negligence, moral turpitude or refusal or unwillingness to perform his duties." The police arrest the coach for domestic battery. ESPN's cameras record the moment the coach was booked, and the network broadcasts these images nationally.

- *Nexus*: While highly reprehensible, the football coach's private domestic dispute has little to do with his primary role as a coach, which is to train his athletes and lead his team to success.

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362. The illustration is loosely based on the facts of *Haywood v. University of Pittsburgh*, 976 F. Supp. 2d 606 (W.D. Pa. 2013).

- *Meaning Transfer*: Though secondary to his athletic responsibilities, as the head of a football program at a major university, the coach is high-profile figurehead and a leader and role model to players and fans alike. His private actions do represent his institution.

- *Scope of Clause*: As enforced here, the morality clause attempts to terminate the employee over allegations of illegal behavior, actions that deserve the lowest protection.

- *Impact*: As the subject of indisputable national media coverage, the coach's actions will certainly impact the university, which will presumably receive strong pressure to distance itself from one of its most high-profile (and highly paid) employees. If it does not, the school could be perceived as condoning the actions and become the subject of further negative attention or even boycotts.

- *Burden*: The coach's high-level success in sports likely granted him significant bargaining power when signing the agreement with the university. Further, any negative impact on his reputation would be the result of the domestic battery itself, rather than from the termination of his contract.

- *RESULT*: The factors weigh heavily in favor of the enforceability of the clause.

#### ILLUSTRATION 3<sup>363</sup>

A small private university hires a married man as an assistant director of financial aid. The employment contract includes a clause stating, "as a Christian institution, the university requires all administrators to exercise strong family values." During the term of the contract, the director's wife files for divorce after she discovers he has had multiple recent affairs. The director's home life becomes the subject of gossip among school employees and students, and the university terminates his employment pursuant to the clause.

- *Nexus*: The administrator's private life does not have a nexus to his daily professional responsibilities, nor is he a role

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363. The illustration is based loosely on the Lee University morality clause. *Supra* note 212.

model or figurehead. However, the institution's clear mission is articulated and clear and it is reasonable for it to require its employees to exercise and model it, even in their private lives, if they freely agree to it in advance.

- *Meaning Transfer*: As the subject is a relatively low-profile employee, meaning transfer is likely to be limited. Still, the fact that employees and students became privy to the information could create the impression on-campus that the small university does not in fact uphold Christian family values.

- *Scope of Clause*: The clause in this case is broad but clear: it requires the exercise of "strong family values," and cites Christianity as the framework for determining such values. The employee could have quite easily predicted that adultery would be a violation of the clause.

- *Impact*: Although major economic consequences seem unlikely, with regard to those who know the on-campus gossip, the director's conduct may undermine the mission of the school. This climate could affect employee culture and student morale.

- *Burden*: In this case, the low-profile employee likely had minimal power to negotiate the terms of the agreement. On the other hand, an employee's past infidelity is not likely the type of behavior that would prevent him from obtaining future employment, at least at secular universities and businesses.

- *RESULT*: Due largely to the morality clause's clarity and ease of predictability, the factors weigh in favor of enforceability.

#### ILLUSTRATION 4<sup>364</sup>

An employment agreement between ABC insurance company and a claims adjuster includes the following provision: "Team Members should avoid off-duty behavior that would have a negative impact on their job performance at the Company, conflict with their obligations to the Company, or *in any way negatively affect the Company's reputation.*" ABC discovers that the claims adjuster, an employee of five years, recently created

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364. The illustration is loosely based on a combination of (1) a morality clause found in TYSON FOODS, INC., CODE OF CONDUCT (2016), [http://media.corporate-ir.net/media\\_files/irol/65/65476/govDocs/codeofconduct.pdf](http://media.corporate-ir.net/media_files/irol/65/65476/govDocs/codeofconduct.pdf); and (2) ESPN's termination of Curt Schilling. Sanomir, *Curt Schilling*, *supra* note 122.

and posted a racially-insensitive meme on his personal (but not private) Facebook page that poked fun at Asian-American drivers. The meme, which went viral, received significant negative online feedback.

- *Nexus*: The employee’s behavior, although potentially offensive, has a weak nexus to his role as an insurance adjuster. The company’s best argument (and one that is often attempted) is that the act shows overall poor judgment and that this, by extension, can affect his professional performance. This is a tenuous proposition.

- *Meaning Transfer*: Although the claims adjuster acts as the face of the company with individual clients, the general public is unlikely to transfer his bad behavior onto his employer.

- *Scope of Clause*: The wide breadth of the clause effectively pokes a hole in the contract, allowing unilateral termination and overuse over something relatively minor.

- *Impact*: The offending acts are known because they garnered significant online attention. However, nothing in the post suggests an association with the employer, so it is unlikely that it will have a negative effect on its reputation. Given the ease of posting feedback online, the fact that the comment got much online feedback does not mean that it created a scandal.

- *Burden*: Like most rank-and-file employees who sign form employment contracts, the employee had little bargaining power over this ambiguous clause. A termination would have a negative impact on the employee of five years, who almost certainly would have to disclose the cause for termination to future employers.

- *RESULT*: The factors weigh against the application of the clause to terminate the employee.

#### ILLUSTRATION 5<sup>365</sup>

A freelance cellphone application developer enters into an independent contractor agreement to create an educational app for a children’s television show. The contract includes a clause that generally prohibits the developer’s “moral turpitude.” During

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365. This illustration is loosely based on the facts of *Jarry v. Southington Bd. of Educ.*, No. 3:08CV954(WWE), 2009 WL 179817, at \*1 (D. Conn. Jan. 22, 2009).

the engagement, the app developer competes in a bikini contest broadcast nationally on raunchy late night television show. On the show, she mentions that she creates children's apps, but does not mention for whom.

- *Nexus*: At first blush, appearing scantily-clad on television has little to do with developing software. The company may argue that because she was engaged to develop content relating to children's education, a nexus is present.

- *Meaning Transfer*: This relationship has a very low degree of meaning transfer. App developers work behind the scenes and are not generally known to the public. She is not a fulltime employee. These factors militate against a finding of meaning transfer.

- *Scope of Clause*: A party should be able to reasonably predict what conduct would violate the agreement. This a temporary engagement and the clause does not state or reference the mission of the company with regard to children. Moreover, while not necessarily professional or prudent, the app developer's conduct was neither illegal nor ignominious.

- *Impact*: Even though this segment was broadcast nationally, the general public is not likely to associate the subject's identity with the company's, and therefore there will likely be little to no impact.

- *Burden*: The freelance developer has relatively little bargaining power, but it must be noted that any burden on her future reputation may have been caused by her own appearance on the show.

- *RESULT*: The factors weigh against the application of the clause to terminate the app developer.

By taking into account the role of the employee, the predictability and breadth of the clause, and its foreseeable impact on the company and burden on the individual, morality clauses can be tailored to attend to the legitimate business interests of the imposing party while at the same time respecting the liberty and privacy of the individual.



### V. Conclusion

In a pre-internet case examining the fairness of a non-contractual termination for off-duty conduct, Judge Posner commented that, “where an employee’s off-duty behavior is blatantly inconsistent with the mission of the employer and is known or likely to become known, most any employer, public or private, however broadminded, would want to fire the employee and would be reasonable in wanting to do so.”<sup>366</sup> While, in certain circumstances, imposing parties should be able to employ and enforce morality clauses, the law must have a balanced standard for analyzing their enforceability.<sup>367</sup> The unfettered use of morality clauses can be socially harmful and unjust.<sup>368</sup> Remaining unchecked, these restrictions can be loopholes for terminations in bad faith, pretexts for discrimination, and vague, unilateral limitations enforced at the imposing party’s whim and subject to the ever-changing social and political tides.<sup>369</sup>

The internet and social media have blurred the boundary between on- and off-duty conduct, leading individuals of all ranks to be subject to public scrutiny and potential scandal.<sup>370</sup> While this provides an additional incentive to companies seeking to deploy such clauses, this Article argues that it is not always a justification for a blanket restraint on legal behavior and speech.

After canvassing the various legal and public policy pressure points inherent in morality clauses, this Article establishes a rubric for their analysis. Our framework proposes examining

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366. *Wild v. U.S. Dep’t of Housing & Urban Dev.*, 692 F.2d 1129, 1133 (7th Cir. 1982).

367. *See supra* note 209 and accompanying text (citing sources comparing non-disclosure agreements and morality clauses to argue that morality clauses should face the same level of judicial scrutiny).

368. *See Brown v. M. Caratan Inc.*, 142 F. Supp. 3d 1007, 1035 (E.D. Cal. 2015) (determining that an employee can sue an employer for self-defamation because an employer should have a reasonable expectation that the fired employee will need to disclose the circumstances of his expulsion—breaching a morality clause—to his prospective employer).

369. *See supra* note 359 and accompanying text (discussing how morality contracts can occasionally provide issuers with fodder to act arbitrarily and in bad faith).

370. *See supra* Part II.B.2 (discussing how employers constantly check social media throughout the application process).

morality clauses and their enforceability along five factors: nexus, meaning transfer, scope, impact, and burden.

Simply put, morality clauses should be enforceable only when (1) there is a reasonable nexus between the offending activity and the imposing party's legitimate business interests, (2) those business interests are definite enough so as to assist a reasonable person in predicting what is prohibited, and (3) the offending activity causes or will foreseeably cause a reputational backlash against the imposing party. In addition, courts should examine (4) the degree of meaning transfer, or associative power that the restricted party has with the company in the public's esteem. For instance, the private, moral failings of low-level employees may be unlikely to mar an employer, but when the purpose of the contract is to create an association or endorsement, the scales tip in favor of the imposing party. Finally, courts should scrutinize (5) the burden imposed on the restricted party, as morality clauses can especially harm individuals with little bargaining power.

An *ex ante* restriction on *any* behavior or speech that is "potentially embarrassing" forces people into an imagined conformity and "press conference" behavior both on and off the job.<sup>371</sup> This chills speech, innovation, and challenges to the status quo, not to mention forcing employees to check many of their legal rights at their employer's door.<sup>372</sup> Analyzing morality clauses through the five-pronged analysis allows for their more efficient, balanced, and just use and enforcement.

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371. See Clark, *supra* note 80, at 13–14 (discussing the potential chilling effect of speech that might be encountered by those subject to morality clauses).

372. *Supra* notes 203–206 and accompanying text.