

NOTES

“REPUTATIONS . . . A LIFETIME TO BUILD, SECONDS TO DESTROY”¹: MAXIMIZING THE MUTUALLY PROTECTIVE VALUE OF MORALS CLAUSES IN TALENT AGREEMENTS

*Sarah D. Katz**

I often doubt whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law. We should lose the fossil records of a good deal of history and the majesty got from ethical associations, but by ridding ourselves of an unnecessary confusion we should gain very much in the clearness of our thought.² – Oliver Wendell Holmes

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* Editor-in-Chief, *CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW*. Candidate for Juris Doctor, Benjamin N. Cardozo School of Law, June 2012; B.A., *cum laude*, Davidson College, 2009. Special thanks to Professor Susan Heyman for her guidance during the development and creation of this Note, to Tyler Smith for his editorial suggestions, and to my family and friends for their support during my writing process.

¹ *STARDUST* (Paramount Pictures 2007) (line of Captain Shakespeare).

² Oliver Wendell Holmes, *The Path of the Law*, 10 *HARV. L. REV.* 457, 464 (1897).

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I. INTRODUCTION

Ordinarily, contract law does not ask *why* a breach of contract occurs, but only *whether* one has occurred. Failure to act within contractual guidelines generally yields a requirement that the party "pay damages . . . and nothing else."³ Yet, since the 1920s,⁴ standard talent contracts in the entertainment, sports, and product endorsement industries have included "morals clauses,"⁵ which are restrictions on a celebrity's or athlete's ("talent") personal conduct outside the scope of their contractual obligations.⁶ If Oliver Wendell Holmes is correct that "[m]orals deal with the actual internal state of the individual's mind, what he actually intends,"⁷ then what place do they have in contract law, which asks only *if* a breach has occurred, and not *why*?

Simply put, morals clauses are a 'get out of jail free' card for contracting parties.⁸ When the "talent"⁹ does or says something

³ *Id.* at 462.

⁴ Noah B. Kressler, Note, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 236-37 (2005).

⁵ "Morals clauses" are also termed "public image clauses," "good-conduct clauses," "morality clauses," "moral turpitude clauses," "personal conduct clauses," and "behavioral clauses." Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 351 n.10 (2009). For purposes of this Note, the term "morals clause" will refer generally to any contractual provision that may be described by any of the aforementioned names.

⁶ "Morals clauses," generally, are "contract tools by which something bad off the playing-field or the movie set can get you into legal trouble and potentially threaten your paycheck, your contract, even your career." Symposium, *2008 Seton Hall University School of Law Sports & Entertainment Law Symposium: From the Arena to the Streets – The Pressures Placed on Athletes, Entertainers, and Management*, 19 SETON HALL J. SPORTS & ENT. L. 381, 481 (2009) [hereinafter Seton Hall Symposium] (statement of Scott Shagin).

⁷ Holmes, *supra* note 2, at 463.

⁸ See Kressler, *supra* note 4, at 235 (a "'morals clause' generally allows buyers, such as

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that invites or invokes a negative response from the public, the “non-talent” party (e.g., sports league, entertainment project, or endorsing company)¹⁰ may acquire the legal right to dissociate from the talent by terminating the agreement between them pursuant to the contract’s morals clause.¹¹ The ‘value’ of a morals clause is determined by the degree of protection it affords to each party respectively, and thus to the venture at the heart of the contractual relationship.¹²

Today, the first draft of a talent agreement in the entertainment, fashion, and sports industries almost always contains a morals clause.¹³ The fate of the clause in a particular talent agreement depends largely on the parties’ identities. Industry rookies and talent who are subject to guild or union collective bargaining agreements often find themselves subject to a morals clause because they lack the power or right to negotiate or strike the restriction from the contract. On the other hand, talent with sufficient “star power”¹⁴ often strike the clause altogether,¹⁵ leaving non-talent with a classic Hobson’s choice—that is, to take

advertisers, to terminate a talent agreement when an actor’s conduct is detrimental to the buyer’s interests or otherwise devalues the performance due”).

⁹ See Pinguelo & Cedrone, *supra* note 5, at 349 n.7 (defining “talent” as “individuals possessing creative, artistic, athletic, or other performance aptitudes . . . whose services are individually unique, non-duplicable, and non-replicable . . . [not] individuals who obtain skills through education or training, and whose services are easily replaceable.”). See also *infra* Part II.A.

¹⁰ For purposes of this Note, “non-talent” will refer to a contractual party that does not meet the standard for “talent.” See *infra* Part II.A.

¹¹ See Pinguelo & Cedrone, *supra* note 5, 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.”). There are also so-called “reverse-morals clauses,” which provide talent with a termination right, but this Note will focus on traditional morals clauses. See Porcher L. Taylor, III, Fernando M. Pinguelo & Timothy D. Cedrone, *The Reverse-Morals Clause: The Unique Way to Save Talent’s Reputation and Money in a New Era of Corporate Crimes and Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 66-67, 68 n.5, 79-80 (2010) (“[A] reciprocal contractual warranty to a traditional morals clause intended to protect the reputation of talent from the negative, unethical, immoral, and/or criminal behavior of the endorsee-company or purchaser of talent’s endorsement[,]” existing since Pat Boone’s 1986 contract with Dot Records, but remaining rare due to the unbalanced bargaining power between talent and non-talent in the lion’s share of sports and entertainment contracts.).

¹² See *infra* Part II.A.

¹³ See, e.g., THOMAS A. CROWELL, *THE POCKET LAWYER FOR FILMMAKERS: A LEGAL TOOLKIT FOR INDEPENDENT PRODUCERS* 221-22 (2d ed. 2011).

¹⁴ Daniel Auerbach, *Morals Clauses as Corporate Protection in Athlete Endorsement Contracts*, 3 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 1, 7 (2005).

¹⁵ See CROWELL, *supra* note 13.

the agreement *sans* morals clause or leave it.

The fundamental purpose of a contract is to increase certainty and predictability in the parties' subsequent relationship. To maximize certainty and predictability in any relationship, there must be effective communication between the parties *ab initio*—for example, prior to any marriage, the smart couple will discuss and come to some sort of agreement on matters such as where they want to live, what lifestyle they would like to achieve, whether they would like to have children, and if so, how many. In the contractual realm, parties are likely to have less problematic relationships if each party understands, and agrees to mutually support, the other's interests and expectations.¹⁶ From such an *ex ante* mutual understanding, it is most likely that a contract with terms properly tailored to both parties' interests and expectations will be formed. When the parties fail to communicate *ab initio*, or are unwilling to agree on a balance of both parties' interests, the resultant contract will not be fine-tuned to the realities of the parties' relationship.

Morals clauses present a microcosm of this issue pertaining to contracts generally. Such clauses tend to take the form of one-size-fits-all models—chosen by virtue of the balance of power between the parties and prevalent assumptions about how to maximize protection of the more powerful party's interests—rather than individualized clauses drafted for the particular parties and desired contractual relationship.¹⁷

The standard assumptions that underlie the perceived 'value' of a morals clause are differentiated on the basis of which role a party is playing in the contractual relationship and, somewhat secondarily, the party's relative bargaining power vis-à-vis the other party. These assumptions appear to remain constant in both domestic and international talent agreements.¹⁸ Non-talent parties typically assume that flexibility increases value—i.e., that broad

¹⁶ See 1 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 1:1 (4th ed. 2010), available at Westlaw WILLSTN-CN.

¹⁷ Most morals clauses remain unproblematic because they are not triggered. See generally Kressler, *supra* note 4, at 235-36 (noting that while morals clauses are currently "standard term(s)" in talent agreements, there is "no substantive scholarly research on the subject and only a few cases interpreting" such clauses, specifically or in general). Nonetheless, the issues and potential harm that arise when a morals clause is triggered justify requiring such clauses to adhere to the generally applicable canons of contract law. See *infra* Part II.A.

¹⁸ See *infra* Part III.

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language yields the greatest protection by creating a termination right that is triggered by a greater number of events.¹⁹ Conversely, talent parties generally presuppose that protection for their interests is maximized by less flexibility—or, narrowly-worded clauses triggered by fewer events.²⁰

When applied universally to all industries—without properly accounting for the vastly different attendant circumstances that define each—these fundamental assumptions may actually do more harm than good.²¹ The failure to account for industry differences creates a disconnect between the morals clause language and the parties' actual interests that decreases predictability in the contractual relationship, causing a decrease in the overall protective value of the morals clause to both parties.²² Individually drafted morals clauses, that both account for the relevant industry and are narrowly tailored to the particular parties' interests and expectations, would increase the quantum of protection provided by increasing predictability within the contractual relationship, which would increase the clause's value to both parties.²³

Part II of this Note will introduce morals clauses, the contractual parties in talent agreements, the relevant industry-specific governance structures, and “no-morals-clauses-allowed” talent agreements. Part III will explain and analyze 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. Part IV will establish a new method for calculating the value of a morals clause, and explain factors that should be considered in the construction of narrowly tailored, industry- and party-specific morals clauses.

¹⁹ See Auerbach, *supra* note 14, at 8-9; Pinguelo & Cedrone, *supra* note 5, at 370, 374-75.

²⁰ See Pinguelo & Cedrone, *supra* note 5, at 379 (“Broadly-worded morals clauses can place heavy restrictions on the activities in which talent can engage; and, in certain cases, can even penalize talent for engaging in legally permissible conduct.”).

²¹ See *infra* Part III.

²² See *infra* Part IV.

²³ See *infra* Part IV.

II. BACKGROUND

A. *The Who, What, and Why of "Morals Clauses"*

In the realm of entertainment, sports, and endorsement agreements, there are generally two types of parties: "talent" (e.g., a celebrity, actor, director, writer, athlete);²⁴ and "non-talent" (e.g., an advertiser/sponsor, sports team or league, movie/television studio).²⁵ Contracts between these parties are often referred to as "talent agreements," and cover a wide variety of talent/non-talent relationships, ranging from employment with a sports team and casting for a movie or television series, to product endorsement and player sponsorship.²⁶

Collectively, non-talent parties annually spend billions of dollars on talent contracts.²⁷ Talent lucky enough to be on the receiving end of such expenditures stand to earn millions for very little work—such as Peyton Manning's 2010 earnings of \$15 million for merely endorsing products including Gatorade, MasterCard, Oreo, and Reebok.²⁸ Such expenditures are designed to increase the value and market-share of non-talent's product or project through "[m]eaning transference"²⁹—that is, using a "celebrity's established familiarity and credibility" to make a product/project "similarly familiar and credible" to consumers.³⁰ The subject

²⁴ See *supra* note 9.

²⁵ See *supra* note 10 (For purposes of this Note, "non-talent" will refer to a contractual party that does not meet the standard for "talent.").

²⁶ See generally Kressler, *supra* note 4, at 239-44; Pinguelo & Cedrone, *supra* note 5, at 348-49, 363-66.

²⁷ See Auerbach, *supra* note 14, at 5-7 (the average player salary for the 2003-2004 NBA season was greater than \$4.9 million; U.S. companies spent \$1 billion on endorsement contracts in 1996, and Nike and Reebok alone planned to spend \$1.2 billion between 2005 and 2009). See also Seton Hall Symposium, *supra* note 6, at 486 (in 2007 Nike's endorsement deals totaled \$1.44 billion, and the Beijing Olympics totaled \$2.5 billion in sponsorships).

²⁸ See Georg Szalai, *Peyton Manning Dethrones Tiger Woods on Top of Sports Power Ranking*, THE HOLLYWOOD REPORTER (Jan. 28, 2011, 8:43 AM), <http://www.hollywoodreporter.com/news/peyton-manning-dethrones-tiger-woods-94091>.

²⁹ Kressler, *supra* note 4, at 240-41.

³⁰ See, e.g., Joel Stonington, *Tiger Woods No Longer Most Powerful U.S. Athlete*, BUSINESSWEEK (Jan. 27, 2011), http://www.businessweek.com/lifestyle/content/jan2011/bw20110126_747072.htm?chan=autos_special+report+--+power+100+2011_power+100+2011+special+report (in addition to being "the most popular quarterback in America's favorite sport," sponsors see Manning as "marketable, recognizable, and down-to-earth[.]" and "[o]n top of his stellar on-field performance, Manning maintains an all-American image.").

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matter of talent agreements is constant, regardless of the applicable industry: the commodity bargained for is the talent's overall image. In contrast, the non-talent's industry determines the manner in which the talent's image will be used to generate beneficial value for non-talent: sports teams need skilled players who are also fan-favorites; studios believe that marquis actors will draw moviegoers to the box office and home-viewers to specific television programs; and corporations seek to associate their products with celebrities in order to benefit from the celebrities' public goodwill.³¹

Problematically for non-talent, the meaning transference process cannot be functionally limited to positive implications, and incidental transfers of unfavorable meanings from talent to a product or project may occur based on the talent's personal conduct.³² Such detrimental transferences may be caused by almost any sort of conduct, with examples ranging from public sex scandals (e.g., Tiger Woods) and mental or emotional disorders (ex., Mary-Kate and Ashley Olsen),³³ to a professional athlete's move from one team to another (e.g., LeBron James).³⁴ The considerable sums spent by non-talent to exploit meaning transference for revenue gains necessitate mechanisms by which non-talent's investment may be protected from the negative publicity risk inherent in any association between a product/project and talent.³⁵

Morals clauses protect non-talent by providing a right to terminate a talent/non-talent relationship.³⁶ Defined broadly, a morals clause is:

³¹ See *infra* Part IV.B (discussion of industry-specific interests and values).

³² See Kressler, *supra* note 4, at 240-41.

³³ See Pinguelo & Cedrone, *supra* note 5, at 349 (noting that both Mary-Kate and Ashley Olsen were dropped from a "Got Milk?" campaign based on Mary-Kate's eating disorder).

³⁴ See Stonington, *supra* note 30 (discussing how James' move from Cleveland to Miami caused "numerous fans [to] sour[] on him[,]") which led to his fall in the Power Rankings from No. 2 in 2009 to No. 11 in 2010).

³⁵ See *id.* ("[C]ompanies cannot afford meaningful sponsorships of athletes who lack a reliable track record. They prefer decency and consistency over razzle-dazzle and the threat of scandal.")

³⁶ The meteoric rise in the incidence of morals clauses in endorsement agreements from 1997 (when frequency was estimated at less than 50%), to 2003 (at least 75%), demonstrates the value of such clauses to non-talent parties in talent agreements. Casey Shilts, Kate Jett & Nick Desiato, *Making the Pitch: Player Endorsements in Professional Sports*, 25-FALL ENT. & SPORTS LAW. 2, 4 (2007).

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A contractual provision that gives one contracting party (usually a company [*non-talent*]) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought [*talent*]) in the event that such [*talent*] engages in *reprehensible behavior or conduct* that may *negatively impact his or her public image and, by association, the public image of [non-talent]*.³⁷

Theoretically, a morals clause grants non-talent the power to legally sever its relationship with talent.³⁸ This right of termination may be based on a wide variety of “[o]bjectionable conduct,”³⁹

³⁷ Pinguelo & Cedrone, *supra* note 5, at 351 (emphasis added).

³⁸ See Kressler, *supra* note 4, at 243. See also Adam Epstein, *An Exploration of Interesting Clauses in Sports*, 21 J. LEGAL ASPECTS SPORT 5, 23 (2011) (“It is important to recognize that just because a morals clause may exist in an agreement does not necessarily mean that it has to be exercised by the non-breaching party. . . . [I]t may merely serve as a deterrent to misconduct.”). Epstein also discusses the “hazardous activity clause,” another clause meant to perform a deterrence function, which “allows the team, at its option, to modify the financial obligation to a player if a player is involved in a particular type of activity outside the context of their sport and is injured as a direct result.” *Id.* at 17, 14-15. However, like attempting to define “morality” or “disrepute,” Epstein notes that “defining what a hazardous activity is can be a curious challenge[.]” and such clauses often yield uncertainty mirroring that resulting from morals clauses. *Id.* at 16.

Generally, non-talent will analyze the costs and benefits of termination, weighing the talent’s specific non-compliance against the desired image or outcome originally sought from the relationship. See Keven J. Davis, *Sports Marketing: Endorsements, Sponsorships, Licensing and Merchandising*, SM009 A.L.I.-A.B.A. CONTINUING LEGAL EDUC. 205 (2007), available at Westlaw SM009 ALI-ABA 205. Davis explains:

Companies are very sensitive to any negative publicity. It is very difficult to negotiate a morals clause because a company will want as much flexibility as possible to disassociate the company and its products from the athlete if the athlete is involved in any negative publicity. On the other hand, an athlete will not want her endorsement agreement terminated due to innuendo and rumors. *Each situation is different and the attorney / representative should be aware of any particular concerns involving the Player.*

Id. § 11, at 232 (emphasis added). See also Auerbach, *supra* note 14, at 14-15, 6 (citing the Reebok/Allen Iverson relationship as an “appropriate synergy” for Reebok’s desired image, when Iverson’s 2002 felony assault charge and resultant “bad boy . . . street cred” failed to yield any negative impact on Reebok’s sales following Reebok’s decision to stand by their man); Matthew Philips, *Nickelodeon’s Dilemma: A Look at Cable, Morals Clauses and Jamie Lynn Spears*, NEWSWEEK, Dec. 19, 2007, <http://www.thedailybeast.com/newsweek/2007/12/19/nickelodeon-s-dilemma.html> (statement of Anthony Oncidi) (discussing “nude pictures” of Vanessa Hudgens, one of the stars of Disney’s *High School Musical* franchise, that “surfaced on the Internet” in 2007 and the potential effect of such pictures vis-à-vis a morals clause in her contract, if one was included in the agreement’s terms) (“I’m sure that she did [have a morals clause]. But, . . . Disney has an interest in keeping her on that show, which it probably saw as outweighing the damage done by those pictures.”).

³⁹ Daniel R. Avery & Joseph S. Rosen, *Complexity at the Expense of Common Sense?*:

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depending on the agreement's terms, ranging from "the expression of unpopular political views"⁴⁰ to "on-the-field activity."⁴¹ Recent entertainment industry headlines have provided far too many examples of both off- and on-the-field problematic conduct: Charlie Sheen's "winning"⁴²-based exodus from the CBS hit show *Two and a Half Men*;⁴³ and John Galliano's forced departure from both his post as creative director/designer for Dior and his eponymous fashion label after a British newspaper streamed a video of Galliano shouting anti-Semitic statements at other patrons in a Paris bar.⁴⁴ Practically, however, legal dissolution of

Emerging Trends in Celebrity Endorsement Deals, 23-SUM ENT. & SPORTS LAW. 13, 15 (2005).

⁴⁰ *Id.* ("Objectionable conduct may include the expression of unpopular political views. For example, Sears and Federal Express terminated sponsorships of 'Politically Incorrect' after host Bill Maher called Americans cowards for 'lobbing cruise missiles from 2,000 miles away,' post Sept. 11.").

⁴¹ *Id.* (internal quotation marks omitted) ("AT&T Broadband filed a breach of contract claim against NASCAR Busch Series driver Mike Borkowski for on-track altercations that resulted in at least three crashes. And truth may not necessarily be a defense in these cases. Reebok canceled its endorsement contract with NBA forward Shawn Kemp after he stated that basketball sneakers are not what they used to be, that today's sneakers are 'throwaways' and that his all-time favorite sneaker was made by Nike, Reebok's arch-rival.").

⁴² See *infra* note 243.

⁴³ See, e.g., Mark Cina & Lacey Rose, *Charlie Sheen Fired from 'Two and a Half Men'*, THE HOLLYWOOD REPORTER (Mar. 7, 2011), <http://www.hollywoodreporter.com/news/charlie-sheen-fired-two-a-165014>.

⁴⁴ See Rebecca Leffler, *John Galliano Fired From Dior*, THE HOLLYWOOD REPORTER (Mar. 1, 2011) <http://www.hollywoodreporter.com/news/john-galliano-fired-dior-162796>; Maysa Rawi, *John Galliano is Sacked From His Own Label*, DAILY MAIL, Apr. 15, 2011, <http://www.dailymail.co.uk/femail/article-1377172/John-Galliano-sacked-label.html>. Interestingly, at least one response to Galliano's comments also may have implicated a morals clause. Natalie Portman, who had a contractual relationship with Dior (as the celebrity endorser/face of Dior's Miss Dior Cherie fragrance), released a public statement after Galliano's suspension from Dior:

I am deeply shocked and disgusted by the video of John Galliano's comments that surfaced today. In light of this video, and as an individual who is proud to be Jewish, I will not be associated with Mr. Galliano in any way. I hope at the very least, these terrible comments remind us to reflect and act upon combating these still-existing prejudices that are the opposite of all that is beautiful.

Cathy Horyn, *Natalie Portman Condemns Galliano*, NYTIMES.COM (Feb. 28, 2011, 11:55 PM), <http://runway.blogs.nytimes.com/2011/02/28/natalie-portman-condemns-galliano>. In addition, Portman wore a Rodarte dress to the Oscars (instead of something designed by the House of Dior). See *Sharon Stone Sticks by Dior During Oscar Week*, THE HOLLYWOOD REPORTER (Mar. 3, 2011), <http://www.hollywoodreporter.com/news/dior-hired-crisis-pr-firm-163541>. Assuming Portman's endorsement contract with Dior included a morals clause, it is possible that her statement (or choice of Oscar attire) could

the talent/non-talent relationship rarely serves to remove memory of the association from the public consciousness.⁴⁵

Invocation of a morals clause may cost the terminated talent substantial financial losses.⁴⁶ After Billie Jean King's former lesbian lover filed a palimony suit against her in 1981, King lost approximately \$2 million when sponsors terminated all of her long-term endorsement contracts.⁴⁷ Kobe Bryant experienced a similar loss of endorsement revenue in 2003 when charges of sexual assault against him were made public.⁴⁸ Since Tiger Woods' November 2009 extra-marital affairs scandal, he has lost at least four major endorsement deals, and been removed from advertising campaigns and the cover of his own videogame.⁴⁹ Yet, despite the

have breached the clause, and/or given Dior a right to terminate its relationship with Portman as well. For an example of a termination right based on choice of attire, see Reebok Endorsement Agreement, *in* Davis, *supra* note 38, § 6.1.5, at 217 (Reebok Endorsement Agreement § 6.1.5, "Failure to Wear Reebok Products", gives rise to a termination right in Reebok if "Athlete does not, for any reason, visibly utilize Reebok Products exclusively in professional competition.").

⁴⁵ See Kressler, *supra* note 4, at 239 (discussing the massive reputational harm suffered by Proctor & Gamble when the X-rated film *Behind the Green Door* starring its Ivory Soap endorser, model Marilyn Briggs (a.k.a. Marilyn Chambers), was released).

⁴⁶ Typically, non-talent parties will not incur significant financial costs (in addition to the loss of estimated revenue from the defunct campaign/project) based on such a termination. However, Pepsi's 2003 cancellation of advertisements starring Ludacris—in response to criticism from Bill O'Reilly—forced Pepsi into a \$3 million donation to Ludacris' charitable foundation to avoid a music industry boycott of Pepsi products that had been called for by Russell Simmons. See Pinguelo & Cedrone, *supra* note 5, at 372, 372 n.142.

In addition, talent agreements may contain indemnification provisions obligating talent in breach of the agreement to pay certain costs and/or damages flowing from the breach. See *e.g.*, Reebok Endorsement Agreement, *supra* note 44. The indemnification section of the Reebok Endorsement Agreement provides that the endorsing athlete:

[W]ill indemnify and hold Reebok harmless from and against any and all claims, damages, liabilities, losses, costs and expenses, (including reasonable counsel fees and expenses), it incurs and arising out of or related to (a) the Endorsement; (b) any breach or threatened breach by Athlete of any representation, warranty, covenant, or other obligation of Athlete under this Agreement, and (c) any act or omission of Athlete.

Id. § 10.1, at 220.

⁴⁷ See Stan Grossfeld, *No Royalty Like King: NU Honor is Just Latest for True Tennis Pioneer*, BOSTON GLOBE, Dec. 3, 2006, at 15C, available at Westlaw, 2006 WLNR 21009431.

⁴⁸ See Pinguelo & Cedrone, *supra* note 5, at 372 (noting Bryant's lost deals with McDonald's and Nutella).

⁴⁹ See Taylor et al., *supra* note 11, at 67 n.4 (lost Accenture and AT&T deals, and Gillette and Tag Heuer ads); John Gaudiosi, *Electronic Arts Drops Tiger Woods From Cover of His Own Game*, THE HOLLYWOOD REPORTER (Jan. 5, 2011), <http://www.hollywoodreporter.com/news/electronic-arts-drops-tiger-woods-68731> (*Tiger Woods PGA*

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magnitude of such potential losses, talent has only sought to challenge such terminations (through external review mechanisms such as litigation or arbitration) in a handful of cases.⁵⁰

B. Who/What Makes the Rules in Sports and Entertainment?

In the world of sports, the role of non-talent is played primarily by sports leagues,⁵¹ and secondarily by their respective franchises (or, teams).⁵² In the United States, the “Big Four”—National Basketball Association (NBA), National Football League (NFL), National Hockey League (NHL), and Major League Baseball (MLB)—dominate the realm of professional sports.⁵³ The Big Four’s governance structures are defined by three documents⁵⁴: (1) the league constitution and bylaws,⁵⁵ (2) a collective bargaining agreement (CBA)⁵⁶ between the league and its respective players’ association⁵⁷; and (3) the uniform player

Tour 12: The Masters); Georg Szalai, *Golf Digest Ends 13-Year Endorsement Deal with Tiger Woods*, THE HOLLYWOOD REPORTER (Jan. 7, 2011), <http://www.hollywoodreporter.com/news/golf-digest-ends-13-year-69506> (lost Golf Digest, Gatorade, and Gillette deals). Additionally, Woods’ overall revenue—largely made up of endorsement earnings—dropped 32% between 2009 (\$103 million) and 2010 (\$70 million). *E.g.*, Stonington, *supra* note 30.

⁵⁰ See *infra* Part III; Pinguelo & Cedrone, *supra* note 5, at 350.

⁵¹ The sports leagues are privately-held business entities, subject to government regulation and judicial oversight in a manner similar to other industries. See Jason M. Pollack, Note, *Take My Arbitrator, Please: Commissioner “Best Interests” Disciplinary Authority in Professional Sports*, 67 FORDHAM L. REV. 1645, 1647 n.17 (1999); GLENN M. WONG, ESSENTIALS OF SPORTS LAW 2 (4th ed. 2010) (noting that laws governing sports primarily impact the legal structure, organization, and operations of professional sports leagues).

⁵² Teams in the Big Four are privately-owned entities, typically held by partnerships or corporations. See WONG, *supra* note 51, at 4.

⁵³ *E.g.*, WONG, *supra* note 51, at 2 (also discussing the “single entity leagues” (so titled because of their legal ownership structure), including the Women’s National Basketball Association (WNBA), Women’s United Soccer Association (WUSA) and Major League Soccer (MLS)).

⁵⁴ See *id.* at 14.

⁵⁵ See Pollack, *supra* note 51, at 1647 n.15 (noting that the NBA Constitution in its entirety is not available to the public, though some portions are available in articles and other texts).

⁵⁶ The CBA generally covers topics ranging from player salaries to grievance procedures. See 1 AARON N. WISE & BRUCE S. MEYER, INTERNATIONAL SPORTS LAW AND BUSINESS 103 (1997) (listing “pensions, medical benefits, . . . roster size, locker rooms, training camps, [and] disciplinary rules” among topics covered by the Big Four CBAs).

⁵⁷ A players’ association is a labor union for athletes playing under contract with a professional sports team. See WONG, *supra* note 51, at 529-30, 514 (noting that over the

contract (UPC) between a team and each of its players.⁵⁸ Each league also has an individual officer charged with protecting the sport's integrity and the league's best interests: the commissioner.⁵⁹ Thus, the conduct of players in all leagues is governed by the league CBA, the player's UPC, and the league commissioner.

International sports operate in a manner that is similar in part and different in part. Each sport is largely self-governed by independently created game rules and league regulations.⁶⁰ National leagues often operate under the aegis of the international umbrella organization for the sport.⁶¹ In particular contrast to the United States, national leagues may be subject to greater government oversight or involvement.⁶² Like the United States, the athlete-team relationship is explicitly regulated by the player's contract with a team and any collective bargaining agreement that may apply.⁶³

last sixty years, the players' associations have become exceedingly powerful mechanisms of protection for player interests, such as salary, benefits, and job security).

⁵⁸ The Big Four CBAs use one of two terms—uniform player contract (UPC) and standard player contract (SPC)—for this agreement. Each league's UPC/SPC incorporates the league CBA by reference—meaning that all players who sign a UPC/SPC are governed by both their UPC/SPC and the league CBA. See WONG, *supra* note 51, at 515, 539.

⁵⁹ In 1921, the MLB created the office of the Commissioner in response to the “Black Sox scandal” (in which eight members of the Chicago White Sox rigged the 1919 World Series, by throwing five (of the eight games played) to the Cincinnati Reds). See Pollack, *supra* note 51, at 1645-46, 1649-58. See also *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298, 299 (N.D. Ill. 1931) (“[The MLB Commissioner is] endow[ed] . . . with all the attributes of a benevolent but absolute despot and all the disciplinary powers of the proverbial pater familias.”).

⁶⁰ See CRAIG MOORE, *SPORTS LAW AND LITIGATION* 1, 9 (2d ed. 2000).

⁶¹ For example, England's Rugby Football Union (RFU) expressly incorporates the International Rugby Board (IRB) Regulations Relating to the Game. RFU REGULATIONS, 2.2.3 (2010/2011), http://www.rfu.com/TheGame/~media/Files/2011/The_Game/Regulations/RFU_Regulation_2.ashx (last visited Oct. 12, 2011).

⁶² Some countries—France, Greece, Italy, and Spain, *inter alia*—have enacted national “sports law statutes” that provide for government regulation of professional sports. 2 WISE & MEYER, *supra* note 56, at 792, 1112, 1178, 1250-51, 1274-77, 1285-91 (1997). Other countries, such as Mexico, have enacted a sports law statute applicable only to amateur (not professional) sports. *Id.* at 907-16. Like the United States, others—e.g., Canada, New Zealand, Australia, Japan, and the United Kingdom—have no comprehensive sports law statutes, but rather apply general laws to particular facets of sports as required. *Id.* at 792, 1638. Wise and Meyer also note that Canadian courts will often look to law and precedent from the United Kingdom, Australia, New Zealand, France, and the United States. *Id.* at 792.

⁶³ See, e.g., 2 WISE & MEYER, *supra* note 56, at 1285-91 (translating Law No. 91 of March 23, 1981 (Italy)) (Article 4 requires written contracts between athletes and teams—

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The entertainment industry here and abroad, like its athletic counterpart, is governed by a conglomerate relationship between production studios, guild collective bargaining agreements, and individual talent contracts. The United States has five primary “above-the-line” entertainment labor unions or guilds, that represent “artistic” talent (i.e., actors, directors, writers): the American Federation of Musicians (AF of M), American Federation of Television and Radio Artists (AFTRA), Screen Actors Guild (SAG), Directors Guild of America (DGA), and the Writers Guild of America (WGA).⁶⁴ Among the non-U.S. guilds, two are of notable importance to Hollywood: the Alliance of Canadian Cinema, Television and Radio Artists (ACTRA),⁶⁵ and the British Actors’ Equity Association (Equity).⁶⁶ These guilds provide greater protection than might otherwise be required under state labor codes or individual contracts through CBAs—which are incorporated into all members’ individual employment agreements⁶⁷—and serve “at their members’ behest, [as] the primary gatekeepers for . . . employment opportunities.”⁶⁸ Over time, the guilds have gained significant prestige and power, which they employ liberally in the defense of talent’s wide variety of interests—from employment conditions to revenue sharing.⁶⁹

that match the terms required by the CBA (and any standard form contract) in place between the sport’s national federation and interested parties’ representatives—to be filed with and approved by the national federation).

⁶⁴ See James M. O’Brien III, Comment, *Regulation of Attorneys under California’s Talent Agencies Act: A Tautological Approach to Protecting Artists*, 80 CAL. L. REV. 471, 487, 487 n.85 (1992) (noting that “below-the-line” unions represent “technical and craft employees such as grips, electricians, and film editors”).

⁶⁵ ACTRA, <http://www.actra.ca/main> (last visited Sept. 9, 2011).

⁶⁶ EQUITY, <http://www.equity.org.uk> (last visited Sept. 9, 2011). See also LESLIE E. COTTERELL, *PERFORMANCE: THE BUSINESS AND LAW OF ENTERTAINMENT* 3-5 (3d ed. 1993).

⁶⁷ See Russell J. Frackman, *The Failure to Pay Wages and Termination of Entertainment Contracts in California: Some Implications of the Labor Code*, 52 S. CAL. L. REV. 333, 337-41 (1979); Bob Tarantino, *A Minor Conundrum: Contracting with Minors in Canada for Film and Television Producers*, 29 HASTINGS COMM. & ENT. L.J. 45, 66 (2006) (“Producers who wish to engage performers who are members of . . . [ACTRA] are required to become signatories to . . . the Independent Production Agreement (the “IPA”) (which establishes minimum terms and conditions of engagement for performers in the film, television and radio industry) . . .”).

⁶⁸ Emily C. Chi, *Star Quality and Job Security: The Role of the Performers’ Unions in Controlling Access to the Acting Profession*, 18 CARDOZO ARTS & ENT. L.J. 1, 2 (2000).

⁶⁹ See generally Carole E. Handler, James D. Nguyen, & Marina Depietri, *The WGA Strike: Picketing for a Bigger Piece of the New Media Pie*, 25-WTR ENT. & SPORTS LAW. 2-5 (2008) (discussing the WGA’s 100-day (November 5, 2007–February 12, 2008) strike

C. The No-Morals-Clauses Club

Some entertainment industry talent agreements contain, or incorporate by reference from other agreements, blanket prohibitions of morals clauses of any sort.⁷⁰ The CBAs of the DGA and the WGA employ the “no-morals-clause-allowed” model, which expressly prohibits the inclusion of morals clauses in any agreement signed by guild members.⁷¹ This explicit rejection arose in response to denials of screen credit⁷² for talent who violated morals clauses.⁷³

Table 1. No Morals Clauses Allowed.	
WGA Theatrical and Television Basic Agreement art. 54	“[After] March 1, 1981, Company agrees that it will not include the so-called ‘morals clause’ in any writer’s employment agreement covered by this Basic Agreement.” ⁷⁴
DGA Basic Agreement § 17-123	“Employer agrees that it shall not include or enforce any so-called ‘Morals Clause,’ as the term is commonly understood in the motion picture and television industries, in any contract of employment or deal memo for the services of an Employee.” ⁷⁵

against the Alliance of Motion Picture and Television Producers (AMPTP)—primarily concerning revenue sharing—that resulted in cancellation of the 2008 Golden Globes Awards ceremony and large layoffs by studios and networks).

⁷⁰ It is important to note that talent agreements in the sports industry appear—from all the examples discovered during research for and discussed in this Note—to always include some sort of morals, or conduct, clause. Thus, the sports industry is not relevant to discussion of the no-morals-clause-allowed model, and, if employed, would likely not provide an acceptable quantum of protection. *See infra* Part III.

⁷¹ Kressler, *supra* note 4, at 236 n.6.

⁷² *See* Robert Davenport, *Screen Credit in the Entertainment Industry*, 10 LOY. L.A. ENT. L. REV. 129, 129 (1990) (alteration in original) (“[B]ig box office names are built, in part, through being prominently featured in popular films and by receiving appropriate recognition in film credits and advertising.”).

⁷³ *See id.* at 133 n.26 (noting that this practice emerged prior to the 1950s and was popular in the McCarthy era, during which studios employed it to deny screen credit to artists accused of involvement with Communism).

⁷⁴ WGA Theatrical and Television Basic Agreement art. 54 (2008), http://www.wgaeast.org/fileadmin/user_upload/files/Minimum_Basic_Agreement_2008.pdf.

⁷⁵ Directors Guild of America Basic Agreement § 17-123 (2008), <http://www.dga.org/Contracts/Agreements.aspx>.

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The case of *Nader v. ABC Television, Inc.*⁷⁶ (discussed *infra* at Part III.B) demonstrates the protective value of the “no-morals-clauses-allowed model” to talent safeguarded by such clauses. The last sentence of Nader’s morals clause stated: “In addition to whatever other right ABC may have, ABC may also remove Artist’s credit, if any, from all such programs on which screen credit may have appeared.”⁷⁷ Given that talent’s “ability to get work . . . is often based on the drawing power their name may be expected to have at the box office,”⁷⁸ Nader’s termination may have resulted in not only loss of employment on *All My Children* and reputational damages, but also in damage to his prospects of future employment. Thus, the no-morals-clauses-allowed model provides superior protection for talent, but *only* at the cost of a drastic decrease in protection for non-talent.⁷⁹

The SAG CBA does not employ the “no-morals-clause-allowed” model. Yet, many talent agreements between studios and marquis actors or actresses do not contain a morals clause because such talent have the “clout to eliminate . . . restrictive

⁷⁶ *Nader v. ABC Television, Inc. (Nader I)*, 330 F. Supp. 2d 345 (S.D.N.Y. 2004); *Nader v. ABC Television, Inc. (Nader II)*, 150 F. App’x 54 (2d Cir. 2005) (applying New York law).

⁷⁷ *Nader I*, 330 F. Supp. 2d at 346.

⁷⁸ Davenport, *supra* note 72, at 129.

⁷⁹ Talent agreements in the endorsement/advertising industry, in contrast, tend to provide explicit protection for talent’s intellectual property rights without a simultaneous abdication of morals clauses of any sort. For example, in December 2009, Ashley Madison (an internet-based dating service with the slogan “Life is short. Have an affair.TM” that boasts a 100% “Ashley Madison® Affair Guarantee”) offered Tiger Woods a \$5 million endorsement contract. See *Sponsorship and Endorsement Agreement between Avid Dating Life Inc. d/b/a Ashley Madison and ETW Corp. f/p/s/o Eldrick “Tiger” Woods*, TMZ.COM (Dec. 2, 2009) [hereinafter Ashley Madison/Tiger Woods Agreement], <http://www.scribd.com/doc/23594359/Am-Tiger-Contract>; ASHLEY MADISON, <http://www.ashleymadison.com> (last visited Sept. 9, 2011). Under the contract, Woods would have been required to grant Ashley Madison “the non-exclusive right and license throughout the World . . . to use Tiger Woods’ name, nickname, initials, autograph, facsimile signature, photograph, likeness, and/or endorsement (the “Property”)” Ashley Madison/Tiger Woods Agreement, *supra*, ¶ 2. By express provision, if the contract were later terminated (including for violation(s) of the morals clause), “all rights granted to Ashley Madison under this Agreement shall forthwith terminate and immediately revert to Tiger Woods, and Ashley Madison shall discontinue all use of and reference to the Property.” Ashley Madison/Tiger Woods Agreement, *supra*, ¶ 9. Thus, the “no-morals-clause-allowed” model is not the only method by which talent’s intellectual property rights may be adequately protected. Given that the interests and protective needs of non-talent parties in the entertainment (television) and endorsement industries are often strikingly comparable, the no-morals-clause-allowed model may one day be considered an unreasonable denial of protection for non-talent. See *infra* Part IV.B.

contract language,” making any morals clause “the first thing” stricken from the contract.⁸⁰ Under the “missing” morals clause model, “[s]tudios have little recourse . . . when a star such as” Mel Gibson or Tom Cruise “implodes.”⁸¹ For example, when Mel Gibson was arrested for drunk driving in 2006, Disney had no right to terminate its distribution agreement for Gibson’s movie *Apocalypto*.⁸² When Tom Cruise entered the “danger zone[,] with public tirades about psychiatry, Scientology, and postpartum depression,” Paramount Pictures was still obligated by contract to release *Mission: Impossible III*.⁸³ Studios may attempt alternative methods of coercion, such as letters threatening liability for monetary damages to a production,⁸⁴ or by creating distance between a particular project and the studio brand.⁸⁵ In such cases, neither talent nor non-talent can truly be said to benefit from either the relationship, or the lack of *de jure* protection (despite the existence of slight *de facto* protection from the aforementioned actions).

In contrast to the motion picture industry, endorsement agreements employing the “missing” morals clause model still provide non-talent with some modicum of palpable protection for brands and/or products. This sanctuary takes the form of a discretionary right to “simply shelve the [advertising] campaign.”⁸⁶ Thus, talent agreements in the “no-morals-clauses-allowed” club do not, as is currently assumed, benefit talent. In fact, when situations arise that might serve to breach a morals clause (if the talent agreement contained one), it is more likely that the “no-

⁸⁰ Merissa Marr, *Hollywood Report: When a Star Implodes; Studios Have Few Options When Celebrities Stumble; Return to Morals Clause?*, WALL ST. J., Aug. 4, 2006, at W8, available at ProQuest, Doc. ID 1088820731. It bears noting that though very few talent parties desire or intentionally seek public notoriety when choosing private actions, even fewer are willing to sacrifice their autonomy by accepting a morals clause without objection. At this impasse, both parties are left to the mercy of the laws of supply and demand that determine the parties’ bargaining power. See Auerbach, *supra* note 14, at 7.

⁸¹ Marr, *supra* note 80.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* (employed by Morgan Creek Productions to curb Lindsay Lohan’s behavior during the making of *Georgia Rule*).

⁸⁵ *Id.* (discussing how Disney may change the marketing strategy for *Apocalypto* from focusing on Gibson’s role as director, to the movie’s “fast-paced action and mystery,” as the studio had done previously for a different Lindsay Lohan project, *Herbie: Fully Loaded*).

⁸⁶ N.R. Kleinfeld, *When a Celebrity Becomes Notorious*, N.Y. TIMES, May 18, 1981, at D1, available at Westlaw, 1981 WLNR 187835.

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morals-clauses-allowed” model will actually cause harm to both parties.⁸⁷

III. “WHAT WE’VE GOT HERE IS [A] FAILURE TO COMMUNICATE.”⁸⁸ – THE PROBLEMS WITH PREVAILING MORALS CLAUSE MODELS

A. “Morality” Triggers

The earliest incarnations of morals clauses contained triggers defined by notions of “decency”⁸⁹ and “morality.”⁹⁰ “Morality” is fundamentally an indefinite term that is in a “constant state of

⁸⁷ The one exception to this otherwise generally-applicable rule appears to be everyone’s favorite anomaly, Mr. Charlie Sheen. Despite Sheen’s pattern of alcohol- and drug-induced behavior, his star power did not plummet. In early March 2011, Sheen signed a deal with Ad.ly (a company that matches celebrities with companies seeking “celebrity endorsements on Twitter”) under which he could earn up to \$1 million per year. See *How Charlie Sheen Will Be Matched With Brands for Twitter Endorsements*, THE HOLLYWOOD REPORTER (Mar. 6, 2011), <http://www.hollywoodreporter.com/news/how-charlie-sheen-will-be-164827>. Sheen was also reportedly offered deals relating to a Charlie Sheen comic book, a Tiger Blood energy drink and cocktails, and a variety of merchandise (e.g., t-shirts and mugs) bearing his image and/or catchphrases. See *Charlie Sheen’s Growing List of Merchandising, Marketing Deals*, THE HOLLYWOOD REPORTER (Mar. 8, 2011), <http://www.hollywoodreporter.com/news/charlie-sheens-growing-list-merchandising-165391>. Notwithstanding this precedent set by Sheen, it stands to reason that non-talent will prefer to spend “more sponsorship money for those who choose to be ‘good’ than those who choose to be ‘bad.’” Douglas Quan, *Tiger Turns Down \$100M ‘No Morality’ Deal*, POSTED SPORTS (May 20, 2010), <http://sports.nationalpost.com/2010/05/20/tiger-turns-down-100m-no-morality-deal> (statement of Lindsay Meredith, professor of marketing at Simon Fraser University).

⁸⁸ COOL HAND LUKE (Jalem Productions 1967).

⁸⁹ See *Decency Definition*, DICTIONARY.COM, <http://dictionary.reference.com/browse/decency> (last visited Mar. 10, 2011) (World English Dictionary entry) (“1.[C]onformity to the prevailing standards of propriety, morality, modesty, etc[.]”).

⁹⁰ For example, in *Drayton v. Reid*, 5 Daly (N.Y.) 442 (1874), the New York Court of Common Pleas allowed the termination of a contract between Alice Drayton—a “‘song’ and ‘dance’ performer”—and Jacob Reid and Seth O. Crosby, the proprietors of a theatrical company, by whom Drayton had been hired. Chief Justice Daly noted that Drayton’s contract required her “to conform to the rules and regulations of the company,” and found reasonable the regulation requiring Drayton to “be orderly and *decent* whilst mingling professionally with the members of the troupe.” *Id.* at 444 (emphasis added). The opinion also discussed six witnesses’ testimony concerning Drayton’s “lewd and *indecent* acts,” “addict[ion] to cursing and swearing,” and “*demoralizing*” conduct—including the “public[] talk[]” of her “*immoral* conduct” with another troupe member (“illicit intercourse with a married man” in at least two different hotels). *Id.* at 443-44 (emphasis added). The court held that Reid and Crosby were justified in terminating the contract when Drayton, “in the presence of members of the troupe[,] committed acts too gross and disgusting to be described,” despite her otherwise complete performance under the contract. *Id.* at 444.

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flux[.]” but may broadly be said to include “behavior that comports to an existing code of conduct put forward by a society.”⁹¹ Given the vast universe of conduct this definition might encompass, non-talent had exceedingly broad latitude to determine when talent’s conduct failed to meet the standard set by the contemporaneous society.

“Morality”-based morals clauses were first implemented in the entertainment industry during the heyday of the Hollywood studio system.⁹² In response to a myriad of Hollywood scandals in the early 1920s,⁹³ standard contracts were “littered with clauses covering every aspect of” talents’ lives.⁹⁴ Among the multitude of others were “self-protective” morals clauses, which provided the studio with the power to “withhold money, or fire people, if they got involved in scandal.”⁹⁵ An average morals clause might read:

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 [studio] or the motion picture industry.⁹⁶

Improprieties cited by studios as legitimate grounds for termination ranged from illegal acts to “mo[re] harsh and unreasonable” prohibitions against conduct such as interracial

⁹¹ Pinguelo & Cedrone, *supra* note 5, at 352.

⁹² The term “studio system” refers to a period of time (primarily from the 1910s through the late 1930s) when Hollywood functioned like a factory: all studio resources (from its human resources—directors, writers, producers, actors, etc.—to physical resources—sound stages, sets, costumes, etc.) were devoted to one project at a time, in a continuous cycle of film production and release. A studio’s human resources were often referred to as “contract artists,” who signed multi-year contracts to work exclusively for one studio, for set and relatively small salaries. See Linda J. Demaine, *Navigating Policy by the Stars: The Influence of Celebrity Entertainers on Federal Lawmaking*, 25 J.L. & POL. 83, 86, 86 n.11 (2009); DAVID THOMSON, *THE WHOLE EQUATION: A HISTORY OF HOLLYWOOD* 26, 160-78 (2004).

⁹³ See THOMSON, *supra* note 92, at 140-41 (discussing the 1921 Roscoe “Fatty” Arbuckle rape and murder scandal, the 1922 still-unsolved murder of director William Desmond Taylor, the mid-1920s drug-related deaths of Wallace Reid, Barbara La Marr, and Olive Thomas, and Charlie Chaplin’s 1924 marriage to an underage girl).

⁹⁴ Marr, *supra* note 80.

⁹⁵ THOMSON, *supra* note 92, at 142.

⁹⁶ *Morality Clause for Films*, N.Y. TIMES, Sept. 22, 1921 (emphasis added), <http://query.nytimes.com/mem/archive-free/pdf?res=9A02E0DC123EEE3ABC4A51DFB F66838A639EDE>.

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dating.⁹⁷

As World War II wound down, and the Cold War heated up, the House Un-American Activities Committee (HUAC) zeroed in on American culture as a tempting medium for Communists to spread “subversive messages.”⁹⁸ In October 1947, HUAC subpoenaed 41 individuals with substantial connections to Hollywood to testify at the committee’s hearings.⁹⁹ Ten witnesses refused to testify, claiming First Amendment protection from questions about their involvement with the Communist party¹⁰⁰—for their refusal, the “Hollywood Ten”¹⁰¹ were cited for and convicted of contempt of Congress.¹⁰² One month later, on November 24, 1947, Hollywood caved to government and public pressure and issued the “Waldorf-Astoria Policy Statement” (Waldorf Statement), which condemned the Hollywood Ten and declared Communists unwelcome in the motion picture industry.¹⁰³ The politically-charged fallout from the Waldorf Statement was

⁹⁷ Marr, *supra* note 80.

⁹⁸ Dan Georgakas, *Hollywood Blacklist*, in *ENCYCLOPEDIA OF THE AMERICAN LEFT* (Mari Jo Buhle, Paul Buhle, & Dan Georgakas eds., 1992), available at <http://www.writing.upenn.edu/~afilreis/50s/blacklist.html>. Late in the summer of 1947, HUAC representatives visited Louis B. Mayer, head of Loew’s studio, and informed him of the committee’s belief that Loew’s (and Hollywood generally) was “infested with Communists,” and recommended that Hollywood “clean house, [or] Congress . . . and public opinion” would. *Loew’s, Inc. v. Cole*, 185 F.2d 641, 650 (9th Cir. 1950) (testimony of Louis B. Mayer). At first, Hollywood stood strong against HUAC pressure. *See Cole*, 185 F.2d at 650 (testimony of Louis B. Mayer) (“I said that I am not going to fire men on the assumption that they are Communists, when they have done nothing Communistic that I can find and no one has proven they are Communists. . .”).

⁹⁹ Harold W. Horowitz, *Loyalty Tests for Employment in the Motion Picture Industry*, 6 *STAN. L. REV.* 438, 442 (1954).

¹⁰⁰ *Id.*

¹⁰¹ *See* Notes and Comments, “Political” Blacklisting in the Motion Picture Industry: A Sherman Act Violation, 74 *YALE L.J.* 567, 567 (1965) [hereinafter “Political” Blacklisting] (noting that the “Hollywood Ten” included eight writers, one writer-producer, and one director); Georgakas, *supra* note 98 (naming the Hollywood Ten: Alvah Bessie, Herbert Biberman, Lester Cole, Edward Dmytryk, Ring Lardner, Jr., John Howard Lawson, Albert Maltz, Sam Ornitz, Robert Adrian Scott, and Dalton Trumbo).

¹⁰² “Political” Blacklisting, *supra* note 101, at 567. *See also* *Lawson v. United States*, 176 F.2d 49, 54 (D.C. Cir. 1949) (upholding the convictions), *cert. denied*, 339 U.S. 934 (1950); Georgakas, *supra* note 98 (noting that by mid-1950, a majority of the Hollywood Ten had begun serving one-year prison terms).

¹⁰³ *See* Horowitz, *supra* note 99, at 443. The Waldorf Statement was crafted by 50 members of the Motion Picture Association of America (MPAA), Association of Motion Picture Producers (AMPP), and the Society of Independent Motion Picture Producers, who met at Manhattan’s Waldorf-Astoria hotel. *See* 1 JOHN COGLEY, *REPORT ON BLACKLISTING* 21 (1956).

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two-fold: (1) all existing contracts between the Hollywood Ten and the studios were terminated;¹⁰⁴ and (2) the “Hollywood Blacklist”—a list of “subversive” actors and writers that producers were barred from hiring¹⁰⁵—was created.

When the studios exercised their standard morals clauses to terminate contracts with the Hollywood Ten,¹⁰⁶ three challengers emerged—Lester Cole, Ring Lardner, Jr., and Adrian Scott—and brought breach of contract claims against the studios.¹⁰⁷ The Ninth Circuit interpreted and construed each contested morals clause on the basis of their almost identical facts,¹⁰⁸ and—despite linguistic differences in the clauses—upheld each termination.¹⁰⁹

Table 2. Hollywood Ten Morals Clauses.

<i>Cole</i>	“The employee agrees . . . that he will not do or commit any act or thing that will tend to <i>degrade him in society</i> or <i>bring him into public hatred, contempt, scorn or ridicule</i> , or that will tend to <i>shock, insult or offend the community</i> or <i>ridicule public morals or decency . . .</i> ” ¹¹⁰
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¹⁰⁴ See *The Waldorf Statement*, reprinted in COGLEY, *supra* note 103, at 22 (“Members of the Association of Motion Picture Producers deplore the action [sic] of the ten Hollywood men who have been cited for contempt of the House of Representatives. We do not desire to pre-judge their legal rights, but their actions have been a disservice to their employers and have impaired their usefulness to the industry. We will forthwith discharge or suspend without compensation those in our employ and we will not re-employ any of the ten until such time as he is acquitted or has purged himself of contempt and declares under oath that he is not a Communist.”). The Waldorf Statement also promised that Hollywood would “not knowingly employ a Communist,” requested guidance from Congress (via legislation), and stated that “[n]othing subversive or un-American has appeared on the screen . . . [in the] patriotic services” rendered to the nation “in war and peace.” *Id.* at 22-23.

¹⁰⁵ “Political” Blacklisting, *supra* note 101, at 567-68. See also Georgakas, *supra* note 98 (discussing the Blacklist’s self-regulation, claiming that “Ronald Reagan, then head of the Screen Actors Guild, kept in touch with the FBI about ‘disloyal’ actors” exploring writers’ evasion of the Blacklist via pseudonyms, and the Blacklist’s more devastating effects on actors, like Charlie Chaplin—a British citizen—who was barred from the United States until 1972).

¹⁰⁶ See Pinguelo & Cedrone, *supra* note 5, at 355.

¹⁰⁷ *Loew’s, Inc. v. Cole*, 185 F.2d 641 (9th Cir. 1950) (applying California law) (Lester Cole); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954) (applying California law) (Ring Lardner, Jr.); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957) (applying California law) (Adrian Scott).

¹⁰⁸ Cole and Lardner were screen writers, *Cole*, 185 F.2d at 644, *Lardner*, 216 F.2d at 847, and Scott was a director, *Scott*, 240 F.2d at 87.

¹⁰⁹ See Pinguelo & Cedrone, *supra* note 5, at 358-61.

¹¹⁰ *Cole*, 185 F.2d at 645 (emphasis added).

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<i>Lardner</i>	“[I]f the artist shall conduct himself, either while rendering such services to the producer, or <i>in his private life</i> in such a manner as to <i>commit an offense involving moral turpitude</i> under Federal, state or local laws or ordinances, or . . . offend against <i>decency, morality</i> or . . . cause him to be <i>held in public ridicule, scorn or contempt</i> , or . . . <i>cause public scandal</i> , then, . . . the producer may, at its option . . . terminate this contract” ¹¹¹
<i>Scott</i>	“[T]he producer will conduct himself with <i>due regard to the public conventions and morals</i> and will not do anything which will tend to <i>degrade him in society</i> or <i>bring him into public disrepute, contempt, scorn or ridicule</i> , or that will tend to <i>shock, insult or offend the community or public morals or decency</i> or prejudice the corporation or the motion picture industry in general” ¹¹²

The Ninth Circuit upheld the termination in *Twentieth Century-Fox Film Corp. v. Lardner* on the basis of the rule established by *Loew's, Inc. v. Cole*, and affirmed the similar termination in *Scott v. RKO Radio Pictures, Inc.* on the basis of *Lardner*.¹¹³ In *Cole*, the court found that by refusing to answer HUAC's questions, Cole could “hardly be said to . . . [have acted] ‘with due regard to public conventions.’”¹¹⁴ Further, a jury “might well find” that Cole's refusal implied involvement with Communism, and “because, even in 1947, 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 [] his agreement.”¹¹⁵

The *Cole* rule has yet to be overruled and was not limited by its terms to the entertainment (or any other) industry. As such, the assumption since the McCarthy Era has been that morals clauses with “morality” triggers continue to provide broad flexibility to non-talent parties that choose to invoke such termination rights. In 2000, however, this theory was disproved in the context of professional sports by Latrell Sprewell and the NBA Grievance Arbitrator, who proved the wisdom of the common

¹¹¹ *Lardner*, 216 F.2d at 848 (emphasis added).

¹¹² *Scott*, 240 F.2d at 87-88 (emphasis added).

¹¹³ *Lardner*, 216 F.2d at 850; *Scott*, 240 F.2d at 91.

¹¹⁴ *Cole*, 185 F.2d at 648.

¹¹⁵ *Cole*, 185 F.2d at 649 (emphasis added).

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saying, ‘when you assume, you make an ass out of you and me.’

The current NBA and NHL morals clauses—found in each league’s respective uniform or standard player contract—each include a “morality” trigger.¹¹⁶ The governing documents for both leagues provide additional restraints on players’ conduct by means of rights—in favor of the signing team, the league, or the league Commissioner—to impose other disciplinary measures.¹¹⁷

Table 3. Morals Clauses with “Morality.”	
NBA UPC § 16(a)(i)	“The Team may terminate this Contract . . . if the Player shall: (i) <i>at any time</i> , fail, refuse, or neglect to conform his <i>personal conduct</i> to standards of good citizenship, <i>good moral character</i> (defined here to mean <i>not engaging in acts of moral turpitude</i> , whether or not such acts would constitute a crime)” ¹¹⁸

¹¹⁶ The current NBA CBA, which incorporates and defines the terms of the Uniform Player Contract (UPC), is valid between July 29, 2005 and June 30, 2011. National Basketball Association 2005 Collective Bargaining Agreement, art. XXXIX, § 1 [hereinafter NBA CBA], available at <http://www.nbpa.org/cba/2005>. The NBA morals clause is contained in section 16 of the UPC, titled “Termination.” NBA Uniform Player Contract § 16(a)(i), available at <http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf> [hereinafter NBA UPC].

The current NHL CBA is valid between September 16, 2004 and September 15, 2011. Collective Bargaining Agreement Between National Hockey League and National Hockey League Players’ Association, art. 3.1 (2005) [hereinafter NHL CBA], available at <http://www.nhl.com/ice/page.htm?id=26366>. Article 11.1 incorporates the Standard Player Contract (SPC) and prohibits any amendments or modifications to it. NHL CBA, art. 11.1. The NHL morals clause is contained in paragraph 2(e) of the SPC, with its corresponding termination right in paragraph 14(a). NHL Standard Player Contract §§ 2(e), 14(a), available at <http://www.nhl.com/ice/page.htm?id=26366> [hereinafter NHL SPC] (paragraph 14(a) permits termination for “material breach” of the SPC).

¹¹⁷ See, e.g., NBA UPC, *supra* note 116, § 5(b)(iii)-(iv) (emphasis added) (“The Player agrees: . . . (iii) to conduct himself on and off the court according to the highest standards of *honesty, citizenship, and sportsmanship*; and (iv) not to do anything that is *materially detrimental* or *materially prejudicial* to the best interests of the Team or the League.”); NHL SPC § 4 (“The Club may from time to time . . . establish reasonable rules governing the conduct . . . of the Player For violation of any such rules . . . the Club may impose a reasonable fine upon the Player The Club may also suspend the Player for violation of any such rules.”).

¹¹⁸ NBA UPC, *supra* note 116, § 16(a)(i) (emphasis added). Black’s Law Dictionary defines “moral turpitude” as “[c]onduct that is contrary to justice, honesty, or morality.” BLACK’S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS. Moral turpitude may be grounds for the dismissal of an employee where “taking the nature of the plaintiff’s employment into account the acts complained of rendered the plaintiff unfit to perform the duties which he had undertaken.” 19 WILLISTON & LORD, *supra* note 16, § 54:45 (quoting *Child v. Boyd & Corey Boot & Shoe Mfg. Co.*, 175 Mass. 493 (1900))

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NHL SPC § 2(e)	“The Player . . . [agrees] (e) to conduct himself <i>on and off the rink</i> according to the highest standards of honesty, <i>morality</i> , fair play and sportsmanship” ¹¹⁹
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Despite adopting the most draconian morals clause language among the Big Four, neither the NBA nor NHL has promulgated any explanatory statement concerning the expected behavioral standard. The NFL opted for a different approach: a morals clause without a “morality” trigger,¹²⁰ plus a Personal Conduct Policy that attempts to clarify the expected standard of player conduct:

Standard of Conduct: While criminal activity is clearly outside the scope of permissible conduct . . . the standard of conduct for persons employed in the NFL is considerably higher. It is not enough simply to avoid being found guilty of a crime. Instead, as an employee of the NFL . . . you are held to a higher standard and expected to conduct yourself in a way that is responsible, promotes the values upon which the League is based, and is lawful.¹²¹

A well-known 1997 incident, involving Latrell Sprewell and the Golden State Warriors, stunningly demonstrates the dangers of relying on the *Cole* rule to preserve morals clauses triggered by “morality.” During team practice on December 1, 1997, Golden State Warriors coach P.J. Carlesimo told Sprewell to “sharpen his passes,” and ordered him to leave practice for talking back in response.¹²² When Carlesimo repeated the order, Sprewell “threatened to kill Carlesimo and grabbed . . . [him] by the throat, dragging him to the ground and choking him for ten to fifteen seconds.”¹²³ Twenty minutes later, Sprewell attacked Carlesimo again, landing one of several punches thrown.¹²⁴ Within forty-

(finding “the test is . . . not morality in the abstract”).

¹¹⁹ NHL SPC, *supra* note 116, § 2(e) (emphasis added).

¹²⁰ See NFL UPC § 11, in NFL CBA, 252 (2006-12) (emphasis added), available at <http://images.nflplayers.com/mediaResources/files/PDFs/General/NFL%20COLLECTIVE%20BARGAINING%20AGREEMENT%202006%20-%202012.pdf> (“If at any time, in the sole judgment of Club . . . Player has engaged in *personal conduct* reasonably judged by Club to *adversely affect or reflect on Club*, then Club may terminate this contract.”).

¹²¹ NFL Personal Conduct Policy (2008), <http://images.nflplayers.com/mediaResources/images/oldImages/fck/NFL%20Personal%20Conduct%20Policy%202008.pdf>.

¹²² Roger A. Javier, “*You Cannot Choke Your Boss & Hold Your Job Unless You Play in the NBA*”: *The Latrell Sprewell Incident Undermines Disciplinary Authority in the NBA*, 7 VILL. SPORTS & ENT. L.J. 209, 210 (2000).

¹²³ *Id.*

¹²⁴ *Id.* at 211.

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eight hours, the Warriors discharged Sprewell from his four-year, \$32 million contract¹²⁵ (under the “Conduct Clause” contained therein),¹²⁶ and NBA Commissioner David Stern chose to impose a disciplinary sanction, suspending Sprewell from the league for one year.¹²⁷ Based on this incident, Sprewell also lost an endorsement contract with Converse, reportedly valued between \$300,000 and \$600,000.¹²⁸

Sprewell challenged the Warrior’s termination of his player contract and Commissioner Stern’s suspension in a hearing presided over by the NBA Grievance Arbitrator John Feerick,¹²⁹ pursuant to the NBA Grievance Procedure.¹³⁰ As to the

¹²⁵ Phil Taylor, *Center of the Storm*, SPORTS ILLUSTRATED, 62 (Dec. 15, 1997), <http://sportsillustrated.cnn.com/vault/cover/featured/9617/index.htm> (noting also that Sprewell’s contract had almost three years and \$25 million remaining on it at that time).

¹²⁶ Javier, *supra* note 122, at 212. The “Conduct Clause” referred to is section 16 of the NBA UPC then in force, which required players to “conform to standards of good citizenship and good moral character” and prohibited “engaging in acts of moral turpitude.” *Id.* at 211 n.16.

¹²⁷ See Javier, *supra* note 122, at 211-12 (also noting Stern’s accompanying statement: “A sports league does not have to accept or condone behavior that would not be tolerated in any other segment of society.”). Commissioner Stern’s power to levy such a suspension is based on NBA Constitution article 35(d)(ii) (incorporated by reference into the NBA UPC at section 5(b)):

The Commissioner shall have the power to suspend for a definite or indefinite period, or to impose a fine not exceeding \$50,000, [or both] . . . upon any Player who, in his opinion . . . (ii) shall have been guilty of conduct that does not conform to standards of *morality* or *fair play*, that does not comply at all times with all federal, state, and local laws, or that is *prejudicial* or *detrimental* to the [NBA].

NBA Constitution art. 35(d)(ii), A-14, available at <http://www.nbpa.org/sites/default/files/EXHIBIT%20A.pdf>.

¹²⁸ Taylor, *supra* note 125.

¹²⁹ See NBA CBA, *supra* note 116, at art. XXXI, § 1 (defining the scope of the Grievance Arbitrator’s authority). John Feerick, then also serving as Dean of Fordham University Law School, spent twenty-one years with Skadden, Arps, Slate, Meagher & Flom. Feerick’s colleagues have been known to refer to him as “John the Just,” “St. John,” and “John the Good.” Javier, *supra* note 122, at 212-13.

¹³⁰ See NBA UPC, *supra* note 116, § 17 (“[A]ny dispute arising between the Player and the Team relating to any matter arising under this Contract, or concerning the performance or interpretation thereof . . . shall be resolved in accordance with the Grievance and Arbitration Procedure set forth in Article XXXI of the CBA.”). Sprewell argued that both claims were “[g]rievances regarding discipline,” which required the NBA Grievance Arbitrator to use a “just cause for the penalty imposed” standard of review. NBA CBA, *supra* note 116, at art. XXXI, § 14(c). The NBA argued that the suspension was not a matter of discipline, but rather an “action taken by the Commissioner . . . [that] concern[ed] the preservation of the integrity of, or the maintenance of public confidence in, the game of basketball[.]” which required an “arbitrary and capricious” standard of review under NBA CBA article XXXI, section 8(b). *In re Nat’l Basketball Players Ass’n*

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termination of his contract under its morals clause, Sprewell argued that his conduct did not meet the “moral turpitude” standard required by the UPC.¹³¹ The Warriors argued that the termination was rightful under two provisions in the UPC: (1) the section 16(a)(i) morals clause; and (2) the section 16(a)(iii)¹³² right to terminate for material breaches of the UPC.¹³³ Feerick agreed with Sprewell, in part, and ordered reinstatement of Sprewell’s contract and reduction of the NBA suspension from 82 to 68 games.¹³⁴ Feerick—defining his role in the arbitration to require him to “reach a fair solution within the letter and spirit of the collective bargaining agreement”¹³⁵—found that Sprewell’s conduct was “born of anger and passion and did not constitute an act of moral turpitude.”¹³⁶ In a footnote, Feerick discussed prior interpretations of “moral turpitude,” including the “universal recognition . . . [that it is] an undefined and undefinable standard[.]”¹³⁷ and concluded that they stood “for the proposition that moral turpitude is something more than simple assault and

on behalf of Player Latrell Sprewell and Warriors Basketball Club and Nat’l Basketball Ass’n, 591 PLI/Pat 469, 482-83 (2000) [hereinafter Sprewell Arbitration]. Sprewell’s argument concerning the morals clause termination was made in the alternative, and proper only if the termination was deemed a “contractual matter rather than” a disciplinary matter. *Id.* at 484.

¹³¹ See Sprewell Arbitration, *supra* note 130, at 484.

¹³² Now, NBA UPC section 16(a)(iv): “The Team may terminate this Contract upon written notice to the Player if the Player shall: . . . at any time, fail, refuse, or neglect to render his services hereunder or in any other manner materially breach this Contract.” NBA UPC, *supra* note 116, § 16(a)(iv).

¹³³ See Sprewell Arbitration, *supra* note 130, at 481-82 (citing the Warriors’ Team Rules “personal conduct” clause which states that “intentional violation of significant team rules will be considered a material breach of the Player Contract,” and that by his actions, Sprewell “intentionally violated significant Team Rules regarding violence, personal conduct and good citizenship,” thereby breaching his contract).

¹³⁴ See Javier, *supra* note 122, at 216, 216 n.63. In total, Sprewell’s December 1, 1997 actions cost him \$6.4 million and a 68-game suspension (reinstatement of his contract with the Warriors allowed Sprewell to recover the \$17.3 million due under the last two years of that contract). *Id.* at 217, 217 n.71. Applying the “just cause” standard, Feerick found that the “two disciplines together,” and the respective “severity” of each, were “unprecedented . . . with respect to an act of violence[.]” and held that he was “unable to sustain the termination . . . as meeting a standard of just cause.” Sprewell Arbitration, *supra* note 130, at 570. See also Pollack, *supra* note 51, at 1700-05.

¹³⁵ Sprewell Arbitration, *supra* note 130 at 571, n.13 (quoting *N.L.R.B. v. Strong*, 393 U.S. 357, 365 (1969) (Douglas, J., dissenting)).

¹³⁶ Sprewell Arbitration, *supra* note 130, at 571. See also Pollack, *supra* note 51, at 1700-05.

¹³⁷ Sprewell Arbitration, *supra* note 130, at 571 n.12 (quoting *Jordan v. DeGeorge*, 341 U.S. 223, 235 (1952) (Jackson, J., dissenting)).

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something more than the outcome of temper or natural passion.”¹³⁸ The day after Feerick’s ruling, Commissioner Stern commented on the decision, stating: “[apparently,] you cannot choke your boss and hold your job unless you play in the NBA.”¹³⁹

The absence of any citation to *Cole* in Feerick’s arbitration decision suggests that the *Cole* rule only provides adequate protection for “morality” triggers employed in the entertainment industry. The relative ease with which Feerick did away with the clause’s defenses, and the resultant public embarrassment suffered by the Golden State Warriors and the NBA,¹⁴⁰ demonstrate that the protective value of morals clauses with “morality” triggers in the sports industry may be undesirably, and unexpectedly, low.

Recent fashion agreements for U.S.-based brands and retail programs—which may include Internet (and thus worldwide) sales—have also tended toward “morality” triggers.¹⁴¹ Most fashion agreements (pertaining to designers, models,¹⁴² and celebrity endorsers) include goodwill and tarnishment language from trademark law:

[Celebrity] shall, at all times, engage in and maintain such personal behavior as shall enhance and promote the *goodwill of the Brand*, and the image thereof . . . [Celebrity] shall not take any action that may detract from the *goodwill associated with the Brand*, *tarnish its image*, or otherwise *erode its selling power*.¹⁴³

¹³⁸ Sprewell Arbitration, *supra* note 130, at 571 n.12.

¹³⁹ Ira Berkow, *Sports of The Times; Undoing A Reasonable Punishment*, N.Y. TIMES, Mar. 5, 1998, at C1, available at Westlaw, 1998 WLNR 3041222 (commenting that “[w]hat wasn’t said was that his attack was also unprecedented.”).

¹⁴⁰ See generally Pollack, *supra* note 51; Berkow, *supra* note 139.

¹⁴¹ “Morality” triggers are also common to brand endorsement agreements. See, e.g., Reebok Endorsement Agreement, *supra* note 44. Section 6.1. provides a termination right in favor of Reebok in the event that any event listed in the subsequent subsections occurs, including section 6.1.4, titled “Morals,” which states:

The commercial value of the Endorsement is impaired by Athlete’s commission of any act or involvement in any occurrence which violates widely-held principles of *public morality* or decency, is a felony or crime of *moral turpitude* in the jurisdiction in which it is committed, or reflects unfavorably on Athlete, Reebok or Reebok Products.

Id. at § 6.1.4, at 216-17 (emphasis added).

¹⁴² See also Pinguelo & Cedrone, *supra* note 5, at 348; *Kate Moss: Sorry I Let People Down*, CNN.COM (Sept. 22, 2005), <http://edition.cnn.com/2005/WORLD/europe/09/22/kate.moss/index.html> (model Kate Moss lost contracts with Rimmel London, Burberry, and H&M after a picture of Moss doing cocaine was published in the *Daily Mirror*).

¹⁴³ This language comes from a brand endorsement agreement that is currently in-force (emphasis added) (on file with author). To protect the confidentiality of both parties, the

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Others invoke classic “moral turpitude” language (in addition to goodwill language), which may bind the talent both before and during the agreement’s term.¹⁴⁴

Table 4. Morality is always in Fashion.	
Brand/Designer Agreement	“[Designer] shall, at all times and in all material respects, engage in and maintain such personal behavior as shall enhance and promote the goodwill of the Marks and the image thereof. [Designer] warrants that she has not committed, and during the Term will not commit, any act which constitutes an offense involving moral turpitude under federal, state or local laws, or which is reasonably likely to materially damage, denigrate or injure the reputation of the Products or [Company] . . . [A]ny breach by [Designer] of her obligation under this Section . . . will be a basis for termination of this Agreement.” ¹⁴⁵
Retail Partnership Program Agreement	“Designer warrants . . . to not having committed (and not to commit during the Term) any act that constitutes an offense involving <i>moral turpitude</i> under federal, state or local laws or that may bring [Designer], [Retail Partner] . . . or [Company] into public <i>disrepute</i> , contempt, scandal or ridicule, or that may insult or offend the public generally or otherwise may damage, denigrate or injure the reputation or success of the Products . . . [Retail Partner] or [Company]. Should Designer violate . . . this paragraph, [Company] shall have the right to terminate this Agreement and have no further obligation as to the [Designer Fee] and

clause has been edited to remove all identifying information.

¹⁴⁴ See 2 ROBERT LIND, MEL SIMENSKY, TOM SELZ & PATRICIA ACTON, ENTERTAINMENT LAW: LEGAL CONCEPTS AND BUSINESS PRACTICES § 9:107 (3d ed. 2011), available at Westlaw ENTERTAIN § 9:107 (“If a person in the past has done anything that might fall into one of these three categories, the morals clause can be triggered if the past conduct is currently publicized.”). See also Reebok Endorsement Agreement, *supra* note 44, § 6.1.6, at 217 (“Damaging Statements” section provides a termination right for Reebok if statement made during the agreement’s term, and for substantial liquidated damages if a qualifying statement is made “at any time after the [t]erm”).

¹⁴⁵ See *supra* note 143.

	Designer promptly shall reimburse such portions of the [Designer Fee] already paid by [Company].” ¹⁴⁶
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As the foregoing provisions demonstrate, the consequences of breaching a morals clause can range from mere termination of the agreement to termination plus loss of compensation due and an obligation to return compensation already paid under the contract. Ergo, minimizing linguistic ambiguity is of the utmost importance, given the estimable financial (and inestimable reputational) harm that may flow from action by talent that will serve to breach such a morals clause.

International sports may have perceived this potential lack of value decades before the Sprewell incident, as seen in some international policy documents that define a special social role for sports and the athletes who participate in them. As early as 1978, the United Nations Educational, Scientific and Cultural Organization (UNESCO) promulgated the International Charter of Physical Education and Sport,¹⁴⁷ which stated:

Top-class sport . . . must be protected against any abuse. The serious dangers with which phenomena such as violence . . . and commercial excesses[,] threaten its *moral values*, image and prestige pervert its very nature The public authorities, voluntary sports associations . . . and the athletes themselves must combine their efforts in order to eliminate these evils.¹⁴⁸

Despite this express reference to “moral values,” most international sports unions and leagues have chosen not to subject talent to morals clauses with “morality” triggers.¹⁴⁹ Unfortunately for the international sports industry, however, its chosen standard—“disrepute” triggers—also appears to fail in its attempt to maximize protective value.

¹⁴⁶ See *supra* note 143.

¹⁴⁷ UNESCO, International Charter of Physical Education and Sport (Nov. 21, 1978) (emphasis added), available at http://www.unesco.org/education/information/nfsunesco/pdf/SPORT_E.PDF.

¹⁴⁸ *Id.* art. 7.1.

¹⁴⁹ See *infra* Part II.B. See also Council of Europe, Code of Sports Ethics (Sept. 24, 1992) (revised May 16, 2001), http://www.coe.int/t/dg4/sport/sportineurope/charter_en.asp (“Individuals have the [] responsibilit[y] . . . [t]o behave in a way which sets a good example and presents a positive role model for children and young people . . .”).

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B. “Disrepute” Triggers

The legitimacy of morals clauses with “disrepute”¹⁵⁰ triggers was, like their “moral” counterparts, established by case law stemming from the entertainment industry.¹⁵¹ Fifty-four years after *Cole*, Michael Nader—an actor appearing on ABC’s *All My Children*¹⁵²—challenged ABC’s invocation of his morals clause, terminating his contract on the basis of “his well-publicized [2001] arrest for selling cocaine to an undercover police officer.”¹⁵³ ABC incorporated Standard Terms and Conditions into Nader’s contract, paragraph 8 of which read:

MISCONDUCT. If, *in the opinion of ABC*, Artist shall commit any act or do anything which might tend to bring Artist into *public disrepute*, contempt, scandal, or ridicule . . . or to injure the success of any use of the Series or any program, ABC may . . . immediately terminate . . . Artist’s employment . . .¹⁵⁴

The Southern District of New York, granting summary judgment to ABC, held that “the morals clause is not, on its face, so vague, ambiguous or overbroad as to render it void.”¹⁵⁵ The Second Circuit affirmed, finding that Nader “provide[d] no support for his claim[s]” of ambiguity and vagueness, and stating that “no indication [exists] that New York departs from the generally applicable law on this point . . . [that] [m]orals clauses have long been held valid and enforceable . . .”¹⁵⁶ The Second Circuit also found “Nader’s assertion that his conduct did not fall within the terms of the morals clause . . . meritless,” because:

The undisputed facts that Nader was arrested and that the arrest generated media attention brings his conduct *well within*

¹⁵⁰ “Disrepute” may be defined as “[a] loss of reputation; dishonor.” BLACK’S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS.

¹⁵¹ See *Nader v. ABC Television, Inc. (Nader I)*, 330 F. Supp. 2d at 345, 346 (S.D.N.Y. 2004).

¹⁵² *Nader I*, 330 F. Supp. 2d at 346 (emphasis added). See also MARK LITWAK, DEALMAKING IN THE FILM & TELEVISION INDUSTRY: FROM NEGOTIATIONS TO FINAL CONTRACTS 148-49 (3d ed. 2009) (discussing television contracts) (“Actor employment agreements may contain a ‘morals’ clause that requires the actor to conform himself/herself so as not to violate public conventions or subject himself/herself to public hatred, contempt, or ridicule. If the actor violates this clause, the employer has the right to terminate the agreement.”).

¹⁵³ *Nader v. ABC Television, Inc. (Nader II)*, 150 F. App’x 54, 55 (2d Cir. 2005) (applying New York law).

¹⁵⁴ See *Nader I*, 330 F. Supp. 2d at 346.

¹⁵⁵ *Nader I*, 330 F. Supp. 2d at 348.

¹⁵⁶ *Nader II*, 150 F. App’x at 56 (citations omitted).

any reasonable interpretation of the clause.”¹⁵⁷

The *Nader* rule does not provide strong protection for morals clauses with “disrepute” triggers because it is based on a reasonableness standard, which inherently lacks *ex ante* predictability for both non-talent and talent. From ABC’s (non-talent) perspective, the morals clause was enforceable only *after* external review, the outcome of which is never ascertainable *ex ante*. From Nader’s viewpoint, the rule was an *ex post* death knell to the reasonable predictability he enjoyed *ex ante*—based on the facts that he had not been terminated by ABC in 1997 (under an earlier contract for *All My Children*) when he was arrested for driving while intoxicated, and that ABC rehired him in 2000 despite knowledge of his prior arrest.¹⁵⁸ The *Nader* rule also appears to contravene the general principle of contract law that ambiguous language is interpreted against the drafting party.¹⁵⁹

Nader, like the *Cole* rule, is not limited by its terms to the entertainment industry. Yet, as demonstrated by the Sprewell incident, the *Cole* rule failed to adequately protect a “morality” trigger in the professional sports context.¹⁶⁰ It is not entirely clear whether *Nader*, or a *Nader*-like rule, suffers from a similar shortcoming in relation to “disrepute” triggers utilized in the sports industry.¹⁶¹

Talent agreements in international sports tend to employ morals clauses with “disrepute” triggers. The Court of Arbitration for Sport (CAS)—an international tribunal that hears sports disputes, including those concerning athletes’ contracts¹⁶²—has

¹⁵⁷ *Nader II*, 150 F. App’x at 56 (emphasis added).

¹⁵⁸ Nader originally appeared on the soap opera between 1991 and 1999, during which time his contract was terminated for artistic reasons—not on the basis of his 1997 arrest for driving while intoxicated. See *Nader I*, 330 F. Supp. 2d at 346-47.

¹⁵⁹ See *Warner Bros. Pictures v. Columbia Broad. Sys.*, 216 F.2d 945, 949 (9th Cir. 1954) (footnote omitted) (“The instruments under which Warner Claims [sic] were prepared by Warner Bros. Corporation which is a large, experienced moving picture producer. It would seem proper, therefore, to construe the instruments under the assumption that the claimant knew what it wanted and that in defining the items in the instruments which it desired and intended to take, it included all of the items it was contracting to take.”).

¹⁶⁰ See *supra* Part III.A.

¹⁶¹ The ten cases that have cited *Nader II* have referred only to other portions of the opinion concerning the Americans with Disabilities Act (ADA) and the elements of a claim of fraud under New York law. See, e.g., *Strohl v. Bride Adventure Ctr., Inc.*, No. 08 CV 259(RML), 2010 WL 3236778, at *6 (E.D.N.Y. Aug. 13, 2010) (ADA); *Fierro v. Gallucci*, No. 06-CV-5189 (JFB)(WDW), 2010 WL 1223122, at *11 (E.D.N.Y. Mar. 24, 2010) (fraud).

¹⁶² The Court of Arbitration for Sport (CAS) was created in 1984 by the International

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defined “[b]ringing a person into disrepute” as “lower[ing] the reputation of the person in the eyes of ordinary members of the public to a significant extent.”¹⁶³ Cases involving athletes participating in a drunken bar fight¹⁶⁴ and athletes driving while intoxicated (plus leaving the scene of an accident)¹⁶⁵ have been found to satisfy this articulation of the “disrepute” standard.

International Cricket Council (ICC), Code of Conduct art. 2.1.8(b)	“[C]onduct that . . . (b) brings the game into <i>dispute</i> .” ¹⁶⁶
Union of European Football Associations (UEFA), Disciplinary Regulations art. 5	“[P]layers . . . shall conduct themselves according to the principles of loyalty, integrity and sportsmanship [A] breach of these principles is committed by anyone: . . . [who] brings the sport of football, and UEFA in particular, into <i>disrepute</i>” ¹⁶⁷

Olympics Committee (IOC). See WONG, *supra* note 51, at 201-02 (noting that the IOC was removed from its post as CAS governor in 1992, and replaced by the International Council of Arbitration for Sport (ICAS), to increase the CAS’ impartiality), 27-28, 30 (describing the IOC as an “international, nongovernmental, not-for-profit organization located in Switzerland[,]” the master of all things Olympic that oversees all International Federations (IFs) (which determine eligibility rules) and National Olympic Committees (NOCs) (that administer national teams, training, and funding)).

¹⁶³ Nicholas D’Arcy v. Australian Olympic Committee, CAS 2008/A/1539 (May 27, 2008), <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1539.pdf>.

¹⁶⁴ *Id.*

¹⁶⁵ Chris Jongewaard v. Australian Olympic Committee, CAS 2008/A/1605 (Sept. 19, 2008), <http://jurisprudence.tas-cas.org/sites/CaseLaw/Shared%20Documents/1605.pdf> (Jongewaard’s car hit and seriously injured another cyclist, Matthew Rex, who had also been drinking).

¹⁶⁶ International Cricket Council Code of Conduct, art. 2.1.8(b), http://static.icc-cricket.yahoo.net/ugc/documents/DOC_C26C9D9E63C44CBA392505B49890B5AF_1285831265162_312.pdf (emphasis added) (adding in the Guidelines that this rule “may (depending upon the seriousness and context of the breach) prohibit the following: (a) public acts of misconduct; (b) unruly public behaviour; and (c) inappropriate comments which are detrimental to the interests of the game”). See also Cricket Australia Code of Behaviour § 1(6) (2009-11), http://www.auscricket.com.au/site/_content/document/00000059-source.pdf (emphasis added) (“[P]layers and officials must not *at any time* engage in behaviour . . . that could bring them or the game of cricket into *disrepute* or be harmful to the interests of cricket[.]”) (adding in the Guidelines that this rule applies not only to conduct, but also to “public comment or comment to or in the media”).

¹⁶⁷ Union of European Football Associations Disciplinary Regulations art. 5.1, 5.2(d)

International Rugby Board (IRB) Regulations, Regulation 20.1.8 (Code of Conduct)	“All Unions, Associations, Rugby Bodies, Clubs and Persons: . . . shall promote the reputation of the Game and take all possible steps to prevent it from being brought into <i>disrepute</i>” ¹⁶⁸
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Despite the guidance provided by the few CAS rulings to examine the international “disrepute” trigger, a directly applicable, overarching rule that shields the protective value of such clauses has not yet been laid down. Like their American counterparts,¹⁶⁹ international talent and non-talent parties within the sports industry have a strong desire to avoid public litigation of sports legal disputes.¹⁷⁰ Despite the benefits of “certainty and . . . protection . . . [for] the rights of the parties,” the drawback of “damage done to the sport as a whole by the column space it achieved in the tabloid and broadsheet media” makes litigation

(2008 ed.), <http://www.uefa.com/uefa/aboutuefa/organisation/legaljustice/index.html> (emphasis added). See also The Football Association Handbook Rule E 3(1) (2010-11), <http://www.thefa.com/TheFA/RulesandRegulations> (emphasis added) (“A Participant shall *at all times* act in the best interests of the game and shall not act in any manner which is improper or brings the game into *disrepute*”) (Rule E 1(b) notes that to breach Rule E 3(1) is to commit actionable “Misconduct” under the FA Rules). The Football Association (The FA) “was founded in 1863 as the governing body of the game in England. The FA is responsible for all regulatory aspects of the game of football in England.” *Who We Are*, THEFA.COM, <http://www.thefa.com/TheFA/WhoWeAre> (last visited Mar. 11, 2011).

¹⁶⁸ IRB REGULATIONS 20.1.8 (emphasis added), <http://www.irb.com/lawregulations/regulations/index.html>. See also AUSTRALIAN RUGBY UNION CODE OF CONDUCT paras. 3(d), -(m) (2005-2008), <http://www.rupa.com.au/ArticlePage.aspx?PageID=57> (emphasis added) (“All participants in the game are bound: . . . (d) . . . to take all reasonable steps to prevent the game from being brought into *disrepute*; . . . (m) not to do anything which adversely affects . . . the game, the ARU . . . sponsor, official supplier or licensee, including, but not limited to, any illegal act or any act of dishonesty or fraud.”). The New Zealand Rugby Union (NZRU) CBA expressly incorporates the IRB “disrepute” standard by requiring contract players to comply with IRB rules and regulations. New Zealand Rugby Union CBA § 51.1(i) (2010-2012), http://www.nzrpa.co.nz/includes/files/_cms/file/Collective%20Agreement%202010-2012.pdf (emphasis added). The English Rugby Football Union (RFU) expressly incorporates the IRB “disrepute” standard by requiring every local league to “include in its own rules a rule stating that each of its members is bound by . . . iRB [sic] Regulations” RFU REGULATIONS, *supra* note 61, at 2.2.3.

¹⁶⁹ See Pinguelo & Cedrone, *supra* note 5, at 350 (noting that “relatively few cases . . . have been actually litigated”).

¹⁷⁰ See Graham Perry, *Dispute Resolution in Sport: New Challenges New Options*, 2001 INT’L SPORTS L. REV. 92, 93.

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undesirable.¹⁷¹

A recent British case indirectly addressed morals clauses, in light of another case concerning current press practices relating to personal scandals that reaffirmed the need for “responsible journalism” to prevent “trial by press without proper safeguards, which is clearly not in the public interest.”¹⁷² The 2010 case of *John Terry v. Persons Unknown*¹⁷³—the captain of English and Chelsea football, and “lucrative face” of Nationwide, Samsung, and Umbro¹⁷⁴—concerned Terry’s own Tiger Woods-like adultery scandal. Terry, a “self-promoted family man”¹⁷⁵ sought a “super injunction”¹⁷⁶—based on his European Convention on Human Rights (ECHR) Article 8 right to respect for private and family life¹⁷⁷—to forestall media reports¹⁷⁸ of his alleged affair with a teammate’s ex-girlfriend.¹⁷⁹ Having granted a week-long temporary injunction, the High Court refused to renew the order,¹⁸⁰ finding that the heart of Terry’s claim was “essentially a business matter . . . the impact of any adverse publicity upon the business of earning sponsorship and similar income.”¹⁸¹ The High Court’s ruling implies that the ECHR Article 8 right to a private life is not a sufficient justification to subjugate the media’s Article 10 right to freedom of expression where an individual “repeatedly and so enormously fail[ed] to fulfil [sic] the *moral responsibilities* that civil society had come to expect . . . by virtue of [a] *public sporting position*,” in which case the Article 8 right may be

¹⁷¹ *Id.*

¹⁷² Flood v. Times Newspapers LTD, [2010] EWCA (Civ) 804 [104] (Eng.), available at <http://www.bailii.org/ew/cases/EWCA/Civ/2010/804.html>.

¹⁷³ John Terry v. Persons Unknown, [2010] EWHC (QB) 119 (Eng.), available at <http://www.bailii.org/ew/cases/EWHC/QB/2010/119.html>.

¹⁷⁴ Craig Callery, Comment, *John Terry: Reflections on Public Image, Sponsorship, and Employment*, 2010 INT’L SPORTS L. REV. 48.

¹⁷⁵ *Id.*

¹⁷⁶ *John Terry*, [2010] EWHC (QB) 119, [24]. See also Callery, *supra* note 174, at 48 (defining a “super injunction” as an order that simultaneously “prevent[s] the media from exposing th[e] incident, . . . [and] ‘prohibit[s] the disclosure of the fact that an order has been made and provid[es] for sealing the whole court file[.]’”).

¹⁷⁷ Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (1950), http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf.

¹⁷⁸ The press may assert a right to freedom of expression under ECHR Article 10. See *id.* art. 10.

¹⁷⁹ Callery, *supra* note 174, at 48.

¹⁸⁰ *John Terry*, [2010] EWHC (QB) 119, [132].

¹⁸¹ *John Terry*, [2010] EWHC (QB) 119, [95].

“qualified by acceptable standards of behaviour.”¹⁸² Thus, the court demonstrated its unwillingness to declare the private life of a famous footballer “morally untouchable” where the sole interest for which Article 8 protection is sought is one relating to business (such as the potential triggering of a morals clause).¹⁸³

Morals clauses with “disrepute” triggers do not provide the same protective value across industry lines, nor a particularly high level of protection generally. The *Nader* rule may provide adequate protection for non-talent in the entertainment industry, but *only* after completion of an external review process. The British *Terry* rule will not function to save talent from public revelation of their improprieties, or any consequential reputational or economic harm. Thus, based on a fundamental lack of predictability and disregard for the specific needs of particular industries, “disrepute” triggers fail to maximize the protective value of morals clauses to both parties in both the entertainment and sports industries.

Talent agreements utilizing “morality” and “disrepute” triggers (and those in the “no-morals-clauses-allowed” club discussed *supra*) fail to maximize the protective value of morals clauses by maximizing a lack of predictability instead. The harm to both parties that results from this failure emphasizes the need to abandon these one-size-fits-all models, and to adopt in their place individually-drafted, narrowly-tailored morals clauses that are designed specifically to increase protective value to both parties.

¹⁸² Callery, *supra* note 174, at 49 (emphasis added to “moral responsibilities” and “sporting position”).

¹⁸³ Callery, *supra* note 174, at 48 (internal quotation marks omitted). As a result of the scandal, Terry lost his position as captain of the England national soccer team. *Id.* at 51. British Sports Minister Gerry Sutcliffe stated: “On the field John Terry is a fantastic player and a good England captain, . . . but to be the captain of England you have got to have wider responsibilities for the country.” Henry Winter, *Sports Minister Gerry Sutcliffe Calls John Terry’s England Captaincy Into Question*, TELEGRAPH, Feb. 1, 2010, <http://www.telegraph.co.uk/sport/football/teams/chelsea/7122139/Sports-minister-Gerry-Sutcliffe-calls-John-Terrys-England-captaincy-into-question.html>. Terry did not, however, face further sanction from Chelsea—unlike his teammate, Ashley Cole, who was fined £400,000 for “bringing the club’s name into disrepute for similar indiscretions.” Callery, *supra* note 174, at 52 (noting that Cole’s improprieties occurred while he was on a club trip, whereas Terry’s did not). Based on Cole’s fine and the media storm surrounding Terry’s scandal, it is reasonable to conclude that Terry’s conduct would meet the “disrepute” standard, yet escaped further loss thanks to Chelsea’s seemingly absolute discretion over the matter. The drastically different consequences of Terry’s and Cole’s similar actions—based on Chelsea’s liberal exercise of discretion—demonstrate the lack of predictability inherent to the “disrepute” trigger, and the consequent decrease in protective value for talent of such clauses.

IV. MAXIMIZING MORALS CLAUSES' PROTECTIVE VALUE

The specter of disagreement and dispute looms like the sword of Damocles over every contract known to man. There is no contractual language that may be properly defined as bullet- or foolproof. Nonetheless, contract law attempts to alleviate the risk of dispute to the extent possible given each contractual relationship's unique circumstances. Contract law as applied to morals clauses should seek to do the same.

The value of a morals clause as a protective measure is based on the clause's ability to decrease the likelihood of harm to both parties. A morals clause is valuable to non-talent only if it permits termination of the agreement when such action is necessary to protect non-talent's interests. Conversely, a morals clause is valuable to talent only if it contains specifically-defined triggers that allow talent to evaluate *ex ante* the potential risks of certain types of personal conduct.¹⁸⁴ This value is determined by predictability in the contractual relationship and the unique characteristics of the parties' industry. Analysis of the determinative force of these qualitative quantities explains the inefficacy of the currently employed one-size-fits-all models, and clarifies the necessity of individually-drafted, narrowly-tailored morals clauses in order to maximize such clauses' protective value.

A. *Value and Predictability*

Predictability is a product of the interaction of three primary factors: certainty, ambiguity, and the likelihood of external intervention into the contractual relationship. Value and predictability enjoy a positive, or direct, relationship: as predictability increases, so does value. Therefore, value is also determined by certainty, ambiguity, and the likelihood of external intervention.

Certainty. The law requires contractual terms to be "reasonably certain"—i.e., supply "a basis for determining the existence of a breach and for giving an appropriate remedy."¹⁸⁵ This principle does not require *absolute* certainty; rather, only the quantum that is "reasonable" under the circumstances—uncertainty is not problematic per se. Conversely, it is common

¹⁸⁴ See Pinguelo & Cedrone, *supra* note 5, at 374.

¹⁸⁵ RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

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sense that the likelihood of disputes between the parties *increases* as certainty *decreases*. Therefore, predictability and certainty operate directly on each other: as certainty increases, so does predictability.

All morals clauses should be considered as containing two material terms: (1) the “prohibited conduct”¹⁸⁶—acts that, from non-talent’s perspective, if committed by talent would pose a risk to the subject matter of the contract (i.e., talent’s overall image and the specifically enumerated use of it by non-talent); and (2) the corresponding “*quantum satis*”¹⁸⁷—the limitation(s) that qualify the circumstances in which the morals clause is triggered (i.e., when the termination right may rightfully be exercised). Both terms must be drafted with a high degree of certainty to ensure the composite certainty of the morals clause.¹⁸⁸

Ambiguity. Ambiguity is a question of degree, ranging from least (unambiguous—“reasonably capable of only one construction”) to most (ambiguous—“reasonably susceptible to at least two reasonable but conflicting meanings . . .”).¹⁸⁹ As ambiguity is indefinite, in and of itself, its inherent effect is to decrease the foreseeability of its effect. Ambiguity and predictability, therefore, have an inverse relationship: as ambiguity decreases, predictability increases.

Likelihood of external intervention. Ambiguity is both a cause and result of external intervention into a contractual relationship. On the one hand, ambiguity is a question of fact—i.e., where the parties believe a term has “at least two reasonable but conflicting meanings”¹⁹⁰—that may drive the parties to an external review

¹⁸⁶ Kressler, *supra* note 4, at 255-56 app.

¹⁸⁷ “*Quantum satis*” is Latin for “a sufficient amount.” *Glossary of Medical Terms*, 3 J. FORENSIC DOCUMENT EXAMINATION 34 (1990). As used in European Union food law, *quantum satis* means “a level not higher than is necessary to achieve the intended purpose . . . provided that . . . [consumers are] not mislead[.]” Directive 94/36/EC, of the European Parliament and of the Council of 30 June 1994 on Colours For Use in Foodstuffs, 1994 O.J. (L 237) 13, 14 (art. 2, § 7). For purposes of this Note, *quantum satis* will indicate the requisite measure of conduct required before a contract’s morals clause can rightfully be exercised.

¹⁸⁸ Current morals clauses conflate these two terms in a manner that decreases overall certainty of the morals clause at issue. See *infra* Part IV (discussion of the NBA UPC morals clause).

¹⁸⁹ 11 WILLISTON & LORD, *supra* note 16, § 30:4. Williston qualifies this definition by adding: “when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement, and who is cognizant of customs, practices, usages, and terminology as generally understood in the particular trade or business.” *Id.*

¹⁹⁰ *Id.*

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process. On the other hand, ambiguity is a question of law—a legal conclusion that allows for interpretation and construction of the term.¹⁹¹ Playing the role of either cause or result, it is clear that as ambiguity increases, so does the likelihood of external intervention.

As a general principle, ambiguous language is interpreted against the drafting party.¹⁹² There are, however, exceptions to every rule, and any intervention into the parties' relationship inherently decreases predictability by virtue of adding another opinion to the mix.¹⁹³ Thus, predictability and the likelihood of external intervention operate inversely on one another: as the likelihood of intervention decreases, predictability increases.

The maximum degree of predictability—with regard to one contractual term in isolation—is achievable when the term has a high degree of certainty, a low degree of ambiguity, and a small likelihood of external intervention. As predictability and value operate in direct proportion, value stands the greatest chance of maximization when predictability is maximized.

B. Value and Industry

The industry at the heart of a talent agreement also plays a determinative role in the calculation of a morals clause's protective value. Fundamentally, a morals clause is “a form of corporate protection.”¹⁹⁴ Thus, its value cannot properly be defined without accounting for the nature, structure, and reality of the industry involved.

Endorsement/Advertising. Completely unhindered by collective bargaining, endorsement agreements provide the greatest opportunity for non-talent and talent to tailor contractual provisions to their respective needs. Non-talent takes on great risk through product endorsement—i.e., where the intent is to create a complete association between talent and a particular product, the

¹⁹¹ See *id.* (“It is a generally accepted proposition that where the terms of a writing are plain and unambiguous, there is no room for interpretation or construction, since the only purpose of judicial construction is to remove doubt and uncertainty.”); *id.* § 30:1 (“[I]nterpretation involves ascertaining the meaning of contractual words, while construction involves deciding their legal effect.”).

¹⁹² See *supra* note 159 (discussing *Warner Bros.*).

¹⁹³ See *supra* Part III.A (discussion of Sprewell/Golden State Warriors/NBA arbitration).

¹⁹⁴ See Pinguelo & Cedrone, *supra* note 5, at 366 (discussing morals clauses as “a form of corporate protection”).

product's brand will suffer the repercussions of any negative publicity incurred by its talent.¹⁹⁵ Thus, the protective value of a morals clause is determined by broad power, exercisable in non-talent's sole discretion, to protect products and brands through swift termination of troublesome talent.

Entertainment. The entertainment industry, often referred to as a collective whole under the name Hollywood, actually encompasses two sub-industries with somewhat divergent interests: the television industry, and the motion picture industry. This deviation is caused by a variety of factors, many of which significantly impact the scope of protection desired from a morals clause. One important element common to both sub-industries is the existence and strength of the guild CBAs applicable to each, which may alter the process by which individual talent agreements are formed.¹⁹⁶

Television. "Television programming . . . [is] directly influenced by advertising."¹⁹⁷ As such, networks have adopted a "conservative bias [toward programming], with no risks and no controversy that would exclude, alienate, or miss parts of the audience."¹⁹⁸ Networks seek to 'brand' their programs as products for consumption by audiences.¹⁹⁹ Branding a program as a whole creates strong associations between not only the network and the program, but also between the talent involved with the program. Such associations yield "meaning transference[s],"²⁰⁰ which run "the risk of the public imputing the misdeeds of an actor onto the character with which he is strongly associated."²⁰¹ Thus, the protective value of a morals clause for non-talent is maximized when the clause provides a predictable (and quickly exercisable) termination right when talent's personal conduct harms a program's brand. Likewise, talent value morals clauses that clearly delineate *ex ante* the types (and measures) of personal conduct that may trigger termination. Clauses plagued by uncertainty and ambiguity drastically increase the likelihood of external intervention, which may ultimately prevent non-talent from

¹⁹⁵ *See id.* at 368.

¹⁹⁶ *See supra* Part II.B.

¹⁹⁷ Kressler, *supra* note 4, at 242.

¹⁹⁸ *Id.* (alteration in original) (quoting WILLIAM LEISS ET AL., SOCIAL COMMUNICATION IN ADVERTISING 113 (1997)).

¹⁹⁹ *See* Kressler, *supra* note 4, at 242.

²⁰⁰ *See supra* pp. 5-7.

²⁰¹ Kressler, *supra* note 4, at 240, 242. *See supra* Part II.A.

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terminating the talent agreement, or delay termination in a manner that causes additional harm to non-talent. The extent of this risk yields a corresponding decrease in the morals clause's value.

Motion Pictures. Studios' interest in branding movies depends on whether a movie is considered a single project, or one part of a larger franchise. The relative impact of negative meaning transferences tends to increase "[a]s the value of a film's brand increases," leading studios to become increasingly more willing to "discard[] [talent] if they become a liability."²⁰² Studios also begin to act more akin to advertisers where product placement is used to raise the capital that finances a film.²⁰³ Thus, the protective value of a morals clause largely depends on the nature of the particular project and parties at issue.

Sports. The collective bargaining process has the greatest impact on the sports industry. While represented by players associations, individual athletes are generally not at liberty to demand alterations to any clauses in a league's UPC.²⁰⁴ Thus, any individual interests that athletes may have are subsumed by the collective bargaining process and the league's substantial bargaining power. The primary protective value of a morals clause to the leagues is provided by an ability to swiftly and decisively exercise liberal discretion to broadly protect the league brand. Therefore, value is maximized where the league has predictable authority to make discretionary decisions on a case-by-case basis.

C. Alternative Triggers and Specific Corresponding Quanta Satis

Morals clause triggers, and their corresponding *quanta satis*, should be drafted in the most certain—and least ambiguous—terms possible. As demonstrated above,²⁰⁵ it is only by maximizing certainty that the risk of external intervention is minimized, thus maximizing predictability and protective value. Within the vast universe of human conduct, the following types of behavior commonly appear as "prohibited conduct," and may serve as a starting point in the drafting process.²⁰⁶ The focus of all such

²⁰² Kressler, *supra* note 4, at 244.

²⁰³ *See id.* at 243.

²⁰⁴ *See supra* Part II.B.

²⁰⁵ *See supra* Part IV.A.

²⁰⁶ These potential triggers were chosen from among the morals clauses examined in this Note. Ideally, parties will consider their respective needs and choose triggers

negotiations should center around the parties' particular interests and protective needs, in light of the industry at the heart of the talent agreement.

Felonious and/or criminal conduct. This "prohibited conduct" should be defined by reference to state and/or federal laws, and limited by a specific *quantum satis* that makes clear whether mere allegation, indictment, or conviction is required to trigger non-talent's right to terminate the agreement.²⁰⁷

Drugs and alcohol. Similarly, this conduct should be defined by reference to state and/or federal laws, and limited by specific *quanta satis* which indicate whether mere possession, purchase, use, or sale by talent is required to give rise to a termination right in non-talent. The clause should also make clear what type of drugs and/or alcohol is necessary to trigger the clause, by qualifying the substances in terms such as illegal (with respect to state and/or federal laws pertaining to the substance itself, or only to persons under a specific age), legal (with proper prescription), legal (where wrongfully acquired), or legal (but used for non-medicinal purposes).

Violence. This conduct should be defined by reference to state and/or federal laws, and limited by *quanta satis* relating to whether use of a weapon is required (if so, whether that weapon must be capable of lethal force, and whether the weapon must actually be used in the perpetration of the violent conduct at issue), and the degree of harm (potential, given the circumstances, or actually inflicted). The drafters may also consider including limiting language that accounts for mitigating circumstances.

*Public Statements.*²⁰⁸ Though admittedly more uncertain, a

appropriate for those interests.

²⁰⁷ *But see* Philips, *supra* note 38 (statement of Anthony Oncidi) ("In California there is a very strict rule that an employer cannot take adverse employment action based on an arrest that has not led to a conviction. So an arrest might run afoul of a morals clause, but you have a statutory provision that still protects them as it does any other employee.").

²⁰⁸ At first glance, public statement triggers may appear to implicate First Amendment concerns. As noted in a recent court filing, however, "there is no 'state action' at issue . . . since . . . [few, if any, non-talent parties are] government entit[ies], and private parties routinely enter contracts to limit speech (e.g., non-disclosure agreements, non-disparagement agreements)." Memorandum in Support of Defendant's Motion for Judgment on the Pleadings at 1 n.1, *Mendenhall v. Handsbrands, Inc.*, No. 11-cv-570 (M.D.N.C. Aug. 30, 2011), 2011 WL 3861271.

At least one entertainment industry legal blog has noted the "growing movement in talent contracts to craft contractual language specifically geared at curbing commentary on Twitter and other social media outlets." Eriq Gardner, *Lawsuit Defends Celebrities' Rights to Say Controversial Things on Twitter*, THR, ESQ. (July 25, 2011), <http://www.holly>

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need may arise for a trigger based on public statements capable of causing harm to one or both parties.²⁰⁹ To mitigate the ambiguity of current models, drafting parties may consider a *quantum satis* that limits the prohibited acts and/or statements to those that *intend* (rather than just “tend”) to cause harm to non-talent’s interests, products, or brands. The parties should also specify what medium of communication qualifies under the class (whether the clause encompasses merely traditional media such as television and print publications, or includes Internet-based media such as social-networking websites).²¹⁰

woodreporter.com/thr-esq/lawsuit-defends-celebrities-rights-say-214881. See also Matt Belloni, *Hey, Showbiz Folks: Check Your Contract Before Your Next Tweet*, THR, ESQ. (Dec. 21, 2010), <http://www.hollywoodreporter.com/blogs/thr-esq/hey-showbiz-folks-check-contract-63398>. In addition, one commentator has offered some advice for Charlie Sheen, John Galliano, Prince Andrew, and Glenn Beck to consider prior to their next public statements/outbursts: “[G]enerally . . . have a nice hot cup of shut up.” Hadley Freeman, *PR Advice for Charlie Sheen and Other Celebrity Dummies*, Posting to *Comment is Free*, GUARDIAN, Mar. 9, 2011, <http://www.guardian.co.uk/commentisfree/2011/mar/09/hadley-freeman-celebrity-pr-advice>.

²⁰⁹ See, e.g., Reebok Endorsement Agreement, *supra* note 44, § 6.1.6, at 217. Section 6.1.6, titled “Damaging Statements,” provides a termination right for Reebok if:

Athlete or any person authorized by Athlete, at any time during the Term makes damaging or unfavorable public statements regarding Athlete’s association with Reebok, or Reebok products, programs or personnel, or speaks favorably of Competitors or their products in a manner which has the effect of discrediting Reebok Products or promoting the products of a Competitor.

Id.

²¹⁰ For example, the MLB has its own social media policy that:

[A]ppplies to all employees and independent contractors . . . of the 30 Major League Clubs (at both the Major and Minor League level), but does not apply to active players represented by the Major League Baseball Players Association . . . [and] controls the use of online and interactive media . . . including, but not limited to profiles, commentary, writings, photographs, images, logos, and audio or video files (. . . “Content”) . . . posted on outlets including but not limited to Facebook, MySpace, Twitter, blogs, podcasts, message boards and websites. . . .

MLB Social Media Policy, BIZ OF BASEBALL (May 1, 2011, 6:27pm), http://bizofbaseball.com/index.php?option=com_content&view=article&id=5191:older-undated-version-of-mlb-social-media-policy&catid=7:selection-of-docs&Itemid=25. Inter alia, the policy prohibits (in a section titled “Prohibited Conduct”) “[d]isplaying any disparaging or false Content or Content that adversely affects the business interests or reputation of [MLB or] any [team or individual to whom the policy applies] . . .” *Id.* Individuals who violate the policy “may be subject to disciplinary action up to and including termination.” *Id.* See also Maury Brown, *Inside Major League Baseball’s Social Media Policy*, BIZ OF BASEBALL (May 2, 2011), http://bizofbaseball.com/index.php?option=com_content&view=article&id=5192:inside-major-league-baseballs-social-mediapolicy&catid=26:editorials&Itemid=39 (explaining the policy and Ozzie Guillen’s suspension under it).

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It is worth noting, however, that the relationship between morals clauses and social media is not without its own complexities. On July 18, 2011, Rashard Mendenhall (a running back for the NFL's Pittsburgh Steelers) filed suit against Hanesbrands, Inc. claiming that Hanesbrands breached the talent agreement between Mendenhall and the Champion brand by terminating his exclusive endorsement contract on the basis of several of his Twitter tweets.²¹¹ According to the complaint, "Hanesbrands took no action[.]" and did not communicate with Mendenhall regarding any of these tweets.²¹² Hanesbrands did, however, act on May 5, 2011,²¹³ after Mendenhall "issued a series of tweets [on May 2, 2011 and May 4, 2011] concerning the public celebrations of [Osama] bin Laden's death[.]"²¹⁴ Hanesbrands informed Mendenhall that it was terminating the agreement pursuant to the morals clause contained in the August 2010 amendment to the agreement, which read:

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 we shall have the right to immediately terminate this Agreement. [*Hanesbrands'*] *decisions on all matters arising under this Section . . . shall be conclusive.*²¹⁵

In a May 9, 2011 letter to Mendenhall, Hanesbrands elaborated on its position regarding breach of the morals clause:

In light of Mr. Mendenhall's series of Tweets regarding the

²¹¹ See Complaint, *Mendenhall v. Hanesbrands, Inc.*, No. 11-cv-570 (M.D.N.C. July 18, 2011), 2011 WL 2820268; Gardner, *supra* note 208. The exclusive endorsement relationship began in May 2008 and was amended in late August 2010 to extend the agreement's term to include May 1, 2011 through April 30, 2015. See Complaint, *supra*, ¶ 2. Between mid-March and late April 2011 (when Hanesbrands terminated Mendenhall's contract), Mendenhall (under the Twitter name @R_Mendenhall, self-described as a "Conversationalist and Professional Athlete") tweeted on a number of topics ranging from his March 15 agreement with NFL peer Adrian Peterson who "had compared the NFL labor situation to 'modern-day slavery[.]'" to a mid-April debate about the Islamic religion, and "tweets regarding women and relationships[.]" Complaint, *supra*, ¶¶ 19, 20-21, 26, 28-31.

²¹² Complaint, *supra* note 211, ¶¶ 27, 29, 31.

²¹³ See *id.* ¶ 38.

²¹⁴ *Id.* ¶ 35. The first of Mendenhall's tweets 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 . . ." *Id.* See also *id.* ¶¶ 33-34, 36-37.

²¹⁵ *Id.* ¶ 17 (alteration in original) (emphasis added).

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death of Osama bin Laden and the events of September 11, 2001, we have concluded that his actions meet the standards set forth in the Agreement of bringing Mr. Mendenhall ‘into public disrepute, contempt scandal or ridicule, or tending to shock, insult or offend a majority of the consuming public or any protected class or group thereof’ It is also our opinion that Mr. Mendenhall can no longer be an effective spokesperson for the Champion brand, in light of these actions.²¹⁶

Mendenhall is claiming that Hanesbrands’ breach of contract has caused him to suffer present and future damages in excess of \$1 million.²¹⁷ It is unlikely that the outcome of Mendenhall’s suit (even if settled prior to judicial resolution) would not impact the future relationship between morals clauses and social media.

D. “It’s All Been Done Before”²¹⁸: Drafting with Specificity

Linguistic specificity does not inherently decrease protection for contractual parties. In at least one similarly personal and sensitive area within the realm of talent agreements—nudity riders in film and television contracts²¹⁹—specificity actually maximizes protection for both parties. “Because nudity is so often material to the terms of employment,”²²⁰ specific language provides guidance to both parties as to the acceptable course of conduct within the contractual relationship and prevents “surprises” from befalling either party.²²¹ Section 43(D) of the SAG Theatrical Agreement of 2005 states:

The appearance of a performer in a nude or sex scene or the doubling of a performer in such a scene shall be conditioned upon his or her prior written consent Such consent must include a general description as to the extent of the nudity and the type of physical contact required in the scene.²²²

²¹⁶ *Id.* ¶ 41.

²¹⁷ *See id.* ¶ 49 (Mendenhall is also seeking interest, costs, “and further relief as th[e] Court deems appropriate”).

²¹⁸ BARENAKED LADIES, *It’s All Been Done*, on STUNT (Reprise Records 1998).

²¹⁹ *See* Rick Smith, Comment, *Here’s Why Hollywood Should Kiss the Handshake Deal Goodbye*, 23 LOY. L.A. ENT. L. REV. 503, 516-17 (2003) (“Because nudity is so often material to the terms of employment, SAG has adopted several requirements so that these terms will be well-defined.”).

²²⁰ *Id.* at 517 (citation omitted).

²²¹ *Id.*

²²² SAG Theatrical Agreement of 2005 § 43(D), SCREEN ACTORS GUILD, <http://www.sag.org/files/sag/documents/2005TheatricalAgreement.pdf> (last visited Oct. 17, 2011).

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ACTRA has similar requirements, which are explained in the *ACTRA Nudity in Film Survival Guide*.²²³ An ACTRA nudity rider may specify “the maximum degree of nudity required,” the camera angle at which the actor may be shot (“from the front or back or side only” or “shot only from the waist up” or “full frontal nudity”), and whether a “[b]ody suit, modesty patches, tape, etc.” are desired.²²⁴ Thus, a nudity rider may read:

- (2A) No pubic hair may be shown nor any of Artist’s lower frontal/genital or lower posterior nudity. Artist’s breasts and nipples shall not be shown unless Artist, in consultation with the director, agrees to show Artist’s nipples and/or breasts. In the filming of nude and/or simulated sex scenes, Artist shall not be required to actually be nude (Artist may wear a bodysuit, pasties, underwear or other appropriate undergarments as long as such clothing does not materially interfere with the photography of the scenes.)
- (2B) Artist shall not be required in simulated sex scenes to simulate the performance of the following sex acts: any simulated sex acts with another woman other than kissing and touching (but not touching breasts, the pubic area or buttocks).²²⁵

The specificity with which this nudity rider is drafted serves to protect both the talent and non-talent parties by illuminating the *quantum satis* that qualifies the circumstances in which the talent is willing to perform nude or sexual scenes (i.e., the taboo). Thus, the parties’ expectations are less ambiguous *ab initio* between the parties (and to any external reviewer) and may be more adequately protected during the contractual term.

Morals clauses would surely provide better protection for both parties if definite (instead of ambiguous) language were used for both the *quantum satis* and the taboo. For example, a morals clause might read:

[Non-talent] may terminate this Contract upon written notice to [Talent] if [Talent] shall, at any time during or within one (1) year after the Term:

- (a) be charged with a felony, by a federal and/or state

²²³ *Nudity in Film Survival Guide*, ACTRA, http://www.actra.ca/main/wp-content/uploads/ACTRA_Nudity_Survival_Guide.pdf (last visited Oct. 17, 2011).

²²⁴ *Id.* at 7.

²²⁵ Nudity Rider, *Re: “Til the End of Time”/Linda Fiorentino*, ¶¶ 2A, 2B (Aug. 4, 1999), <http://www.thesmokinggun.com/file/linda-fiorentinos-bare-facts?page=0>.

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court; or

(b) be convicted of, or plead guilty to (including for the purposes of a plea agreement):

(1) any misdemeanor crime [or, specify by degree or type], by a federal and/or state court, without regard to appeals pending or intended;

(2) any violation of federal and/or state law that involves use, possession, purchase, and/or sale of illegal drugs, or legal prescription drugs wrongfully acquired and/or used for non-medicinal purposes, by [Talent]; or

(3) any violation of federal or state law that involves the use by [Talent] of any weapon capable of lethal force, whether or not such use actually caused harm; or

(c) engage in acts or make public statements (including statements made by [Talent] via Facebook, Twitter, and/or any other social networking website and/or service currently existing or hereafter made public) that:

(1) intentionally or inadvertently threaten the success, financial or otherwise, of the [Product/Project/Service];

(2) express contempt for and/or disparage [Non-talent] and/or the [Product/Project/Service]; or

(3) “[are] likely to damage [Non-Talent’s] enterprise.”²²⁶

Though not bullet- or foolproof, this model undeniably offers increased protection for the parties’ interests by increasing the specificity of language on its face. This increase in turn decreases the clause’s composite ambiguity by making the parties’ intentions more apparent *ab initio*, not only to the parties themselves, but also to any external reviewer.²²⁷ Thus by going the way of nudity riders, the morals clause may relinquish its status as an outsider and become a proper subject within the province of contract law.

²²⁶ RESTATEMENT (THIRD) OF AGENCY § 8.10 (2006) (“An agent has a duty, within the scope of the agency relationship, to act reasonably and . . . to refrain from conduct that is likely to damage the principal’s enterprise.”).

²²⁷ See Aaron Gafni, *Is (Allegedly) Locking a 21-Year-Old in a Closet a Fireable Offense?*, LAW LAW LAND BLOG (Oct. 27, 2010), http://www.lawlawlandblog.com/2010/10/is_allegedly_locking_a_21yearo.html (stating that “[i]n lieu of more general “morals” or “conduct” clauses, Mel Gibson’s employers may seek a “raving anti-Semitic remarks” clause . . . [and] Charlie Sheen’s bosses might want to write a “no naked, drunken hotel room destructions” provision into his next \$2-million-per-episode TV deal . . .”).

V. CONCLUSION

More than a century has passed since Justice Holmes advocated “ridding ourselves of . . . unnecessary confusion[,]”²²⁸ and yet his message has clearly been ignored in the context of morals clauses.²²⁹ It has become abundantly clear that the three models currently in use fail to yield the predictability required to maximize the protective value of morals clauses to both parties.

The morals clause in an endorsement contract offered to Courteney Cox in late 2010 aptly demonstrates the value of certainty to both parties.²³⁰ On October 12, 2010, only one day after news broke about the breakup of Cox and her husband of eleven years, David Arquette,²³¹ Cox was offered a \$1 million contract to become the face of a dating website called Cougar Life “that specializes in hooking cougars up with fresh meat.”²³² The endorsement agreement contained a morals clause with both “morality” and “disrepute” triggers:

Cougar Life shall have the right to terminate this Agreement,

²²⁸ Holmes, *supra* note 2, at 464.

²²⁹ See, e.g., Philips, *supra* note 38. Philips asked Oncidi, “How vague do . . . morals clauses tend to be?” *Id.* Oncidi responded:

Some are more specific than others, but they usually fall along the vague lines of not doing anything that might bring about public disrepute, contempt, scandal or ridicule, or reflecting unfavorably on the network or studio. So yeah, they’re pretty vague, but what that allows is the production company or studio to maintain maximum amount of flexibility without having to name all these shenanigans they [might] engage in, which is what any good lawyer would do.

Id. (alteration in original).

²³⁰ As of the publication date of this Note, Courteney Cox does not appear to have accepted this endorsement agreement. It is used here for the purpose of academic discussion only.

²³¹ Mike Fleeman, *Courteney Cox and David Arquette Separate*, PEOPLE.COM (Oct. 11, 2010, 6:35 PM), <http://www.people.com/people/article/0,,20433530,00.html>.

²³² *Courteney Cox Offered \$1 Mil to Promote Cougar Hunt*, TMZ.COM (Oct. 13, 2010, 3:00 AM PDT), <http://www.tMZ.com/2010/10/12/courteney-cox-cougar-life-dating-site-spokesperson-contract-million/> [hereinafter *Cougar Hunt*]. Cougar Life, Inc. is a Toronto, Ontario, corporation, and the agreement provides that the laws of the Province of Ontario and Canadian law “applicable therein” will govern it. *Sponsorship Agreement between Cougar Life Inc. and Coquette Productions f/p/s/o Courteney Cox* ¶ 10(h), TMZ.COM (Oct. 12, 2010), http://tmz.vo.llnwd.net/o28/newsdesk/tMZ_documents/1012_cox.pdf [hereinafter *Cougar Life Agreement*]. The one-year sponsorship agreement provides compensation of \$1 million “plus applicable taxes,” in exchange for obligations to appear in four television ads and twelve radio ads, and to make at least thirty public appearances during the one-year term. *Cougar Life Agreement*, ¶¶ 3, 4, 1(a), 5(a). The term “f/p/s/o” means “for personal services of.”

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immediately, in the event that . . . Courteney Cox engages in illegal, *immoral*, or criminal conduct resulting in a felony conviction or otherwise conducts herself in a manner that brings herself into *disrepute*; or . . . engages in *conduct contrary to the best interests* of Cougar Life.²³³

Cougar Life reportedly chose Cox to be its “spokes-cougar”²³⁴ based on the “synergy”²³⁵ between its product, Cox’s “personal ‘circumstances’” (i.e., her marital separation), and her starring role on ABC’s *Cougar Town*.²³⁶

The Cougar Life-Cox relationship materially differs from the parties’ circumstances in *Cole* and *Nader* because both cases concerned non-talent parties whose business and conduct were popularly considered to be on the side of moral righteousness, while the talents’ conduct was not. Here, it is highly likely that *Cole*’s “large segment of the public” would view Cougar Life as an immoral and/or disreputable “thing[] of evil”²³⁷ regardless of its spokes-cougar’s identity. Vis-à-vis such a non-talent entity, its morals clause begs two questions: (1) who is Cougar Life to judge morality and disrepute; and (2) what sort of conduct would be “contrary to” its “best interests”?²³⁸

Would Cox breach the agreement if her marriage ends in divorce? The *Cole* rule might operate in Cougar Life’s favor because (arguably) many Americans consider divorce to be immoral and/or disreputable. Even if “many” Americans harbor different moral considerations, a determination by Cougar Life that Cox’s divorce was immoral or disreputable would hardly fall outside of *Nader*’s “any reasonable interpretation of the clause” rule.²³⁹ But what of the fact that Cougar Life chose Cox because of her recently acquired “separated” status? It is hardly a giant leap from public separation to divorce, so why should Cougar Life subsequently gain a termination right from a factual circumstance that it effectively ratified prior to the agreement?

The ambiguity, unfortunately, does not stop there. What is the scope of “conduct contrary to the best interests of Cougar

²³³ Cougar Life Agreement, *supra* note 232, ¶ 8(a)(iii)-(iv) (emphasis added).

²³⁴ *Cougar Hunt*, *supra* note 232.

²³⁵ Auerbach, *supra* note 14, at 15 (discussing the Reebok/Allen Iverson relationship).

²³⁶ *Cougar Hunt*, *supra* note 232.

²³⁷ *Cole*, 185 F.2d at 649.

²³⁸ Cougar Life Agreement, *supra* note 232, ¶ 8(a)(iv).

²³⁹ *Nader II*, 150 F. App’x at 56.

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Life”²⁴⁰ reasonably determinable by Cox *ex ante*? Given that Cougar Life is a “website that specializes in matching older women with younger men,”²⁴¹ would Cox (now age 47) breach the contract by dating an older man? If so, how much “younger”²⁴² than Cox would her potential suitors have to be? Would Cox breach the agreement by dating a woman?! This clause is not problematic because of the variety of actions by Cox that could serve to breach it. It is, however, antithetical to the general law of contracts because Cox would lack the certainty necessary to know *ex ante* which course of action would breach the morals clause.

In a world where the word “winning”²⁴³ can come to mean so many different things (thanks to the one and only Charlie Sheen), linguistic ambiguity is capable of running amok like King Kong, causing lasting damage of epic proportions. Recent personal indiscretions by a number of well-known public figures amply demonstrate the need for morals clauses that *actually* perform their *hypothetical* function. To maximize protection, the parties must have morals clauses specifically drafted to reflect a pre-contractual mutual understanding of each party’s interests. Otherwise, there is no telling just how much “winning” may cost, or which party will foot the bill.

²⁴⁰ Cougar Life Agreement, *supra* note 232, ¶ 8(a)(iv).

²⁴¹ *Cougar Hunt*, *supra* note 232.

²⁴² *Cougar Hunt*, *supra* note 232.

²⁴³ See Melissa Maerz, *The Charlie Sheen Dictionary: A Totally Gnarly, Bi-Winning Guide to the Actor’s Best Quotes*, L.A. TIMES (Mar. 1, 2011), <http://latimesblogs.latimes.com/showtracker/2011/03/the-charlie-sheen-glossary-a-totally-bitchin-bi-winning-guide-to-the-actors-best-quotes.html> (defining “winning” as “[t]he end goal of Charlie Sheen’s life philosophy,” used in such Sheen quotes as, “The only thing I’m addicted to right now is winning” and “Just winning every second”).