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An Inherent Contradiction: Corporate Discretion in Morals Clause Enforcement

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An Inherent Contradiction: Corporate Discretion in Morals Clause Enforcement

*Todd J. Clark**

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INTRODUCTION

Freedom of expression is a fundamental right in any well-established democracy.¹ This right promotes the free flow of information, thoughts,

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* Todd J. Clark is a Professor of Law at North Carolina Central University. First, I would like to thank God for putting me in a position to write about and shed light on issues that I find compelling. I would also like to thank my mother, Dora L. Clark, my father, Sherwood Hill, and my aunt, Selena Comer for all of their love and support. Additionally, I would like to thank my son, Jordan K.

and ideas. Freedom of expression prohibits leaders from manipulating their power, stifling progress, and eliminating the voice of change. Inherent in the freedom of the right to express is the right to oppose.² Expression that goes against the status quo “serves a vital social function in offsetting or ameliorating the normal process of bureaucratic decay.”³ It empowers the citizens of a democratic nation with the means to promote and maintain justice by challenging majority ideas about fairness, equality, and justice. Through this exercise,

[a] nation's unity is created through blending individual differences rather than imposing homogeneity from above; that the ability to explore fullest range of ideas on a given issue was essential to any learning process and truth cannot be arrived upon unless all points of view are first considered; and that by considering free thought, censorship acts to the detriment of material progress.⁴

This fundamental right to freedom of expression is threatened by the use of morals clauses in celebrity endorsement deals. Morals clauses are contractual provisions that provide corporations with an express, unfettered right to terminate an athlete or celebrity spokesperson's endorsement contract when the endorser acts in a manner deemed socially reprehensible

Clark, for serving as part of my motivation for writing. Hopefully, my writings and work as a professor will one day inspire him to achieve his greatest potential. In addition, I would like to thank Professor André Douglas Pond Cummings, Professor Reggie Mombrun, Professor Grace Wigal, and Professor Mary Wright for all of the time they dedicated to helping me improve as both a scholar and a law professor. Anything that I have managed to do well as a member of the academy is largely a function of their dedication and vested interest in my success. I am also grateful to Professor André Douglas Pond Cummings, Professor Kimberly Cogdell Granger for reading drafts of my article. I also appreciate the scholarship grant provided by North Carolina Central School of Law that supported the production of this article. Finally, I am extremely grateful for the assistance provided by my research assistant Alexis White who worked diligently to help me organize my citations and to prepare this article for publication.

1. “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

2. RANDAL MARLIN, PROPAGANDA AND THE ETHICS OF PERSUASION 240–41 (2002).

3. Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 884 (1964).

4. See RHONA K. M. SMITH & CHRISTIEN VAN DEN ANKER, THE ESSENTIALS OF HUMAN RIGHTS 127 (2005) (discussing one of the earliest defenses advanced by John Milton, English Poet and political writer, in favor of freedom of speech in his work, “Areopagitica”).

by corporate leadership.⁵ Such provisions typically are included in standard endorsement contracts and give the corporation wide latitude to cancel the agreement upon an act by the celebrity spokesperson perceived as detrimental to the corporation's brand and image.⁶

Providing corporations with such broad discretion impairs social progress because morals clauses can stifle thought-provoking and change-oriented speech. The very essence of the First Amendment is subjugated to a meaningless idea of grandeur because modern-day corporations now have an unbridled right to temper speech in the private context through the use of broadly drafted morals clauses. This reality is inherently dangerous because a corporation has the right to regulate or restrict speech based upon its assessment of how society will view the endorser's expression. This idea fundamentally is flawed for several reasons. First, given that corporations are driven primarily by profit maximization, it is unnatural to assign to them moral authority. Second, because white Americans—specifically, white American males—occupy the overwhelming majority of corporate leadership, the initial determination about what conduct is morally reprehensible will be made by a homogenous group of people who often views the world from a uniform perspective. Third, if morality is determined by calculating what the majority of the spending population thinks,⁷ then such a determination will favor white Americans' conceptions of morality because the majority of wealth in the United States

5. Fernando Pinguelo & Tim 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 348, 351 (2009).

6. *Id.*

7. See, e.g., Toni Lester, "Finding the 'Public' in 'Public Disrepute' – Would the Cultural Defense Make a Difference in Celebrity and Sports Endorsement Contract Disputes? - The Case of Michael Vick and Adrian Peterson", 6 PACE INTELL. PROP. SPORTS & ENT. L.F. 21 (2016) (explaining that conceptions of morality often are influenced by racial and cultural factors as evidenced by an ESPN poll that reflected that 57% of black Americans believed that the media is biased against black athletes while only seven percent of white Americans held the same belief. The poll further reflected that black people believe that "the media unfairly criticizes black athletes more than white athletes, while the white fans suggest there is no difference in the media's handling of various cases."); see also Jennifer Agiesta, *CNN poll: Americans split on anthem protests*, CNN (Sept. 30, 2017, 2:29 AM), <http://www.cnn.com/2017/09/29/politics/national-anthem-nfl-cnn-poll/index.html> (highlighting a poll that found that 59% of whites said that kneeling during the National Anthem is wrong, whereas 82% of blacks said that it's the right thing to do) [<https://perma.cc/9TQT-X65V>].

is concentrated in the hands of white Americans.⁸ Fourth, due to an incomplete understanding of the truth and a natural desire for people to maintain the status quo—even when it is wrong or unjust—determining what is morally acceptable is often difficult and normally takes time. Finally, broadly drafted morals clauses present a Hobson’s choice⁹ for celebrity endorsers by placing the endorser in the unfair and unreasonable position of sacrificing their freedom of expression, particularly concerning social justice issues, for monetary gain.

American history is riddled with athletes and entertainers who have expressed themselves in ways that were deemed morally wrong at the time of expression; after the passage of time and social enlightenment, however, the same expression was championed as morally acceptable. Based on the discretion that corporations have to evaluate morality, they can terminate endorsement contracts prematurely according to their own biased perceptions of morality before this enlightenment process occurs. Muhammed Ali exemplifies this truth.

In 1966, legendary boxer Muhammed Ali¹⁰ famously remarked, “I ain’t got no quarrel with them Viet Cong. No Viet Cong ever called me nigger,” after he refused to serve in the army during the Vietnam War by claiming conscientious objector status.¹¹ When the public pressed Ali further about his refusal to serve, he eloquently remarked,

You want me to do what the white man says and go fight a war against some people I don’t know nothing about—get some freedom for some other people when my own people can’t get theirs? We’re over there so that the people of South Vietnam can be free. But I’m here in America and I’m being punished for upholding my beliefs.¹²

8. Matt Bruenig, *The Top 10% of White Families Own Almost Everything*, DEMOS (Sept. 5, 2014), <http://www.demos.org/blog/9/5/14/top-10-white-families-own-almost-everything> [<https://perma.cc/93HR-J8ZC>].

9. A Hobson’s choice literally means “take it or leave it.” See Caroline Epstein, *Moral Clause: Past, Present & Future*, 5 N.Y.U. J. INTELL. PROP. & ENT. L. 73, 98–99, for a discussion on the harsh results of broadly drafted moral clauses.

10. *Biography of Muhammad Ali*, BIOGRAPHY, <http://www.biography.com/people/muhammad-ali-9181165> (last visited Aug. 19, 2017) (explaining that Muhammad Ali, three-time World Heavyweight Champion and Olympic Gold Medalist, was a famous 20th century sports figure and activist and is considered the greatest athlete of the 20th century) [<https://perma.cc/68EM-FJQM>].

11. *Muhammad Ali - in his own words*, BBC SPORT (June 4, 2016), <http://www.bbc.com/sport/boxing/16146367> [<https://perma.cc/H35F-M7W8>].

12. HOWARD L BINGHAM & MAX WALLACE, *MUHAMMAD ALI’S GREATEST FIGHT: CASSIUS CLAY VS. THE UNITED STATES OF AMERICA* 149 (2012).

In response to his refusal to serve and his open criticism of the war, Ali drew the ire of the American public who, at the time, found his actions cowardly, anti-American, and unpatriotic.¹³ As a result of his refusal to serve in the army, Ali was convicted and sentenced to five years in prison for draft evasion.¹⁴ Additionally, his boxing license was suspended, and he was stripped of his boxing title while his case was under appeal.¹⁵ Four years after he first was convicted, the United States Supreme Court, in a seven-to-two vote, overturned his conviction.¹⁶ When Ali expressed his political discontent about the Vietnam War, there was an overwhelming public backlash against his actions.¹⁷ In hindsight, however, Ali now is regarded as a hero for independent free thought and as a world champion of positive social activism.¹⁸

Social activism also was on display during the 1968 Olympics in Mexico City, Mexico when Tommie Smith and John Carlos, winners of the gold and bronze medals in the 200-meter dash, respectively, stood on raised Olympic victory podiums with their heads bowed while each man extended his arm toward the sky as a symbol of black power.¹⁹ The imagery of the moment was deliberate and designed to bring attention to

13. Krishnadev Calamur, *Muhammad Ali and Vietnam*, ATLANTIC (June 4, 2016), <https://www.theatlantic.com/news/archive/2016/06/muhammad-ali-vietnam/485717/> [<https://perma.cc/AR87-PXR3>].

14. *Id.* Although Ali was sentenced to five years imprisonment, he never served a day in jail for draft evasion. *Id.*

15. *Id.*

16. *Clay v. United States*, 403 U.S. 698 (1971).

17. See Justin Block, *Muhammad Ali Risked It All When He Opposed The Vietnam War*, HUFF. POST, http://www.huffingtonpost.com/entry/muhammad-ali-risked-it-all-when-he-opposed-the-vietnam-war_us_5751e545e4b0c3752dcda4ca (last updated June 24, 2016) [<https://perma.cc/FUM5-MUNV>].

18. David Remnick, a Pulitzer Prize-winning writer who authored the Ali biography *King of the World*, noted of the boxing champion's stand against the Vietnam War:

As he had before and would again, Ali had showed his gift for intuitive action, for speed, and this time he was acting in a way that would characterize the era itself, a resistance to authority, an insistence that national loyalty was not automatic or absolute. His rebellion, which started out as racial, now had widened in scope.

DAVID REMNICK, *KING OF THE WORLD: ALI AND THE RISE OF AN AMERICAN HERO* 287 (1999).

19. TOMMIE SMITH & DAVID STEELE, *SILENT GESTURE: THE AUTOBIOGRAPHY OF TOMMIE SMITH* 173 (2007).

the unfair treatment of black people in the United States.²⁰ Immediately after their display, the President²¹ of the International Olympic Committee (“IOC”) suspended Smith and Carlos from the United States National team and banned them from staying in the Olympic village for making a political statement in violation of the spirit of the Olympic Games.²² At the time of their display, the American sentiment regarding their actions was overwhelmingly negative.²³ Time magazine characterized their conduct as a “public display of petulance that sparked one of the most unpleasant controversies in Olympic history and turned the high drama of the games into theater of the absurd.”²⁴ Today, however, that negative

20. Tommie Smith and John Carlos’ Black Power salute at the 1968 Olympics was a political demonstration.

[Smith’s] raised right [black gloved fist] stood for black power in America. Carlos’s [raised] left [black gloved fist] stood for the unity of black America. Together they formed an arch of unity and power. The scarf around [Smith’s] neck stood for black pride. The black socks with no shoes stood for black poverty in racist America. The totality of our effort was the regaining of black dignity.

Id.

21. Ironically, although Avery Brundage, President of the International Olympic Committee (“IOC”) in 1936 and prominent Nazi sympathizer during the 1936 Olympics, opined that Smith’s and Carlos’s actions were “a deliberate and violent breach of the fundamental principles of the Olympic spirit,” he did not express the same objection towards the Germans’ Nazi salutes during the 1936 Olympics in Berlin. Brundage reasoned that Nazi salutes were acceptable because the salutes represented a national symbol of expression in a competition of nations but the black power salute was a salute of individual protest. Shirley Povich, *Berlin, 1936: At the Olympics, Achievements of the Brave in a Year of Cowardice*, WASH. POST (July 6, 1996), <http://www.washingtonpost.com/wp-srv/sports/long-term/general/povich/launch/olympics.htm> [https://perma.cc/73H8-K95Q]. In light of Brundage’s reasoning, at the time, his opinion was grossly inconsistent with the IOC Charter that consistently has provided that “the Olympic Games are competitions between athletes in individual or team events and not between countries.” Int’l. Olympic Comm., Olympic Charter, ch. 1, r. 6, ¶ 1 (2015).

22. Initially, the United States Olympic Committee refused to send Smith and Carlos home; when the president of the IOC threatened to ban the entire U.S. track team, however, Carlos and Smith were expelled. MURRY R. NELSON, 1 *AMERICAN SPORTS: A HISTORY OF ICONS, IDOLS, AND IDEAS* 132 (2013).

23. See Gary Younge, *The Man Who Raised a Black Power Salute at the 1968 Olympic Games*, GUARDIAN (Mar. 30, 2012), <https://www.theguardian.com/world/2012/mar/30/black-power-salute-1968-olympics> [https://perma.cc/WGZ5-S64J].

24. *The Olympics: Black Complaint*, TIME (Oct. 25, 1968), <http://content.time.com/time/magazine/article/0,9171,900397,00.html> (“‘Faster, Higher, Stronger’ is the motto of the Olympic Games. ‘Angrier, nastier, uglier’ better describes the scene

sentiment has changed. Smith and Carlos now are regarded as heroes who were central figures in the struggle for civil rights.²⁵

Much like Ali, Smith and Carlos were hated by a majority of the American public, and their actions were perceived as anti-American.²⁶ It is difficult to think that a corporation could have restricted their right to speak on such important issues. Had Ali or Smith and Carlos been athletes today, their exercise of freedom of expression could have cost them several endorsement deals. Ali's decision to defect served as a fundamental example of how to stand up for one's ideals. Smith and Carlos brought the evils of racism in the United States to the social conscience of the world. Their actions forced the United States to rethink its treatment of black people to avoid the devaluation of its position as the primary dictator of morality. If the United States could not treat its own people with dignity and respect, its ability to encourage others to do the same would be undermined.

Today, modern athletes and entertainers are central figures in the fight for justice. For example, both the National Basketball Association ("NBA") and the National Football League ("NFL") have taken strong positions against the discriminatory treatment of homosexuals.²⁷ Many hip-hop artists and hip-hop

in Mexico City last week. There, in the same stadium from which 6,200 pigeons swooped skyward to signify the opening of the 'Peace Olympics,' Sprinters Tommie Smith and John Carlos, two disaffected black athletes from the U.S. put on a public display of petulance that sparked one of the most unpleasant controversies in Olympic history and turned the high drama of the games into theater of the absurd.") [<https://perma.cc/B5BA-MDUB>].

25. William C. Rhoden, *Sports of The Times; Vilified to Glorified: Olympic Redux*, N.Y. TIMES (Oct. 17, 2005), <http://www.nytimes.com/2005/10/17/sports/othersports/vilified-to-glorified-olympic-redux.html> ("In 1968, Smith and Carlos made one of the most courageous and enduring acts of sports demonstration in my lifetime, possibly in modern athletic history, when they raised black-gloved fists and bowed their heads on the victory stand at the Mexico City Olympic Games. The act was a profound gesture against oppression. Today at San Jose State University, their message will come full circle, 37 years later, with a daylong celebration that will end with the unveiling of a 24-foot bronze statue commemorating their Mexico City demonstration.") [<https://perma.cc/4QFW-DVH8>].

26. Ben Cosgrove, *Black Power Salute: Tommie Smith and John Carlos at the 1968 Olympics*, TIME (Sept. 27, 2014), <http://time.com/3880999/black-power-salute-tommie-smith-and-john-carlos-at-the-1968-olympics/> [<https://perma.cc/Q6ZM-XC3X>].

27. Hannah Withiam, *Amar'e Stoudemire Under Fire for Gay 'Joke' Days After Tolerance Award*, N.Y. POST (Feb. 28, 2017), <http://nypost.com/2017/02/28/amare-stoudemire-under-fire-for-gay-joke-days-after-tolerance-award/> (discussing how the former NBA player for the New York Knicks "jokingly" made homophobic comments in response to a reporter's question about a hypothetical

personalities, including Jay-Z,²⁸ Kanye West,²⁹ and Russel Simmons,³⁰ actively participated in the Occupy Wall Street movement.³¹ The influence of

homosexual teammate) [<https://perma.cc/C4PQ-GXK5>]. This comment followed days after receiving the Martin Luther King Jr. Award, “championing his efforts to promote diversity and tolerance.” Earlier in 2012, the league fined Stoudemire \$50,000 for using a homophobic slur against a disgruntled fan who messaged the player about his game performance. *Id.*

28. Shawn Corey Carter, also known as Jay-Z, is an award-winning hip-hop recording artist and business man. Growing up in the drug-infested Macy Projects of New York City, Jay-Z fell victim to the drug, gun violence, and gang culture. At an early age, he turned to rap to escape the social ills plaguing his community. In 1996, he joined Roc-a-Fella records and released his debut album, *Reasonable Doubt*. Throughout the years, Jay-Z has released a slew of No. 1 albums and hit singles. Over the years, he has expanded his brand, starting his own clothing line, Roc-a-Wear, headed his own entertainment management business, Roc Nation, and launched Tidal, a music streaming service. *Biography of Jay Z*, BIOGRAPHY, <http://www.biography.com/people/jay-z-507696> (last visited May 21, 2017) [<https://perma.cc/L427-L2BD>].

29. Kanye West is a Grammy Award-winning rapper, record producer, and fashion designer. Growing up in Chicago, Kanye was drawn to the South-side’s hip-hop scene and began producing for local artists. After moving to New York in 2001, he got his big break when he produced the track “This Can’t Be Life” for Jay-Z. He transitioned from behind the scenes to a reputable hip-hop artist after the release of his well-received debut album, *College Dropout*. Shortly after its release, Kanye began his own record label, GOOD Music. His sophomore album, *Late Registration*, debuted at No. 1 on the Billboard Hot 200—a feat West would repeat with every subsequent solo album release. *Biography of Kanye West*, BIOGRAPHY, <http://www.biography.com/people/kanye-west-362922> (last visited May 21, 2017) [<https://perma.cc/X849-ZGLP>].

30. Hip-hop mogul and co-founder of Def Jam Records, Russell Simmons was the force behind the hip-hop revolution. He began his career by promoting and managing hip hop artists such as LL Cool J, the Beastie Boys, Public Enemy, Kurtis Blow, and Run DMC. *Biography of Russell Simmons*, BIOGRAPHY, <https://www.biography.com/people/russell-simmons-307186> (last visited Sept. 15, 2017) [<https://perma.cc/WP85-MYRL>].

31. Randy Roper, *Russell Simmons, Jay-Z Planning Occupy Wall Street Concert*, HIP-HOP WIRED (Nov. 22, 2011, 11:57 AM), <http://hiphopwired.com/2011/11/22/russell-simmons-jay-z-planning-occupy-wall-street-concert/> [<https://perma.cc/YLK7-QYQN>]. The Occupy Wall Street Movement was a social movement for economic justice. The movement largely was motivated by the concern that 99% of the United States’s wealth is concentrated in the hands of the richest one percent of Americans. See Heather Gautney, *What is Occupy Wall Street? The history of leaderless movements*, WASH. POST (Oct. 10, 2011), https://www.washingtonpost.com/national/on-leadership/what-is-occupy-wall-street-the-history-of-leaderless-movements/2011/10/10/gIQAwkFjaL_story.html?utm_term=.614d11c701e7

athletes and entertainers is vitally important in bringing matters of public concern to the attention of the masses. Often, the attention of these individuals can effectuate legitimate and positive change.

Although a company clearly has a right to use morals clauses and a vested interest in doing so to protect its brand image and goodwill, morals clauses should not trammel political and thought-provoking expression unreasonably. When an athlete enters into an endorsement contract, there is clearly an agreement wherein the athlete has an obligation to promote the brand name of the company; such agreements, however, should not be construed liberally to allow an organization to treat the endorser as a pawn. This Article does not suggest that two parties cannot contract to limit, restrict, or prohibit certain types of speech. Rather, this Article argues that certain types of speech are so germane in expanding moral foundation that such speech should not be restricted unreasonably. This Article advocates for a burden-shifting framework that fairly balances the interests of the athlete-endorser, the corporation, and the public in deciding the enforceability of morals clauses that attempt to censor thought-provoking or political speech. Under the existing framework, once a corporation terminates an athlete-endorser's contract pursuant to the corporation's unilateral determination that the athlete-endorser's conduct violates the contract's morals clause, the athlete-endorser bears the burden of establishing that the corporation's termination amounts to a breach of the contract. Conversely, pursuant to the approach advanced in this Article, once a plaintiff successfully establishes that his speech is thought-provoking or political in nature,³² a presumption arises that his speech is protected and his endorsement contract cannot be terminated for such speech. The corporation can rebut this presumption by proving that the plaintiff-endorser's speech is in direct contravention to the purpose of the endorsement contract; the plaintiff-endorser's expression has a direct and negative effect on the corporation's goodwill or brand image; or the contract includes a clause that is tailored narrowly to prohibit the specific speech expressed by the plaintiff-endorser.³³ If a corporation is unable to meet its burden, termination of the endorsement contract by the corporation will result in a breach of the implied obligation of good faith or violate public policy. This approach is different from the existing framework because it more fairly allocates the burden of proof by placing more of it on the corporation when the corporation terminates an athlete-endorser for engaging in thought provoking or political expression.

[<https://perma.cc/U952-A857>].

32. See discussion *infra* Part VI.

33. See discussion *infra* Part VI.

Part I of this Article chronicles the development and creation of the morals clause as a means to curb various types of expression. Part II provides a comprehensive background and historical context of the development of the implied obligation of good faith. Part III explains how public policy considerations influence the enforceability of some contracts. Part IV analyzes the Rashard Mendenhall case that brought the issue of discretionary enforcement of morals clauses to light. Part V highlights the perils of providing corporations with the power to exercise their own discretion in unilaterally determining whether an athlete-endorser's conduct is morally reprehensible. Part VI provides a resolution to this problem and explains how the solution presented in this Article strikes a fairer balance between the interests of society, the endorser, and the corporation. Finally, Part VII discusses the various types of speech that are protected by the First Amendment and how, by analogy, First Amendment jurisprudence can be used to determine what types of speech should be protected contractually.

I. MORALS CLAUSES

A morals clause is a contractual provision that allows one party the right to terminate an agreement based on conduct the party deems morally reprehensible.³⁴ Morals clauses have existed for almost 100 years and first began to appear in contracts in the early 1920s.³⁵ Roscoe "Fatty" Arbuckle was the impetus for the creation of what the law now recognizes as a morals clause.³⁶ Arbuckle was a silent film comedian and actor in the early 1920s whose services were in high demand until he was arrested and charged with the murder of actress Virginia Rappe.³⁷ The facts surrounding the incident largely were disputed. According to Arbuckle,

[W]hen he retired to his room to change clothes, he found Rappe vomiting in his bathroom. He then helped clean her up and led her to a nearby bed to rest. Thinking she was just overly intoxicated, he left

34. Pinguelo & Cedrone, *supra* note 5, at 351 ("[A] morals clause is a contractual provision that gives one contracting party (usually a company) the unilateral right to terminate the agreement, or take punitive action against the other party (usually an individual whose endorsement or image is sought) in the event that such other party engages in reprehensible behavior or conduct that may negatively impact his or her public image and, by association, the public image of the contracting company.").

35. *Id.* at 353–54.

36. *Id.* at 354–55.

37. Jude Sheerin, 'Fatty' Arbuckle and Hollywood's first scandal, BBC NEWS (Sept. 4, 2011), <http://www.bbc.com/news/magazine-14640719> [https://perma.cc/7MFR-BUU3].

her to rejoin the party. When he returned to the room just a few minutes later, he found Rappe on the floor. After putting her back on the bed, he left the room to get help.³⁸

At least one witness contended that Arbuckle raped Ms. Rappe and then left her in his room to die.³⁹ The media followed Arbuckle's trial very closely and several of them reported that Arbuckle crushed Ms. Rappe with his body weight during the alleged sexual encounter.⁴⁰ Others reported, in graphic detail, that he penetrated her with a foreign object.⁴¹ The case was tried three times.⁴² The first two cases ended in hung juries.⁴³ The jury deliberations of the third trial only lasted a few minutes before the jury returned a not guilty verdict.⁴⁴ The jury also issued Arbuckle the following apology:

Acquittal is not enough for Roscoe Arbuckle. We feel that a great injustice has been done him. We feel also that it was our only plain duty to give him this exoneration. There was not the slightest proof adduced to connect him in any way with the commission of a crime. He was manly throughout the case and told a straightforward story on the witness stand, which we all believed. The happening at the hotel was an unfortunate affair for which Arbuckle, so the evidence shows, was in no way responsible. We wish him success and hope that the American people will take the judgment of fourteen men and women who have sat listening for thirty-one days to the evidence that Roscoe Arbuckle is entirely innocent and free from all blame.⁴⁵

Despite the final disposition of the case, Arbuckle's career was ruined as some people refused to believe his innocence; as a result, the movie industry blacklisted him.⁴⁶ In response to this situation, many Hollywood studios began inserting morals clauses in their contracts.⁴⁷

38. See Jennifer Rosenberg, *The "Fatty" Arbuckle Scandal*, THOUGHTCO., <https://www.thoughtco.com/fatty-arbuckle-scandal-1779625> (last visited Aug. 17, 2017) [<https://perma.cc/5FWW-5MN8>].

39. See *id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Pinguelo & Cedrone, *supra* note 5, at 355.

Around the same time of the Fatty Arbuckle disaster, Babe Ruth⁴⁸ was drawing the ire of the New York Yankees franchise for his night life activities⁴⁹ and his frequent drinking. As a result of his opprobrious behavior, New York Yankees owner Colonel Jake Ruppert required that Ruth sign one of the first clauses attempting to curb an athlete's erratic and irresponsible behavior in an effort to protect the brand image of a franchise.⁵⁰ The provision in Ruth's agreement provided, in relevant part, that he was to

refrain and abstain entirely from the use of intoxicating liquors and that he shall not during the training and playing season in each year stay up later than 1 o'clock A.M. on any day without the permission and consent of the Club's manager, and it is understood and agreed that if at any time during the period of this contract, whether in the playing season or not, the player shall indulge in intoxicating liquors or be guilty of any action or misbehavior which may render him unfit to perform the services to be performed by him hereunder, the Club may cancel and terminate this contract and retain as the property of the Club, any sums of money withheld from the player's salary as above provided.⁵¹

This provision was not technically a morals clause because the Yankees did not have an express right to terminate his contract for morally reprehensible conduct.⁵² Instead, this provision merely allowed the Yankees to terminate Ruth's contract if he indulged in intoxicating liquors, criminal activity, or any

48. Baseball icon Babe Ruth set numerous records as a pitcher and slugging outfielder. He was among the first five players inducted into the sport's Hall of Fame. *Biography of Babe Ruth*, BIOGRAPHY, <https://www.biography.com/people/babe-ruth-9468009> (last visited Sept. 11, 2017) [<https://perma.cc/93NU-7A3Q>].

49. Ruth has been described as a glutton, womanizer, spendthrift, heavy drinker, and smoker. Ruth also regularly collected speeding tickets, broke team curfews, and engaged in fist fights with umpires, fans, and teammates. *See 10 Things You May Not Know About Babe Ruth*, HISTORY (July 11, 2014), <http://www.history.com/news/10-things-you-may-not-know-about-babe-ruth> [<https://perma.cc/L3D4-EZFX>]. Apparently recognizing the problems that Ruth's off-the-field behavior could cause for a baseball team in an age of increased media coverage, the New York Yankees introduced a clause similar to a morals clause into Ruth's playing contract in 1922. *See* Fernando M. Pinguelo, Timothy D. Cedrone & Porcher Taylor, *The Reverse-Morals Clause: The Unique Way to Save Talent's Reputation and Money in a New Era of Corporate Crimes And Scandals*, 28 CARDOZO ARTS & ENT. L.J. 65, 75 (2010).

50. DAVID A. MARK, HIDDEN HISTORY OF MAYNARD 99 (2014).

51. *Id.*

52. *See* Pinguelo & Cedrone, *supra* note 5.

other activity that rendered him unable to play baseball.⁵³ In contrast, a morals clause is broader because it provides an express right to terminate the contract when the athlete does something that the corporation believes is morally unacceptable.⁵⁴

During the McCarthy Era⁵⁵ of the 1940s and 1950s, morals clauses often were used as a means to “censor political conduct and expression rather than challenge immoral conduct.”⁵⁶ Because of American fears about the spread of communism, Congress created the House Committee on Un-American Activities (“HUAC”) in 1938 “to investigate alleged disloyalty and subversive activities on the part of private citizens, public employees, and those organizations suspected of having communist ties.”⁵⁷ Committee members of HUAC were interested particularly in the Hollywood film industry because it was perceived as an incubator for possible communist activity.⁵⁸ This perception was based on two assumptions.⁵⁹ First, as a result of the Great Depression and the economic difficulties it created, HUAC members opined that struggling actors and studio workers would be more vulnerable to bribes from the Communist Party.⁶⁰ Second, HUAC members believed that the movie industry would be attractive to communist supporters as a “source of subversive propaganda.”⁶¹ As a result, in 1947, HUAC unleashed a massive attack on the movie industry by serving subpoenas on more than 40 individuals in the industry, requiring that they appear before the committee for investigative purposes.⁶² Out of this number, ten refused to cooperate with HUAC and

53. Pinguelo, Cedrone & Taylor, *supra* note 49, at 75–76.

54. *See* Pinguelo & Cedrone, *supra* note 5, at 357.

55. The McCarthy Era refers to a period in which companies would use morals clauses to stifle political speech. The term “McCarthyism” was coined in reference to the anti-communism practices of United States Senator Joseph McCarthy fueled by tensions surrounding the Cold War. *See* RICHARD M. FRIED, NIGHTMARE IN RED: THE MCCARTHY ERA IN PERSPECTIVE (1990). The phrase also refers to President Truman’s Executive Order 9835 that “required that all federal civil service employees be screened for ‘loyalty.’” Robert J. Goldstein, *Prelude to McCarthyism: The Making of a Blacklist*, 38 PROLOGUE MAG. (2006), <https://www.archives.gov/publications/prologue/2006/fall/agloso.html> [<https://perma.cc/GA22-XV6F>].

56. Pinguelo & Cedrone, *supra* note 5, at 355.

57. *House Un-American Activities Committee*, GEO. WASH. UNIV., <http://www.gwu.edu/~erpapers/teaching/glossary/huac.cfm> (last visited Aug. 17, 2017) [<https://perma.cc/VC9J-AEDM>].

58. *Hollywood Ten*, HISTORY, <http://www.history.com/topics/cold-war/hollywood-ten> (last visited May 21, 2017) [<https://perma.cc/9S95-8EYX>].

59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

declined to answer whether they had an affiliation with the Communist Party, claiming that they had a First Amendment right to associate with whomever they desired.⁶³ These individuals became known as the Hollywood Ten.⁶⁴ Because of their refusal to cooperate, they were cited by the House of Representatives for contempt of Congress.⁶⁵ As a result, many of the Hollywood Ten were blacklisted by Hollywood studios.⁶⁶ Additionally, many of the studios invoked the morals clauses contained in these individuals' contracts to terminate their employment.⁶⁷ Based on these terminations, three of the Hollywood Ten brought lawsuits against the studios for breach of contract.⁶⁸

In the first case of the trilogy, *Loew's Inc. v. Cole*, Lester Cole was terminated pursuant to the morals clause contained in his employment agreement after he refused to answer adequately whether he was a communist before HUAC.⁶⁹ The

63. *Id.*

64. *Id.* ("The 10 individuals who defied HUAC were Alvah Bessie (c. 1904-85), Herbert Biberman (1900-71), Lester Cole (c. 1904-85), Edward Dmytryk (1908-99), Ring Lardner Jr. (1915-2000), John Howard Lawson (1894-1977), Albert Maltz (1908-1985), Samuel Ornitz (1890-1957), Robert Adrian Scott (1912-73) and Dalton Trumbo (1905-76).").

65. ROBERT H. STANLEY, *THE CELLULOID EMPIRE: A HISTORY OF THE AMERICAN MOVIE INDUSTRY* 130-31 (1978).

66. Arthur Eckstein, *The Hollywood Ten in history and memory*, 16 *FILM HISTORY: AN INT'L J.* 424, 427 (2004). The blacklisting occurred both officially and unofficially. Officially, it occurred through a "joint public announcement of the motion picture firms in November 1947 that henceforth no studio would knowingly employ any member of the Communist Party, or the members of any other group which advocated the overthrow of the United States government by revolution." *Id.* at 424. Unofficially, it occurred through media publications that openly identified individuals having alleged communist ties and through an elimination of job opportunities for such individuals. *Id.*

67. *See Loew's, Inc. v. Cole*, 185 F.2d 641, 649 (9th Cir. 1950); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844 (9th Cir. 1954); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87 (9th Cir. 1957).

68. *See Loew's*, 185 F.2d 641; *Lardner*, 216 F.2d 844; *Scott*, 240 F.2d 87.

69. *Loew's*, 185 F.2d at 645. The morals clause provided:

The employee agrees to conduct himself with due regard to public conventions and morals, and agrees that he will not do or commit any act or thing that will tend to degrade him in society or bring him into public hatred, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or ridicule public morals or decency, or prejudice the producer or the motion picture, theatrical or radio industry in general.

Id.

jury resolved a form of special verdict,⁷⁰ containing four questions, in Cole's favor.⁷¹ The trial court affirmed the jury's determination that Loew's, Inc. ("Loew's") breached Cole's employment contract.⁷² The court of appeals reversed the trial court's decision and disagreed with all of the trial court's holdings.⁷³ In regards to the trial court's first holding, the court of appeals held that Cole's refusal to answer gave the public the general perception that he was a member of the Communist Party.⁷⁴ Because such association, in 1947, largely was considered un-American and morally reprehensible, there were sufficient facts to establish that Cole engaged in conduct that contravened his employment agreement.⁷⁵ In regards to the trial court's second holding, the

70. A special verdict form limits the discretion of the jury in deciding a case only to those questions identified on the form. After deliberating, the jury provides responses to specific questions of fact. Thereafter, the court applies the jury's factual determinations to the relevant law to determine the prevailing party. *See* FED. R. CIV. P. 49(a).

71. *Loew's*, 185 F.2d at 646. The special verdict form contained the following four questions:

Question 1: Did the plaintiff Lester Cole by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, bring himself or tend to bring himself into public hatred, contempt, scorn, or ridicule? (Answer 'yes' or 'no'.) Answer: No.

Question 2: Did the plaintiff Lester Cole, by his statements and conduct before the House Committee on Un-American Activities, in connection with the hearing held by said Committee, tend to shock, insult or offend the community? (Answer 'yes' or 'no'.) Answer: No.

Question 3: Did the plaintiff Lester Cole, by his statements and conducts before the House Committee on Un-American Activities in connection with the hearing held by said Committee, prejudice the defendant Loew's Incorporated as his employer or the motion picture industry generally? (Answer 'yes' or 'no'.) Answer: No.

Question 4: Did the defendant Loew's Incorporated by its conduct towards the plaintiff, subsequent to the hearing, waive the right to take action against him by suspending him? (Answer 'yes' or 'no'.) Answer: Yes.

Id.

72. *Id.*

73. *Id.* at 644.

74. *Id.* at 649.

75. *Id.* The court also opined that Cole's intentional failure to answer HUAC's questions about his communist involvement might be considered a breach of the morals clause because such refusal would be considered a misdemeanor. The court noted that the morals clause provided that Cole "shall act 'with due regard to public conventions.'" Such provision "required more than a mere requirement of obedience

court of appeals disagreed and held that the employer's conduct of expressing a disdain for HUAC's investigative processes and procedures did not amount to an approval of Cole's decision to abstain from answering questions regarding his communist ties.⁷⁶ More specifically, the court held that

[t]he conduct of the employer during this period adds up to an attitude of definite hostility and unfriendliness to the Committee hearings, which the producers apparently feared was headed in the direction of censorship of the screen. Thus Cole may have felt that he was justified in carrying a torch for freedom of speech, and in protesting against the proceedings. But we cannot think that as a matter of law this gave him the implied consent of the employer to go so far as to subject himself to a misdemeanor charge.⁷⁷

According to the court of appeals, the trial court erred on this issue because it focused solely on the fact that Loew's made "no effort to warn or advise Cole as to how he should conduct himself."⁷⁸ The employer, however, had no such duty because

it might well have subjected itself to criticism by the Committee had it undertaken to do so. Had it been disclosed at the hearing that Cole had received instructions as to how to testify, Loew's might well expect to be charged with an improper effort to exert its power as an employer to induce the witness to slant his testimony.⁷⁹

Regarding the trial court's third and final holding, the court of appeals again reversed, holding that Loew's did not waive its right to terminate the contract by continuing to employ Cole after his testimony before HUAC.⁸⁰ Although Loew's was aware of Cole's failure to answer at the HUAC hearing, the court concluded that Loew's did not have a full appreciation for the effect that Cole's conduct would have on its reputation and goodwill.⁸¹ As such, Loew's acquiescence to Cole's continued employment was not a waiver of the morals clause.⁸² Moreover, even if Loew's in fact was aware of the effect that Cole's

to [the] law . . . it necessarily include[d] an agreement to refrain from the commission of a misdemeanor of this character." *Id.*

76. *Id.* at 649–50.

77. *Id.* at 653.

78. *Id.*

79. *Id.*

80. *Id.* at 655–56.

81. *Id.* at 656.

82. *Id.*

conduct would have on its reputation and goodwill, Loew's still maintained a reasonable time upon which to effectuate the termination.⁸³

The second and third cases of the Hollywood Ten trilogy, *Twentieth Century-Fox Film Corp. v. Lardner*⁸⁴ and *Scott v. RKO Radio Pictures, Inc.*,⁸⁵ ruled in favor of the studios by relying on the *Cole* precedent that

the natural result of the artist's refusal to answer the committee's questions was that the public would believe he was a Communist, and because a large segment of the public thought Communism was evil, the artist violated the express morals clause by failing to comport with public conventions and morals.⁸⁶

The facts of the second case in the trilogy, *Lardner*, were substantially similar to those of *Cole*.⁸⁷ Much like *Cole*, Ring Lardner was a member of the Hollywood Ten who was terminated by his employer, Twentieth Century-Fox Film Corporation ("Fox"), pursuant to the morals clause contained in his employment contract⁸⁸ after he failed to answer adequately whether he was a Communist before HUAC.⁸⁹ Lardner argued that he did not breach the contract but contended that if his conduct did amount to a breach, his breach was excused because Fox waived its right to discharge him by continuing to employ him for almost a month after his failure to testify and assigning him

83. *Id.*

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

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

86. Noah B. Kressler, *Using the Morals Clause in Talent Agreements: A Historical, Legal and Practical Guide*, 29 COLUM. J.L. & ARTS 235, 245 (2005).

87. *Lardner*, 216 F.2d at 847.

88. *Id.* at 848. The morals clause contained in Lardner's employment agreement was substantially similar to the morals clause contained in *Cole*'s contract; the morals clause in Lardner's agreement, however, was a bit more comprehensive. The clause in Lardner's agreement provided:

The artist shall perform the services herein contracted for in the manner that shall be conducive to the best interests of the producer, and of the business in which the producer is engaged, and if the artist shall conduct himself, either while rendering such services to the producer, or in his private life in such a manner as to commit an offense involving moral turpitude under Federal, state or local laws or ordinances, or shall conduct himself in a manner that shall offend against decency, morality or shall cause him to be held in public ridicule, scorn or contempt, or that shall cause public scandal, then, and upon the happening of any of the events herein described, the producer may, at its option and upon one week's notice to the artist, terminate this contract and the employment thereby created.

Id.

89. *Id.*

to a new project.⁹⁰ Much like *Cole*, the trial court found in favor of Lardner, holding that he did not breach the contract, but if he did breach, Fox waived its right to terminate.⁹¹ On the issue of breach of contract, the Ninth Circuit Court of Appeals reversed, reasoning that Lardner's conduct clearly provided no benefit to Fox and actually hurt Fox's brand image because of society's negative perception of communism at the time.⁹² As for Lardner's waiver argument, the court of appeals reversed the trial court's decision on that issue as well and remanded the case to the trial court for a determination as to whether Fox had waived its right to terminate Lardner.⁹³

The facts of the third and final case in the Hollywood Ten trilogy, *Scott v. RKO Radio Pictures, Inc.*, were substantially similar to the facts of both *Cole* and *Lardner*, with one distinction: the trial court ruled against Scott, holding that RKO Radio Pictures, Inc. ("RKO") was justified in terminating Scott because his conduct harmed RKO's brand image.⁹⁴ In addition, there was no evidence that RKO waived its right to enforce the termination provision.⁹⁵

Since the McCarthy Era and the Hollywood Ten Trilogy, the primary use of morals clauses has shifted from being used to attack the political ideologies of the athlete to curbing immoral conduct and protecting corporate brand

90. *Id.*

91. *Id.*

92. *Id.* at 851.

93. *Id.* at 853. In instructing the trial court on remand, the court of appeals indicated that it was to determine whether Fox made any affirmations or engaged in any conduct that would lead Lardner reasonably to believe that Fox waived its right to terminate. *Id.* In addition, the jury was required to ascertain when Fox was fully knowledgeable about the extent to which Lardner's conduct harmed the brand image of Fox. *Id.* Once Fox was aware of the extent of the harm, it had a reasonable time thereafter upon which to terminate Lardner's contract. *Id.*

94. *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 91 (9th Cir. 1957). The morals clause in Scott's contract provided that

[a]t all times commencing on the date hereof and continuing throughout the production or distribution of the pictures, the producer will conduct himself with due regard to the public conventions and morals and will not do anything which will tend to degrade him in society or bring him into public disrepute, contempt, scorn or ridicule, or that will tend to shock, insult or offend the community or public morals or decency or prejudice the corporation or the motion picture industry in general; and he will not willfully do any act which will not wilfully [sic] his capacity fully to comply with this agreement, or which will injure him physically or mentally.

Id. at 87-88.

95. *Id.* at 91.

image.⁹⁶ A 1997 survey conducted by Sports Media Challenge, a Charlotte-based sports communication and image management company, “estimated that nearly half of all endorsement deals had morals clauses included.”⁹⁷ As of 2003, industry experts estimated that morals clauses were included in at least 75% of all endorsement agreements.⁹⁸ Currently, the collective bargaining agreements of the NBA,⁹⁹ NFL,¹⁰⁰ NHL,¹⁰¹ and MLB¹⁰² all contain morals clauses in their standard player contracts. The reach of the morals clause, however, is not limited to the sports and entertainment industries. Morals clauses often are

96. Pinguelo & Cedrone, *supra* note 5, at 356.

97. Eric Fisher, *Sosa Flap to Change Endorsement Deals*, WASH. TIMES (June 28, 2003), <http://www.washingtontimes.com/news/2003/jun/8/20030608-124400-6755r/> [<https://perma.cc/87FZ-D6ZF>].

98. *Id.*

99. NAT’L BASKETBALL ASS’N, UNIFORM PLAYER CONTRACT (2011), http://blog.techprognosis.com/wp-content/uploads/2011/05/NBA_Constitution.pdf [<https://perma.cc/T4BP-9XDJ>]. Pursuant to Section 16(a)(i) of this Agreement, a team may terminate a player’s contract upon written notice if the player “at any time, fail[s], refuse[s], or neglect[s] to conform his personal conduct to standards of good citizenship, good moral character (defined here to mean not engaging in acts of moral turpitude, whether or not such acts would constitute a crime).” *Id.* § 16(a)(i).

100. NAT’L FOOTBALL LEAGUE, COLLECTIVE BARGAINING AGREEMENT 256 app. A (2011), <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/4T7D-3LWL>]. Pursuant to Section 11 of the NFL Player Contract found in Appendix A of the Agreement, if a player “has engaged in personal conduct reasonably judged by Club to adversely affect or reflect on Club, then Club may terminate this contract.” *Id.* § 11.

101. NAT’L HOCKEY LEAGUE, COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS’ ASSOCIATION (2013), http://cdn.agilitycms.com/nhlpacom/PDF/NHL_NHLPA_2013_CBA.pdf [<https://perma.cc/3CMU-9RMY>]. Pursuant to section 2(e) of the Stand Player’s Contract found in Exhibit 1 of the Agreement, the player agrees “to conduct himself on and off the rink according to the highest standards of honesty, morality, fair play and sportsmanship, and to refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally.” *Id.* § 2(e).

102. MAJOR LEAGUE BASEBALL, BASIC AGREEMENT 337 app. A (2017), <http://www.mlbplayers.com/pdf9/5450407.pdf> [<https://perma.cc/UP4H-R759>]. Pursuant to section 7(b)(1) of this agreement, a Club may terminate if the Player shall at any time: “fail, refuse or neglect to conform his personal conduct to the standards of good citizenship and good sportsmanship or to keep himself in first-class physical condition or to obey the Club’s training rules.” *Id.* § 7(b)(1).

included in contracts between corporations and high-ranking executive officers.¹⁰³

Although morals clauses traditionally have been used by the corporation to terminate a contractual relationship with an endorser, according to some scholars, there has been a recent proliferation of “reverse morals clauses.”¹⁰⁴ Reverse morals clauses operate much the same way as traditional morals clauses except that they are used by the endorser as a shield to protect the endorser from immoral conduct by the corporation.¹⁰⁵ Pat Boone¹⁰⁶ negotiated the first contract containing a reverse morals clause.¹⁰⁷ After Boone’s first entertainment contract with Dot records¹⁰⁸ was set to expire, Boone became a born-again Christian and was worried about resigning with Dot because of concerns about its strategy for marketing some of its other artists.¹⁰⁹ As a result, prior to resigning,

Boone considered renegeing, upset over cover art for the [Bill Cosby] label’s other new release: nude pictures of John Lennon and Yoko

103. Pinguelo & Cedrone, *supra* note 5, at 364 (finding that a significant number of executive contracts contain provisions that allow a corporation to terminate the agreement for acts of moral turpitude (referencing Stewart J. Schwab & Randall S. Thomas, *An Empirical Analysis of CEO Employment Contracts: What Do Top Executives Bargain For?*, 63 WASH. & LEE L. REV. 231, 233, 248–49 (2006))).

104. *See* Pinguelo, Cedrone & Taylor, *supra* note 49, at 66.

105. *Id.* at 66–67 (“[A] reverse morals clause is 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. Such a clause gives talent the reciprocal right to terminate an endorsement contract based on such defined negative conduct.”).

106. Charles Eugene “Pat” Boone was a successful pop singer with a wholesome, squeaky-clean image in the United States during the 1950s and early 1960s. He was a music chart rival of Elvis Presley and sold more than 45 million records, had 38 top-40 hits, 54 chart appearances, and appeared in more than 12 Hollywood films. Jason Ankeny, *Pat Boone, Biography*, ALLMUSIC, <http://www.allmusic.com/artist/pat-boone-mn0000131681/biography> (last visited Sept. 11, 2017) [<https://perma.cc/26UX-8SUP>].

107. Pinguelo, Cedrone & Taylor, *supra* note 49, at 79.

108. Dot records was a prominent pop label from the 1950s, 1960s, and 1970s that focused on gospel, doo-wop, country, and vocal pop music. Scott Borchetta, *Chris Stacey on the Relaunch of Dot Records, Big Machine’s Latest Imprint*, BILLBOARD (Mar. 24, 2014), <http://www.billboard.com/biz/articles/news/record-labels/5944866/scott-borchetta-chris-stacey-on-the-relaunch-of-dot-records> [<https://perma.cc/TH8Z-3LCR>].

109. Pinguelo, Cedrone & Taylor, *supra* note 49, at 79.

Ono on the Two Virgins album. After much prayer, Boone, ready to opt out of the deal, met with label executives. They were sympathetic to his religious concerns and agreed to a “reverse morals clause”—Boone’s contract would lapse if the record company, not the performer, did something unseemly. Finally, it was agreed that no formal contract would be drawn up. This was fortunate for Boone, as a few months later the label went bust following [Bill] Cosby’s departure.¹¹⁰

Even though the contract never was formally entered, Boone’s ability to negotiate such a favorable condition was predicated largely upon the magnitude of his celebrity at the time.¹¹¹

Although there are no reported cases to date that have interpreted the validity or viability of a reverse morals clauses, the Enron scandal,¹¹² according to many legal scholars, obviated the current need for endorsees to require the inclusion of such clauses. During the early 2000s, Enron, a Houston-based energy company specializing in the purchase and sale of natural gas, was wildly successful and created a brand image synonymous with success.¹¹³ As a result of its success, Enron was able to acquire a 30-year, \$100 million deal for the right to name the Houston Astros’ baseball park.¹¹⁴ The Astros were hoping that Enron would continue to operate as a profitable business entity and a company of high moral character and integrity.¹¹⁵ Enron’s success, however, came crashing down after John Olson, an energy industry financial analyst, learned that Enron engaged in illegal business practices.¹¹⁶ As a result, Enron filed for bankruptcy and the Astros

110. Joseph Reiner, *Pat Boone*, ENCYCLOPEDIA, <http://www.encyclopedia.com/doc/1G2-3493100014.html> (last updated Sept. 15, 2017) [<https://perma.cc/5N4F-KNN9>].

111. *Id.*

112. Susan Lee, *Enron’s Success Story*, WALL ST. J. (Dec. 26, 2001), <https://www.wsj.com/articles/SB10093163516698886920> [<https://perma.cc/HX67-J96U>].

113. *Id.*

114. Edward Wong, *Astros’ Ballpark No Longer Enron Field*, N.Y. TIMES (Feb. 28, 2002), <http://www.nytimes.com/2002/02/28/sports/baseball-astros-ball-park-no-longer-enron-field.html> [<https://perma.cc/PXK8-K2GH>].

115. *Id.*

116. One of the primary illegal practices that Enron engaged in was the use of off balance sheet financing. The hidden liabilities allowed Enron to maintain the appearance of a rapidly growing, but financially stable, company until near the very end when bankruptcy was imminent. Enron’s financial arrangements were complicated and sometimes entailed transferring overvalued assets to partnerships that it had a controlling interest in but was not required to include on its own balance sheet. The partnerships, with minimal equity capital from outside investors, raised

organization sought a court order excusing it from complying with the naming rights agreement.¹¹⁷ Given Enron's tarnished image, the Astros no longer wanted a reminder of Enron's failures and questionable business practices memorialized in its stadium.¹¹⁸ When the Astros filed the court order, Enron actually had not yet breached its agreement to make payments on the naming rights deal; a breach was imminent, however, given Enron's financial condition.¹¹⁹ Consequently, the Astros agreed to a buyout with Enron for \$2.1 million.¹²⁰

To date, courts have used two mechanisms to evaluate the enforceability of a morals clause: (1) the implied obligation of good faith and fair dealing; and (2) the public policy exception. Specifically, when endorsers seek to challenge a corporation's discretion to terminate an endorsement deal, these doctrines are the primary mechanisms that are used to establish that the termination amounts to a breach of contract. Although both of these are viable options, they do not offer sufficient protection in their current iterations. Therefore, the following section provides a background for each mechanism and explains how the approach advocated by this Article more fairly balances the concerns highlighted herein.

II. HISTORICAL DEVELOPMENT OF THE IMPLIED OBLIGATION OF GOOD FAITH

Good faith is hardly a novel notion in American legal jurisprudence—its conceptual roots can be traced back to Roman times.¹²¹ Despite good faith being a well-established concept in American common law

most of their capital from loans using Enron stock, transferred assets, or pledges from Enron as collateral. See Bill Keller, *Enron for Dummies*, N.Y. TIMES (Jan. 25, 2002), <http://www.nytimes.com/2002/01/26/opinion/enron-for-dummies.html> [https://perma.cc/FCJ3-R778].

117. Wong, *supra* note 114.

118. See *Astros Buy Back Rights to Enron Field Name*, BUS. J. (Feb. 27, 2002), <http://www.bizjournals.com/houston/stories/2002/02/25/daily20.html> [https://perma.cc/B47E-5KRR].

119. *Id.*

120. *Id.*

121. B. J. Reitier, *Good Faith in Contract*, 17 VAL. U. L. REV. 705, 708 (1983) (citing Raphael Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROBS. 16 (1956); ONTARIO LAW REFORM COMM'N, REPORT ON SALE OF GOODS 163 (1979); Michael J. Trebilcock, *Good Faith in Sales Transactions*, Research Paper No. II.3, 4–5 (Ontario Law Reform Comm'n Sale of Goods Project 1974)).

jurisprudence,¹²² the notion of the implied obligation of good faith did not develop until the second half of the 19th Century.¹²³ Good faith is a judicially-created concept that is deemed to be implied in every contract.¹²⁴ It is important to note that the concept of “implying” terms was also a critical development of the second half of the 19th Century.¹²⁵

One of the first cases to imply a term into a contract that had yet to be negotiated by the parties was *Wood v. Lucy*.¹²⁶ Although the court did not address specifically the issue of the implied obligation of good faith, the court’s holding in *Wood* evinces an example of the shift from Formalism to Realism. The Formalistic view, practiced during the first half of the 19th Century, applied abstract contract rules to resolve contractual disputes without considering factors outside of the agreement.¹²⁷ Conversely, pursuant to the Realist view, courts were willing to substitute an agreement with terms not included by the parties while also considering factors beyond the four corners of the document.¹²⁸ In *Wood*, Lucy entered into an endorsement deal with Wood wherein Lucy agreed to give Wood the exclusive right to market, license, and endorse all of her products.¹²⁹ In exchange, Wood and Lucy were to split all of the profits from Wood’s efforts evenly.¹³⁰ In light of these obligations, the actual agreement did not contain express language providing that Wood actually had to sell, market, license, or endorse.¹³¹ After entering into the agreement, Wood learned that Lucy had entered into an agreement with a large retailer wherein Lucy agreed to market and endorse a line of clothing for the masses.¹³² This agreement was in direct contravention of Lucy’s agreement with Wood.¹³³

122. “Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.” RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981).

123. Harold Dubroff, *The Implied Covenant of Good Faith in Contract Interpretation and Gap-Filling: Reviling a Revered Relic*, 80 ST. JOHN’S L. REV. 559, 564 (2012).

124. Reitier, *supra* note 121, at 707–08.

125. Dubroff, *supra* note 123, at 559; see also *id.* at 559 n.1, for late 19th Century common law contracts cases in which the implied covenant of good faith was applied.

126. *Wood v. Lucy*, 118 N.E. 214, 214 (N.Y. 1917).

127. Dubroff, *supra* note 123, at 567–68.

128. *Id.* at 571–72.

129. *Wood*, 118 N.E. at 214.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See id.*

Wood brought suit against Lucy for breach.¹³⁴ Lucy argued that the agreement lacked consideration and therefore was unenforceable because Wood had no obligation to do anything as the contract did not require specifically that he market, license, or endorse her products.¹³⁵ Judge Cardozo ruled in favor of Wood, reasoning that there was consideration to support the contract.¹³⁶ Cardozo reasoned that, in an exclusive endorsement contract, to give such contracts business efficacy, courts should imply an obligation to use reasonable efforts.¹³⁷

Approximately 16 years after *Wood*, the New York Court of Appeals decided *Kirke la Shelle Co. v. Paul Armstrong Co.*,¹³⁸ which is recognized as one of the earliest cases dealing with the implied obligation of good faith.¹³⁹ In *Kirke la Shelle*, Kirke La Shelle (“Kirke”) entered into an agreement with Paul Armstrong (“Armstrong”) wherein Armstrong granted Kirke an exclusive right to perform and produce one of Armstrong’s plays.¹⁴⁰ Kirke subsequently purchased the play from Armstrong and began to produce it.¹⁴¹ Sometime thereafter, Kirke was sued by a third party for copyright infringement.¹⁴² Armstrong had fraudulently sold the play to Kirke.¹⁴³ As a result, Kirke sued and obtained a judgment against Armstrong for the amount Kirke spent in defending the infringement litigation and the money Kirke paid to Armstrong for the purchase of the play.¹⁴⁴ Armstrong died shortly before the judgment was entered.¹⁴⁵ Kirke attempted to satisfy the judgment against Armstrong’s estate but later learned that it was insolvent because Armstrong had transferred “practically all his plays and property to the . . . Paul Armstrong Company [(“PAC”).]”¹⁴⁶ Kirke then brought suit against PAC and its attorney for fraud.¹⁴⁷ The suit was settled, and, as part of the written agreement, Kirke was to receive one half of all the proceeds generated from rivals of the

134. *Id.*

135. *Id.*

136. *See id.* at 215.

137. *Id.* at 214–15.

138. *Kirke La Shelle Co. v. Paul Armstrong Co.*, 188 N.E. 163 (N.Y. 1933).

139. Dubroff, *supra* note 123, at 565.

140. *Kirke La Shelle Co. v. Armstrong*, 173 A.D. 232, 233 (1916).

141. *Id.*

142. *Id.* at 234.

143. *See id.*

144. *Kirke La Shelle Co. v. Armstrong Co.*, 188 N.E. 163, 164 (1933).

145. *Id.*

146. *Id.*

147. *Id.*

play,¹⁴⁸ including monies generated from productions “on the road”¹⁴⁹ or “in stock.”¹⁵⁰ The agreement also prohibited PAC from entering into any future agreements that would affect title to the dramatic rights without Kirke’s prior approval.¹⁵¹ After reaching this settlement agreement, PAC sold the “talkie rights”¹⁵² of the play to another entity and declined to split the proceeds with Kirke.¹⁵³ Kirke then brought suit alleging breach of contract.¹⁵⁴ Both parties conceded that “talkies” were commercially unknown at the time of the agreement and were not in contemplation of the parties.¹⁵⁵ The trial court ruled in favor of PAC, reasoning that Kirke could not recover proceeds from the sale of the talkie rights because those rights were not in contemplation of the parties at the time they entered into the agreement.¹⁵⁶ The appellate court disagreed, reasoning that there was an implied obligation on behalf of PAC not to “render valueless the right conferred by the contract.”¹⁵⁷ The *Kirke* decision evidenced a desire to avoid the harsh consequences of the Formalist/Classical approach.

The Formalist/Classical approach to the implied obligation of good faith focused primarily on the plain meaning or the four corners approach to

148. *Id.* “Alias Jimmy Valentine” is a dramatization by the late Paul Armstrong, playwright, of the novel, *A Retrieved Reformation*, by the late O. Henry. PAUL ARMSTRONG, ALIAS JIMMY VALENTINE (1910).

149. Kirke was to receive one half of the monies generated by play companies that produced the play outside of New York. *Kirke La Shelle*, 188 N.E. at 164.

150. Kirk also would be entitled to monetary benefit from stock companies who performed the play regularly. *Id.*

151. *Id.* at 163.

152. A “talkie” was an early form of cinema; a movie synchronized with speech and sound. *See* Dave Kehr, *When Hollywood Learned to Talk, Sing and Dance*, N.Y. TIMES (Jan. 15, 2010), <http://www.nytimes.com/2010/01/17/movies/homevideo/17kehr.html> [<https://perma.cc/PA3N-9DMZ>].

153. *Kirke La Shelle Co.*, 188 N.E. at 163.

154. *Id.* at 164.

155. *Id.* at 165

156. *Id.* The trial court determined that the contract between the parties did not contemplate the production of the play in “talkies” because they were unknown at the time. *Id.*

157. *Id.* at 168. The court also was highly persuaded by the fact that PAC “breached the express covenant of the contract to refrain from making any agreement affecting the rights conveyed to Kirk without its approval.” *Id.* In light of this additional fact, it is unlikely that its absence would have affected the court’s holding given the court’s reference to *Frohman v. Fitch*, 149 N.Y.S. 633 (N.Y. App. Div. 1914). As the court in *Kirke La Shelle* noted, *Frohman* was squarely on point with the case at bar but for the fact that the plaintiff in *Frohman* owed all the stages rights and that it dealt with silent motion pictures, not “talkies.” *Id.* at 167.

resolving contractual disputes whereby courts were limited in their resolution of contractual disputes to the documents embodying the contract. At the core of this view was the notion that the language of the parties' contract should control and that, when interpreting and resolving contractual disputes, courts should focus on the perspective of the objectively reasonable person to best ensure fairness and, most importantly, consistency in results. The promulgation of the Uniform Commercial Code ("UCC") was a critical step in the development of the concept of the implied obligation of good faith. Prior to its enactment, most jurisdictions approached contract law from the perspective of the Restatement First of Contracts and focused primarily on the expressed intent of the parties without regard to any implied terms.¹⁵⁸ The UCC's provision, however, that "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement"¹⁵⁹ entrenched the implied obligation of good faith in contract law. This transition from looking only to the expressed intent of the parties to implying good faith into every contract occurred as a result of two developments: "one, language, because of its inherent ambiguity, cannot always express perfectly the actual agreement of the parties, and two, foreseeing all eventualities that may arise in contract performance is beyond the capacity of humans and gaps in contract provisions inevitably will arise."¹⁶⁰ As courts shifted from the Formalistic view of contract law to a Realist view, as codified in the Restatement Second of Contracts¹⁶¹ and the UCC, courts assumed increased levels of power to resolve contract disputes while considering "the context of an agreement—usage, course of dealing, course of performance, and other factors present in the relationship that gave rise to the agreement."¹⁶²

As jurisprudence regarding the implied obligation proliferated, defining its application became difficult. As a result, scholars like Professor Robert Summers, co-author of the UCC, conceptualized that the implied obligation of good faith should be viewed as an "excluder" without a specific general meaning.¹⁶³ Summers found it particularly troublesome to define good faith

158. See RESTATEMENT (FIRST) OF CONTRACTS § 20 (AM. LAW INST. 1932).

159. U.C.C. § 1-304 (AM. LAW INST. & UNIF. LAW COMM'N 1977).

160. Dubroff, *supra* note 123, at 562.

161. RESTATEMENT (SECOND) OF CONTRACTS § 205 (AM. LAW INST. 1981) provides that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment (a) to this section defines good faith as "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." *Id.* § 205 cmt a.

162. Dubroff, *supra* note 123, at 562.

163. Robert S. Summers, *The General Duty of Good Faith—It's Recognition and Conceptualization*, 67 CORNELL L. REV. 810, 816 (1982).

and, instead, focused his efforts on identifying examples of bad faith. In doing so, he identified four broad categories of bad faith: (1) bad faith in contract negotiation and formation; (2) bad faith in raising and resolving contract disputes; (3) bad faith in taking remedial action; and (4) bad faith in performance and enforcement.¹⁶⁴

A. *Bad Faith in Contract Negotiation and Formation*

As Professor Summers noted, this category of bad faith arises in the following six scenarios:

Negotiating without serious intent to contract, abusing the privilege to break off negotiations, entering into a contract without having the intent to perform, entering a deal recklessly disregarding prospective inability to perform, failing to disclose known defects in goods being sold, and taking undue advantage of superior bargaining power to strike an unconscionable bargain.¹⁶⁵

The subcategories identified in this section involve cases in which the parties deal with bad faith resulting from the relationship between the parties before the contract actually is formed. The typical example of this category involves a situation where parties have an “agreement to agree”; the agreement, however, never is consummated because of the failure of one of the parties to engage fairly.¹⁶⁶

164. Robert S. Summers, “*Good Faith*” in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968).

165. *See id.* at 220.

166. A recent example of this situation is Citigroup’s attempted acquisition of Wachovia in 2008. Although the case ultimately was settled, the following facts are indicative of the type of facts that implicate a breach of the implied obligation of good faith in the negotiation and formation of a contract in which one party does not intend seriously to enter an agreement. In summary, Citigroup and Wachovia reached an agreement in principle wherein Citigroup would acquire several of Wachovia’s businesses and assume some of Wachovia’s debt. Before the parties finalized a formal agreement, Citigroup and Wachovia executed an exclusivity agreement providing that Wachovia was contractually forbidden, among other things, to: (1) “enter into or participate in any discussions or negotiations with, furnish any information relating to Wachovia . . . [or] otherwise cooperate in any way with, or knowingly assist, participate in, facilitate or encourage any effort by, any third party that is seeking to make, or has made, an Acquisition Proposal”; or (2) “enter into any agreement in principle, letter of intent, term sheet, merger agreement, acquisition agreement, option agreement or other similar instrument relating to an Acquisition Proposal.” Immediately thereafter, Wachovia entered into negotiations with Wells Fargo and refused to

B. Bad Faith in Raising and Resolving Contract Disputes

Bad faith in raising and resolving contract disputes generally deals with issues involving one party's unfair or unreasonable actions in working to settle contractual disagreements or one party's failure to work diligently to fulfill its obligations under the contract. In this category, Summers identified the following subcategories: (1) evasion of the spirit of the deal; (2) lack of diligence and slacking off; (3) willful rendering of only substantial performance; (4) abuse of power to specify terms; (5) abuse of power to determine compliance; and (6) interference with or failure to cooperate in the other party's performance.¹⁶⁷

C. Bad Faith in taking Remedial Action

This category of bad faith generally occurs in three contexts: a party (1) attempts to conjure up a dispute; (2) adopts an overreaching or "weaseling"

negotiate with Citigroup. Wells Fargo ultimately reached an agreement to acquire Wachovia for more than \$15 billion. Citigroup brought suit against Wachovia for failure to negotiate in good faith pursuant to the exclusivity agreement. *See* Complaint at 4, *Citigroup, Inc. v. Wachovia Corp.*, 613 F. Supp. 2d 485 (S.D.N.Y. 2009) (No. 08-Civ-8668).

167. Summers, *The General Duty of Good Faith*, *supra* note 163, at 812. Although this list is fairly exhaustive, *Empire Gas Corp. v. Am. Bakeries Co.* exemplifies the essence of the type of case highlighted by this category. In *Empire Gas*, American Bakeries planned to purchase conversion units to convert its fleet of vehicles from propane to gas. As a result, it entered into a four-year contract with American Bakeries in which Empire Gas agreed to provide all the gas that American Bakeries needed. After entering into the agreement, American Bakeries decided not to convert its fleet from propane to gas and failed to purchase any gas. As a result, Empire Gas brought suit, alleging that American Bakeries breached the implied obligation of good faith and fair dealing. The court of appeals affirmed the decision of the trial court, ruling in Empire Gas's favor. It reasoned that Empire Gas had established successfully that American Bakeries continued to own a fleet of approximately 3,000 trucks and possessed the financial capacity to purchase the conversion units, yet failed to do so. More importantly, American Bakeries failed to present any evidence justifying why it failed to purchase any of its requirements. Instead, American Bakeries argued that it was not in breach of the contract because it did not purchase the conversion equipment or the propane from anyone else and therefore was free to reduce its requirements to zero. Again, the court rejected this argument, opining that the implied obligation of good faith requires that a buyer avoid an arbitrary decision to decline to perform its requirements promise without some evidence to establish that such a decision is reasonable in light of the circumstances. *See Empire Gas Corp. v. Am. Bakeries Co.*, 840 F.2d 1333 (7th Cir. 1988).

interpretation and/or construction regarding the language of the contract;¹⁶⁸ or (3) takes advantage of the other party in order to obtain a favorable settlement.¹⁶⁹ These types of cases occur after the parties have entered into a contract but one of the parties acts in bad faith by attempting to get out of his responsibilities identified in the contract or when a party leverages his position to extract an unfair benefit.

D. Bad Faith in Performance and Enforcement

This category of bad faith typically occurs when a party acts unreasonably in attempting to seek a particular remedy. Cases that fall into this category involve situations in which a party abuses “the right to adequate assurances, wrongful refusal to accept delivery, willful failure to mitigate damages and abuse of power to terminate.”¹⁷⁰

In reflecting on each of Professor Summers’s categories and subcategories, it is clear that his conception of the implied obligation of good faith and fair dealing is rooted in notions of morality.¹⁷¹

Good faith offers useful insight into the moral bases of contract, and more specifically, into the sources and nature of contractual obligation. Good faith can be seen as the primary basis of contract liability. It entails that contract obligations are seen to arise because we, as society, think that they should, and only so far as we think that they should. Contracts can be seen to be binding in much the same way as obligations of citizenship bind generally. The obligation to perform contracts should, therefore, arise from a number of bases.¹⁷²

Given that morality is a fundamental component of evaluating good faith in contracting, it is imperative that courts use the concept of good faith as a tool to prohibit unreasonable attempts to define morality in a homogenous and under inclusive manner. Good faith must promote freedom of expression, even when certain expression might be unpopular at the time it is spoken—unpopular expression is the very expression that often moves society towards a greater sense of understanding as well as a more just perspective.

168. See *Sylvan Crest Sand & Gravel v. United States*, 150 F.2d 642, 644 (2d Cir. 1945).

169. *Lingenfelder v. Wainwright*, 15 S.W. 844, 848 (1891). Summers, *The General Duty of Good Faith*, *supra* note 163, at 812

170. Summers, “*Good Faith*” in *General Contract Law*, *supra* note 164, at 248.

171. Summers, *The General Duty of Good Faith*, *supra* note 163, at 810.

172. Reitier, *supra* note 121, at 712 n.33.

III. CONTRACTS IN VIOLATION OF PUBLIC POLICY

The other mechanism that courts may employ to limit the application of an overly restrictive or unreasonable morals clause is the public policy exception to enforcement of a contract. One of the primary arguments against restricting a corporation's right to determine the morality of an endorser's expression focuses on a fundamental tenet of contract law—the idea of “freedom of contract.” Freedom of contract is a legal doctrine that argues that the law should not operate to invalidate agreements freely entered into by an endorser and a corporation, especially considering that both of these parties likely are to be represented by counsel.¹⁷³ Although this is a compelling point, freedom of contract is constrained when the contract violates public policy. The public policy defense to enforcement of a contract has been applied in several contexts.¹⁷⁴

First, the public policy defense can arise when a statute exists that makes a contract unenforceable because the contract contravenes the purpose of the statute. In these cases, whether the court will enforce a contract that violates a statute often depends on whether the statute is regulatory or revenue-raising.¹⁷⁵ When a contract violates a revenue-raising statute, courts are more willing to enforce the contract because the primary purpose of the statute is to raise money, not to curb “bad” behavior.¹⁷⁶ When a contract violates a regulatory statute, courts likely will not enforce such contracts because the purpose of the statute is to prohibit conduct that is harmful to society, not primarily to raise money.¹⁷⁷ *Fitzsimons v. Eagle Brewing Co.* provides a useful illustration of how courts have declined to apply the idea of freedom of contract when the contract violates public policy in the context of a regulatory statute.¹⁷⁸ In *Fitzsimons*, a defendant beer manufacturing company entered into a contract with a plaintiff company that produced malt syrup, a key ingredient in the production of beer.¹⁷⁹ When the parties formed the contract, the plaintiff was aware that the defendant did not possess a proper license to sell beer; nonetheless, the plaintiff delivered the syrup, enabling the defendant to

173. See generally Jerome C. Knowlton, Comment, *Freedom of Contract*, 3 MICH. L. REV. 619 (1905).

174. See Walter Gellhorn, *Contracts and Public Policy*, 35 COLUM. L. REV. 679 (1935).

175. See, e.g., *Christophersen & Kiaer, Inc. v. U. S. Navigation Co.*, 202 N.Y.S. 902, 903 (N.Y. Mun. Ct. 1923).

176. See *id.*

177. *Fitzsimons v. Eagle Brewing Co.*, 107 F.2d 712, 713 (3d Cir. 1939).

178. *Id.*

179. *Id.* at 712.

manufacture beer in violation of the statute.¹⁸⁰ The plaintiff sued when the defendant ultimately breached the contract and refused to pay for the syrup.¹⁸¹ The district court ruled that the contract was unenforceable because the parties were *in pari delicto*,¹⁸² and the court of appeals affirmed, refusing to enforce the contract because it violated a public policy requiring liquor-producers to be licensed.¹⁸³

Second, some courts are reluctant to enforce surrogacy agreements when the agreement looks like it is nothing more than a transaction for the sale of a child or when the agreement is not in the best interest of the child.¹⁸⁴

In addition to the aforementioned examples, there are other contexts in which courts are unwilling to enforce contracts based on important public policy concerns. Courts generally are reluctant to enforce contracts in which a party agrees to an assignment of future wages¹⁸⁵ or when a contract includes a restrictive covenant that hinders a party from providing professional services.¹⁸⁶

These cases highlight the fact that the concept of “freedom to contract” is not an unbridled right. Courts and legislatures are willing to restrain this right when it trammels upon more compelling public interests, even when contracting parties are sophisticated, specifically intend for a particular result to occur at the time of contracting, or have consulted and/or retained legal counsel during the contract negotiation process. In each of these cases, the parties either had the assistance of counsel or contracted freely and voluntarily, yet the court declined to enforce these contracts because there was an overarching concern of protecting the public and ensuring that two independent parties could not frustrate the needs of society.

180. *Id.* at 712–13.

181. *Id.*

182. *See id.* at 714. *In pari delicto* means equally at fault. *In pari delicto*, BLACK’S LAW DICTIONARY (10th ed. 2014).

183. *Fitzsimons*, 107 F.2d at 714.

184. *See, e.g., R.R. v. M.H. & Another*, 689 N.E.2d 790 (1998) (holding that the surrogacy agreement was unenforceable as a matter of public policy because the agreement appeared as if it was drafted to provide for the sale of the child instead of providing support to the mother for carrying the child to term).

185. LINDLEY DANIEL CLARK & STANLEY JAMES TRACY, LAWS RELATING TO PAYMENT OF WAGES 31 (1926).

186. *See* MODEL RULES OF PROF’L CONDUCT r. 5.6 (AM. BAR ASS’N 1983) (prohibiting “a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship”).

Morals clauses that seek to limit free speech rights similarly frustrate this purpose.

IV. THE RASHARD MENDENHALL CASE

The Rashard Mendenhall case served as the genesis for this Article.¹⁸⁷ Hanesbrands terminated Mendenhall based on Hanesbrands's contention that he violated the morals clause in his endorsement contract after he tweeted¹⁸⁸ comments about the morality of celebrating Osama Bin Laden's death. In 2008, Mendenhall entered into a three-year contract with Hanesbrands to endorse its products.¹⁸⁹ Prior to the expiration of the original contract, both parties contractually agreed to extend the endorsement agreement for an additional four years but modified the agreement to include the following clause:

If Mendenhall commits or is arrested for any crime or becomes involved in any situation or occurrence (collectively, the "Act") 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. HBI's decision on all matters arising under this Section 17(a) shall be conclusive.¹⁹⁰

Shortly after the contract extension, Mendenhall tweeted the following comments after President Barack Obama announced the death of Osama Bin Laden:

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 . . .¹⁹¹

187. *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012). Rashard Mendenhall is a former NFL player. He played a total of six NFL seasons—five for the Pittsburgh Steelers and one for the Arizona Cardinals. *Player Profile for Rashard Mendenhall*, NFL, <http://www.nfl.com/player/rashardmendenhall/939/profile> (last visited Sept. 11, 2017) [<https://perma.cc/XJ7N-F93U>].

188. Twitter is a social media platform that allows individuals to create and share ideas and information instantly. *About Twitter*, TWITTER, https://about.twitter.com/en_us/company.html (last visited Sept. 13, 2017) [<https://perma.cc/H336-YXSH>].

189. *Mendenhall*, 856 F. Supp. 2d at 719.

190. *Id.* at 720.

191. @R_Mendenhall, TWITTER (May 2, 2011, 2:29 PM), https://twitter.com/r_mendenhall/status/65166153525379072 [<https://perma.cc/J2VQ-EXRP>].

I believe in God. I believe we're ALL his children. And I believe HE is the ONE and ONLY judge.¹⁹²
 Those who judge others, will also be judged themselves.¹⁹³
 For those of you who said we want to see Bin Laden burn in hell and piss on his ashes, I ask how would God feel about your heart?¹⁹⁴
 There is not an ignorant bone in my body. I just encourage you to #think¹⁹⁵

Mendenhall received both positive and negative responses to his tweets.¹⁹⁶
 As a result of the negative responses, he issued the following explanation:

192. @R_Mendenhall, TWITTER (May 2, 2011, 3:25 PM), https://twitter.com/R_Mendenhall/status/65180241353646080 [<https://perma.cc/39GG-2X83>].

193. @R_Mendenhall, TWITTER (May 2, 2011, 3:26 PM), https://twitter.com/R_Mendenhall/status/65180378125709312 [<https://perma.cc/6U7T-593T>].

194. @R_Mendenhall, TWITTER (May 2, 2011, 3:28 PM), https://twitter.com/R_Mendenhall/status/65180868850884608 [<https://perma.cc/ZU6C-6XV6>].

195. @R_Mendenhall, TWITTER (May 2, 2011, 3:29 PM), https://twitter.com/R_Mendenhall/status/65181197537513473 [<https://perma.cc/8ABY-DGAF>].

196. Complaint at 17–18, *Rashard Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717 (M.D.N.C. 2012) (No. 11-Civ-570). According to Mendenhall's complaint, he received several positive responses to his views, including:

@R_Mendenhall At first I was upset about ur tweets but like ur goal it got me thinkin mad respect for u man Love a man of God

@R_Mendenhall Forgiveness makes you a stronger and better person. holding [grudges] and not learning about the person him/herself will never get you anywhere

@R_Mendenhall That's the purpose of life to manifest ideas & create a better world for the future! #thinking leads to ideas, ideas = change!

@R_Mendenhall I wish people would stop disagreeing with you and realize that by thinking, they are proving you right. You are so refreshing.

@R_Mendenhall seriously says some of the most inspiring & truthful things I've heard in a while, he changed my opinion on athletes. i would give about anything just to have a conversation with @r_mendenhall. he speaks some of the realest words i've ever heard.

@R_Mendenhall // appreciate your thought provoking tweets. it's time people stop living a selfishly blind life.

@R_Mendenhall you used to just be my favorite player on my favorite team, now you are just one of my favorite people. #inspiration

@R_Mendenhall I've never been a Steelers fan, but I have more respect for you than any other professional athlete I can think of.

@R_Mendenhall your mental state should be the prototype for not just athletes but humans in general.

I appreciate those of you who have decided to read this letter and attain a greater understanding of my recent twitter posts. I see how they have gotten misconstrued, and wanted to use this outlet as a way to clear up all things that do not truthfully represent myself, what I stand for personally, and any organization that I am a part of. First, I want people to understand that I am not in support of Bin Laden, or against the USA. I understand how devastating 9/11 was to this country and to the people whose families were affected. Not just in the US, but families all over the world who had relatives in the World Trade Centers. My heart goes out to the troops who fight for our freedoms every day, not being certain if they will have the opportunity to return home, and the families who watch their loved ones bravely go off to war. Last year, I was grateful enough to have the opportunity to travel overseas and participate in a football camp put on for the children of US troops stationed in Germany. It was a special experience. These events have had a significant impact in my life.

What kind of person celebrates death? It's amazing how people can HATE a man they have never even heard speak. We've only heard one side . . .

This controversial statement was something I said in response to the amount of joy I saw in the event of a murder. I don't believe that this is an issue of politics or American pride; but one of religion, morality, and human ethics. In the bible, Ezekiel 33:11 states, "Say to them, 'As surely as I live, declares the Sovereign LORD, I take no pleasure in the death of the wicked, but rather that they turn from their ways and live. Turn! Turn from your evil ways...'" I wasn't questioning Bin Laden's evil acts. I believe that he will have to face God for what he has done. I was reflecting on our own hypocrisy. During 9/11 we watched in horror as parts of the world celebrated death on our soil. Earlier this week, parts of the world watched us in horror celebrating a man's death.

Nothing I said was meant to stir up controversy. It was my way to generate conversation. In looking at my timeline in its entirety, everything that I've said is with the intent of expressing a wide array of ideas and generating open and honest discussions, something I believe we as American citizens should be able to do. Most opinions will not be fully agreed upon and are not meant to be. However, I

Jack Greiner, *Steeler's Tweet Lawsuit Continues*, GRAYDON LAW (Apr. 18, 2012), <https://graydon.law/steelers-tweet-lawsuit-continues/> [https://perma.cc/PG8S-6CKY].

believe every opinion should be respected or at least given some thought. I apologize for the timing as such a sensitive matter, but it was not meant to do harm. I apologize to anyone I unintentionally harmed with anything that I said, or any hurtful interpretation that was made and put in my name. It was only meant to encourage everyone reading it to think.¹⁹⁷

Thereafter, Hanesbrands terminated Mendenhall's endorsement contract and issued this statement via ESPN:

Champion is a strong supporter of the government's efforts to fight terrorism and is very appreciative of the dedication and commitment of the U.S. Armed Forces. Earlier this week, Rashard Mendenhall, who endorses Champion products, expressed personal comments and opinions regarding Osama bin Laden and the September 11 terrorist attacks that were inconsistent with the values of the Champion brand and with which we strongly disagreed. In light of these comments, Champion was obligated to conduct a business assessment to determine whether Mr. Mendenhall could continue to effectively communicate on behalf of and represent Champion with consumers. While we respect Mr. Mendenhall's right to express sincere thoughts regarding potentially controversial topics, we no longer believe that Mr. Mendenhall can appropriately represent Champion and we have notified Mr. Mendenhall that we are ending our business relationship. Champion has appreciated its association with Mr. Mendenhall during his early professional football career and found him to be a dedicated and conscientious young athlete. We sincerely wish him all the best.¹⁹⁸

Mendenhall sued Hanesbrands for breach of the endorsement contract, arguing that Hanesbrands's termination (1) contravened the course of dealings between the parties because Hanesbrands was aware of Mendenhall's use of Twitter to express his opinions on controversial subjects; (2) violated the implied obligation of good faith and fair dealing; and (3) was unreasonable because it was based on its mere disagreement with his comments and not because Mendenhall's comments brought him into "public disrepute, contempt, scandal or ridicule, tending to shock, insult or offend the majority of the consuming public or any protected class or group

197. Mendenhall v. Hanesbrands, Inc., 856 F. Supp. 2d 717, 721 (M.D.N.C. 2012).

198. *Id.* at 721–22.

thereof.”¹⁹⁹ In response, Hanesbrands filed a Motion for Judgment on the Pleadings, arguing that the morals clause expressly granted Hanesbrands the right to terminate the contract.²⁰⁰ Although the court agreed that Hanesbrands possessed an express right to terminate the agreement, the court held that the company could not exercise that right arbitrarily, irrationally, or unreasonably.²⁰¹ Hanesbrands also attempted to argue that Mendenhall’s admission in his complaint that he received negative comments was sufficient to justify his termination because these statements evidenced that his comments caused “public disrepute, contempt, scandal, or ridicule, or tend[ed] to shock, insult or offend the majority of the consuming public or any protected class or group thereof.”²⁰² The court determined that a dispute of material fact existed on this issue because Mendenhall’s admission that he received negative comments was not an admission that his comments caused widespread objection but only that some people objected to his comments.²⁰³ In fact, Mendenhall’s complaint also provided evidence that some people viewed his comments positively.²⁰⁴ Therefore, the court denied Hanesbrands’s motion because there was a dispute of material fact regarding the nature of the public’s response to Mendenhall’s comments.²⁰⁵

Although this case seems to offer some support to athletes when challenging a corporation’s unilateral discretion to terminate an endorsement contract based on a morals clause, the court failed to render a decision that reflects the value of an athlete’s thought-provoking or political speech—particularly when an athlete is a member of a marginalized population. Although the court in *Mendenhall* dismissed Hanesbrands’s motion to dismiss, Mendenhall nonetheless retained the burden of proof in establishing that Hanesbrands violated the implied obligation of fair dealing in good

199. *Id.* at 725.

200. *Id.* at 726. In support of Hanesbrands’ Rule 12(c) motion, Hanesbrands attached copies of several news reports that attempted to detail the public’s negative perception of Mendenhall’s comments. The court did not allow the reports into evidence because Rule 12(c) motions generally are based only on the pleadings unless the accompanying documentary evidence is central to the plaintiff’s claim and is not disputed. Because Mendenhall contested the authenticity of the information contained in the reports, the court did not consider the reports in denying the defendant’s motion. *Id.* at 726–27.

201. *Id.* at 726.

202. *Id.*

203. *Id.* at 727.

204. *Id.*

205. *Id.*

faith.²⁰⁶ More accurately, the court did not determine that Hanesbrands violated the implied obligation of good faith and fair dealing, only that Mendenhall pled sufficient facts to establish a dispute of material fact.²⁰⁷ Ultimately, both parties settled for an undisclosed amount.²⁰⁸ Although some might view this case as a victory for athletes, such a conclusion is overly optimistic; had the case not settled, both parties presumably would have introduced evidence to establish the public's opinion. In sifting through this evidence, the judge would have processed it by evaluating it through his own frame of reference. Although this approach seems reasonable, it has the potential to be biased substantially in favor of white judges' conceptions of morality, which may not always coalesce with the moral conceptions of other groups.²⁰⁹

V. DISCRETIONARY ENFORCEMENT

Toni Lester's article entitled "*Finding the 'Public' in 'Public Disrepute' – Would the Cultural Defense Make a Difference in Celebrity and Sports Endorsement Contract Disputes? - The Case of Michael Vick and Adrian Peterson*" highlights a compelling issue about the discretion that courts and corporations are afforded in the evaluation of whether an athlete's conduct is morally reprehensible.²¹⁰ In his article, Lester evaluates the varying and often conflicting perspectives and attitudes that black and white Americans have regarding whether certain conduct is morally reprehensible.²¹¹ To facilitate his comparison, Lester evaluated the social attitudes of black and white Americans toward Michael Vick²¹² and Adrian Peterson²¹³ after both

206. *Id.* at 724–25.

207. *Id.* at 727.

208. See Marc Edelman, *Rashard Mendenhall Settles Lawsuit with Hanesbrands over Morals Clause*, FORBES (Jan. 17, 2013), <https://www.forbes.com/sites/marcedelman/2013/01/17/rashard-mendenhall-settles-lawsuit-with-hanes-brands-over-morals-clause/#7a909c052483> [<https://perma.cc/US8E-UQVF>].

209. See discussion *infra* Part V.C.

210. See Lester, *supra* note 7, at 21.

211. See *id.*

212. Michael Vick is a former American Football quarterback primarily for the Atlanta Falcons and the Philadelphia Eagles of the NFL. In 2007, he was arrested and convicted for his involvement in a dog fighting ring, spending 21 months in federal prison. After his release, he signed with the Eagles in 2009 and briefly played for the New York Jets and Pittsburgh Steelers until his retirement in early 2017. *Biography of Michael Vick*, BIOGRAPHY, <https://www.biography.com/people/michael-vick-241100> (last visited Sept. 11, 2017) [<https://perma.cc/FW7W-HXLJ>].

213. Adrian Lewis Peterson is an American football running back for the New Orleans Saints of the NFL. In 2014, Peterson was indicted on charges of reckless or

were charged with engaging in criminal conduct.²¹⁴ Vick was indicted and ultimately plead guilty to crimes involving dog abuse but Peterson was charged with child abuse and accepted a plea deal for a lesser charge of reckless assault after he “spanked” his son with a tree switch resulting in bruises to the boy’s body.²¹⁵ In response to these criminal charges, Nike terminated both athletes’ endorsement contracts based on morals clauses contained in their agreements.²¹⁶

Professor Lester’s article highlights the critical point that morality is not absolute.²¹⁷ Instead, conceptions of morality often are influenced by cultural and racial contexts.²¹⁸ As evidence of this reality, Lester referenced an ESPN poll taken after Vick’s guilty plea that reflected that black people and white people had different perspectives about the media’s portrayal of black athletes.²¹⁹ According to the results of the poll, 57% of black Americans believed that the media is biased against black athletes while only seven percent of white Americans held the same belief.²²⁰ In addition, the poll reflected that black people believe that “the media unfairly criticizes black

negligent injury to a child and was suspended for most of the 2014 season as a result. In April 2015, Peterson was reinstated to the league. *Biography of Adrian Peterson*, BIOGRAPHY, <https://www.biography.com/people/adrian-peterson-21155887> (last visited Sept. 11, 2017) [<https://perma.cc/WWP8-7TFK>].

214. Lester, *supra* note 7, at 26–32.

215. *Id.* at 26, 29.

216. According to a Nike spokesperson, Nike terminated Vick’s contract after Vick reached a plea deal. After publically terminating Vick’s agreement, Nike issued a statement providing that “[w]e consider any cruelty to animals inhumane, abhorrent and unacceptable.” *Nike terminates contract with Michael Vick*, USA TODAY (Aug. 24, 2007, 10:12 PM), http://usatoday30.usatoday.com/sports/football/nfl/falcons/2007-08-24-vick-nike_n.htm [<https://perma.cc/EU2D-JXZE>]. Nike initially suspended Peterson’s contract after he was indicted for child abuse, but it later terminated his contract after the NFL indicated that it was reviewing Peterson’s conduct for possible punishment pursuant to the NFL’s personal conduct policy. *Nike terminates contract with Adrian Peterson*, SPORTS ILLUSTRATED (Nov. 6, 2014), <https://www.si.com/nfl/2014/11/06/adrian-peterson-nike-deal-terminated> [<https://perma.cc/HSY3-EA7D>].

217. Lester, *supra* note 7, at 32 (“Strict cultural relativists maintain ‘there is no superior, international, or universal morality, that the moral and ethical rules of all cultures deserve equal respect.’” (quoting Farnoosh Rezaeeahan Milde, *Theories on Female Genital Mutilation*, YALE HUM. RTS. & DEV. L.J. (forthcoming), <http://ssrn.com/abstract=2250346> (last viewed October 5, 2017)) [<https://perma.cc/55VK-T8BD>].

218. Lester, *supra* note 7, at 32–33.

219. Mark Fainaru-Wada, *Survey shows split on racial opportunity*, ESPN (Jan. 11, 2011), <http://www.espn.com/espn/otl/news/story?id=6006813> [<https://perma.cc/CRJ5-HX8C>].

220. *Id.*

athletes more than white athletes, while the white fans suggest there is no difference in the media's handling of various cases."²²¹ The critical point here is that black fans were more likely to perceive the media's attention towards black athletes as negative and biased while white fans were of the opinion that it was neutral and unbiased. Lester postulates that

[s]ome of the frustration reflected in the poll may be grounded in the fact that there seems to be big cultural differences in how the conduct of Vick and Peterson is viewed. Some writers have argued that certain unique aspects of black culture - (dogfighting in the South, for instance, and strict child rearing mores) help explain (and potentially even justify) the behaviors of these men, the inference being that management and the courts should consider these differences before deciding their fate.²²²

In evaluating the evidence relating to public opinion, Lester advances an interesting argument—that the court, in weighing such evidence, should consider the fact that the morality of certain conduct is measured relative to the cultural experiences of a particular cultural base.²²³ Failing to consider the concept of cultural relativism results in a form of racism. As a result, courts should value minority mores and culture in deciding morals clause disputes because this idea

is in line with cultural relativism, which holds that one culture's practice and morals are equal to another's, even if they are different. Advocates of multiculturalism, cultural relativism's close cousin, also believe that “treating members of minority cultural groups as equals re-quires special accommodations to protect their contexts of choice.” In the criminal law arena, such an approach is called the “cultural defense.”²²⁴

As Lester accurately points out, the likelihood that a court would accept the cultural defense in determining the enforceability of a morals clause is low.²²⁵ Instead, Lester suggests that a court is more likely to attempt to determine how the public views the athlete's conduct by evaluating “media coverage, public commentary, arrest records, and the views of management (usually in some combination with these other factors) to assess if public disrepute has occurred

221. *Id.*

222. Lester, *supra* note 7, at 23.

223. *Id.*

224. *Id.* at 24.

225. *Id.*

in these forums.”²²⁶ The difficulty with this course of action is that this analysis largely will be influenced by the judge’s own perception of morality, and given that the majority of corporate decision makers, as well as the purchasing public, are white, these issues will be resolved to the detriment of athletes who come from diverse backgrounds.²²⁷

Lester’s view about how to remedy the problem presented by discretionary review of morals clauses is a bit overly optimistic. Although he recognizes that a bias of some capacity exists regarding racial attitudes towards certain conduct, part of his suggestion for addressing this problem places the responsibility on companies to “do the right thing” by equally and fairly enforcing endorsement contracts.²²⁸ Although this is a reasonable assumption, this Article develops in more detail how this solution is unrealistic because the fundamental purpose of the corporate entity is profit maximization and because Corporate America, as well as some sectors of the judiciary, lacks meaningful diversity.

A. Profit Maximization and Wealth Concentration

The same companies that brought the United States to the brink of financial ruin²²⁹—motivated primarily by profit maximization and controlled largely by a homogenous group of white men—now have the power to determine morality in a way the government cannot.

The primary purpose of the corporate entity is profit maximization.²³⁰ Although the concept of “profit maximization” did not begin with the seminal case of *Dodge v. Ford*,²³¹ this case is included in almost every corporate law textbook and is one of the foundational cases in support of this concept. In *Dodge v. Ford*, Henry Ford made two decisions: (1) to cut special dividends to Ford’s shareholders that included the Dodge Brothers; and (2) to retain cash in order to build a smelting plant for the purpose of increasing production.²³²

226. *Id.*

227. *See* discussion *infra* Part V.B.

228. “Companies who enter into endorsement contracts with celebrities should be equal opportunity enforcers in all such circumstances.” *Id.* at 51.

229. *See* TODD J. CLARK & ANDRÉ DOUGLAS POND CUMMINGS, *CORPORATE JUSTICE* (2016) (discussing the Financial Market Crisis and how a homogenous group of white men, investing in risky derivatives, almost single-handedly destroyed the global economy).

230. *See* Anthony Nwafor, *Shareholders Profit Maximization and Stakeholders Interests in Corporate Governance*, 11 *CORPORATE OWNERSHIP & CONTROL* 670, 670 (2014).

231. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

232. *Id.* at 670–71. The court upheld Ford’s decision to build the smelting plant because it determined that the motivation behind building it related to the business

Generally, these types of business decisions fall within the province of the business judgment rule and are unlikely to be challenged successfully.²³³ When Ford was questioned about why he cut the dividend, however, the basis of his testimony indicated that he thought the company had made too much profit and that profits should be invested back into the corporation so to increase the wages of employees and reduce the price of Ford's cars to benefit the general public.²³⁴ Based on this testimony, the court declined to protect Ford's decision and ordered that the corporation pay a special dividend.²³⁵ Ford could have avoided this outcome by testifying that he cut the dividend to increase cash reserves for the future benefit of corporate expenditures. If so, the Dodge Brothers likely could not have challenged Ford's decision successfully. In oft-quoted language, the court reasoned that

[a] business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the non-distribution of profits among stockholders in order to devote them to other purposes.²³⁶

Although there is some sentiment that *Dodge v. Ford* should be eliminated from the corporate law classroom,²³⁷ its fundamental principle

of the corporation and therefore was protected by the business judgment rule. *Id.* at 684–85.

233. The business judgment rule provides that a corporate director shall not incur liability for breaching the duty of care in making corporate decisions as long as the director's decision was informed, made in good faith, and in the best interests of the corporation. *See Smith v. Van Gorkom*, 488 A.2d 858, 872 (Del. 1985).

234. *See Ford Motor Co.*, 170 N.W. at 683.

235. *Id.* at 685.

236. *Id.* at 684.

237. Professor Lynn Stout argues that *Dodge v. Ford* precedential value is overstated for the following reasons: (1) it is an old case; (2) it was decided by a Michigan court, not a Delaware court that is largely regarded as the most comprehensive, respected, and influential kind of court in the United States regarding corporate matters; and (3) the case is more about shareholder oppression than corporate purpose because the actual holding of the case was that Ford breached a fiduciary duty to the Dodge Brothers in their capacity as minority shareholders. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 166–68 (2008). In regard to the oppression argument, Ford really was trying to prevent the Dodge Brothers from developing a competing enterprise as well as trying to force them to sell back their shares at a cheaper

about profit maximization continues to be the primary validation for corporate existence. Therein lies the problem with assuming that corporations will police themselves adequately in fairly enforcing endorsement contracts. A corporation's focus on profit maximization often conflicts with what most consider "morality." As economist Milton Friedman remarked, "a corporation's responsibility is to make as much money for the stockholders as possible."²³⁸

Because the primary objective of the corporation is to maximize profit, corporate decision making largely will operate to facilitate that purpose. This objective ensures that corporations will endeavor to satisfy and align their corporate perspective with those consumers that best support this end. This reality is especially troubling considering that the likelihood that black Americans' concerns will align with corporate profitability is low given that the majority of wealth in the United States is concentrated in the hands of white people.²³⁹ Because white Americans possess the majority of wealth in the United States, white people's purchasing power operates as a mechanism for subjugating black people's issues and concerns for those of white consumers. Moreover, white American's purchasing power forces Corporate America to appease white Americans' interests. To appreciate the extent of white people's purchasing power and influence, consider that white families own 90% of the United States' wealth compared to black families who only hold 2.6%.²⁴⁰ As further context, black families account only for 2.6% of the United States' wealth but make up approximately 13% of the overall population.²⁴¹ Conversely, white families make up 90% of the United States' wealth despite comprising only approximately 77% of the population.²⁴² In fact, according to an article from Slate entitled "The Wealth Gap Between Blacks and Whites is Even More Enormous Than You Think[,]"

the median white family has a net worth of \$116,000 dollars. This indicates 41 million white households across the nation have over

price because the value of the shares would decline as a result of the lack of dividend. *Id.*

238. *Corporate Social Responsibility: Friedman's View*, BECKER FRIEDMAN INST., <https://bfi.uchicago.edu/news/feature-story/corporate-social-responsibility-friedmans-view> (last visited May 20, 2017) [<https://perma.cc/5QTH-TVFS>].

239. Bruenig, *supra* note 8.

240. *See supra* note 214 and accompanying text; *see also* Antonio Moore, *America's Financial Divide: The Racial Breakdown of U.S. Wealth in Black and White*, HUFF. POST (Apr. 13, 2015), http://www.huffingtonpost.com/antonio-moore/americas-financial-divide_b_7013330.html [<https://perma.cc/JGV6-NDFE>].

241. *QuickFacts United States*, U. S. CENSUS BUREAU, <https://www.census.gov/quickfacts/> (last visited Oct. 22, 2017) [<https://perma.cc/DV5P-QYG9>].

242. *Id.*

\$116,000 dollars in net worth. In comparison, nearly 40[%] or 5.6 million African American homes in the U.S. have zero or negative net worth. In addition, when you deduct the family car as an asset, the median black family in America only has a net worth of \$1,700 dollars.²⁴³

These facts highlight that wealth in the United States is concentrated in the hands of white Americans. Because wealth corresponds to purchasing power, corporations will be inclined to evaluate morality in a manner that most closely resembles the United States' primary customer: white Americans.

B. Lack of Corporate Diversity

Another issue that largely influences corporate discretion is the fact that corporate decision makers overwhelmingly are white people. The lack of diversity in the United States' corporate boardrooms and among its corporate officers is well-documented.

In 2016, among the Fortune 100 corporations, white people accounted for 82.5% of board seats, whereas black people only accounted for 9.9% of board seats.²⁴⁴ Specifically, there were 1,205 total board seats among the Fortune 100, of which 994 were filled by white people—773 white men and 221 white women—compared to only 119 black people—90 black men and 29 black women.²⁴⁵

The board composition for Fortune 500 corporations in 2016 presents a more disparate result. Specifically, white people accounted for 85.6% of board seats whereas black people only accounted for 7.9% of board seats.²⁴⁶ Of the 5,440 total board seats among the Fortune 500, 4,656 were filled by white people—3,763 white males and 893 white women—

243. Moore, *supra* note 240 (citing Jordan Weissmann, *The Wealth Gap Between Blacks and Whites Is Even More Enormous (and Shameful) Than You Think*, SLATE MAG. (Dec. 15, 2014), http://www.slate.com/blogs/moneybox/2014/12/15/the_black_white_wealth_gap_it_s_bigger_than_you_even_think.html [<https://perma.cc/A92V-JA7S>]).

244. DELOITTE & ALLIANCE FOR BD. DIVERSITY, MISSING PIECES REPORT: THE 2016 BOARD DIVERSITY CENSUS OF WOMEN AND MINORITIES ON FORTUNE 500 BOARDS 5 fig. 3 (2017), <https://www2.deloitte.com/us/en/pages/center-for-board-effectiveness/articles/board-diversity-census-missing-pieces.html?id=us:2el:3dp:adbcenpr16:awa:cgc:020617#> [<https://perma.cc/3RUH-232A>].

245. *Id.*

246. *Id.* at 11.

compared to only 428 black people—306 black men and 122 black women.²⁴⁷

In considering the relatively low number of black board members, it is important to keep another unsettling fact in mind: black board members are substantially more likely than white board members to sit on multiple boards.²⁴⁸ According to Richard Zweigenhaft, the Dana Professor of Psychology at Guilford College in Greensboro, North Carolina and author of several articles about the lack of diversity in the United States' corporate boardrooms, one in three black board members sit on multiple boards compared to only one in six white board members doing the same.²⁴⁹ This statistic suggests that black board members are more likely to be recycled, which lessens the likelihood that new black board members will be selected for board positions to enhance diversity further in the United States's corporate boardrooms. Thus, the overall statistics about black people's representation on corporate boards are skewed because the minimal diversity that is present consistently is occupied by the same small number of black people.

The number of black CEOs is even starker. As of January 2016, there were only five black CEOs among the Fortune 500, and there have been only 15 black CEOs in the entire history of the Fortune 500.²⁵⁰ According to Senator Bob Menendez's 2014 Corporate Diversity Survey, diversity among corporate executive teams in the Fortune 100 also is lacking. Specifically, black people accounted for only 4.7% of these positions.²⁵¹

These statistics clearly highlight a lack of diversity and, more specifically, a lack of meaningful black representation within the United States' corporate leadership. For those persons who are of the opinion that diversity does not influence corporate "morality" or corporate perspective, Ben & Jerry's articulated position regarding the Black Lives Matter Movement provides proof positive that diversity does influence corporate

247. *Id.*

248. Richard L. Zweigenhaft, *Diversity Among CEOs and Corporate Directors: Has the Heyday Come and Gone?*, WHO RULES AMERICA?, http://www2.ucsc.edu/whorulesamerica/power/diversity_among_ceos.html (last visited Oct. 22, 2017) [<https://perma.cc/YA3K-SMDH>].

249. *Id.*

250. See Ellen McGirt, *Why Race and Culture Matter in the C-Suite*, FORTUNE (Jan. 22, 2016), <http://fortune.com/black-executives-men-c-suite/> [<https://perma.cc/SU6B-5DXD>].

251. BOB MENENDEZ, UNITED STATES SENATOR FOR NEW JERSEY, 2014 CORPORATE DIVERSITY SURVEY 11 (June 2015), <https://www.menendez.senate.gov/imo/media/doc/2014%20Corporate%20Diversity%20Survey%20Report.pdf> [<https://perma.cc/FW4H-KDRY>].

perspective. On the company's main webpage, under the tab marked "Values," it prominently displays the issues that Ben & Jerry's cares about as a company. The first item listed is "Racial Justice." In explaining why "Racial Justice" is important to Ben & Jerry's, its explanation reaffirms one of the fundamental propositions of this Article:

It is true that while we may have fewer overt racists, racism is still deeply embedded within systems like our schools, workplaces, the criminal justice system and hospitals, to name a few. Think about it: because white people occupy a disproportionate number of positions of power in our society it comes at the expense of people of color.²⁵²

What is even more compelling about the company's position is that it supports the Black Lives Matter Movement.²⁵³

Black lives matter.

They matter because they are children, brothers, sisters, mothers, and fathers. They matter because the injustices they face steal from all of us—white people and people of color alike. They steal our very humanity. Systemic and institutionalized racism are the defining civil rights and social justice issues of our time. We've come to understand that to be silent about the violence and threats to the lives and well-being of Black people is to be complicit in that violence and those threats.

We ask you to join us in not being complicit.

There is good news: the first step in overcoming systemic racism and injustice is to simply understand and admit that there is a problem. It's trying to understand the perspective of others whose experiences are different from our own. To not just listen, but to truly understand those whose struggle for justice is real, and not yet complete.

Rev. Dr. William J. Barber, II, President of the North Carolina NAACP, said it best when reacting to the recent police shooting

252. *Racial Justice*, BEN & JERRY'S, <http://www.benjerry.com/values/issues-we-care-about/racial-justice> (last visited Oct. 23, 2017) [<https://perma.cc/43HV-95XU>].

253. Black Lives Matter is an ideological and political intervention in a world in which black people's lives are systematically and intentionally targeted for demise. It is an affirmation of black people's contribution to this society, our humanity, and our resilience in the face of deadly oppression. *See* BLACK LIVES MATTER, <http://blacklivesmatter.com/guiding-principles/> (last visited Sept. 15, 2017) [<https://perma.cc/7L7P-V4F9>].

in Charlotte, NC. He said, “Our objective is simple: to ensure justice-loving people act toward justice, with all evidence, and that we stand together and act from a place of power and love, rather than out of fear and anger.”

It’s been hard to watch the list of unarmed Black Americans killed by law enforcement officers grow longer and longer. We understand that numerous Black Americans and white Americans have profoundly different experiences and outcomes with law enforcement and the criminal justice system. That’s why it’s become clear to us at Ben & Jerry’s that we have a moral obligation to take a stand now for justice and for Black lives.

We want to be clear: we believe that saying Black lives matter is not to say that the lives of those who serve in the law enforcement community don’t. We respect and value the commitment to our communities that those in law enforcement make, and we respect the value of every one of their lives.

But we do believe that — whether Black, brown, white, or blue — our nation and our very way of life is dependent on the principle of all people being served equal justice under the law. And it’s clear, the effects of the criminal justice system are not color blind.

We do not place the blame for this on individual officers. Rather, we believe it is due to the systemic racism built into the fabric of our institutions at every level, disadvantaging and discriminating against people of color in ways that go beyond individual intent to discriminate. For this reason, we are not pointing fingers at individuals; we are instead urging us to come together to better our society and institutions so that we may finally fulfill the founding promise of this country: to be a country with dignity and justice for all.

All lives do matter. But all lives will not matter until Black lives matter.

We ask people to be open to understanding these issues, and not to reflexively retreat to our current beliefs. Change happens when people are willing to listen and hear the struggles of their neighbor, putting aside preconceived notions and truly seeking to understand and grow. We’ll be working hard on that, and ask you to as well.

- Your friends at Ben & Jerry’s²⁵⁴

254. *Why Black Lives Matter*, BEN & JERRY’S, <http://www.benjerry.com/whats-new/2016/why-black-lives-matter> (last visited Sept. 12, 2017) [<https://perma.cc/K896-VDTF>].

Ben & Jerry's position on racial justice is an anomaly in the corporate world. Although many corporations that embrace conceptions of corporate social responsibility focus on things like environmental issues, Ben & Jerry's cut against the grain by focusing on race.²⁵⁵ The company's racial focus likely is attributable to the meaningful representation of diversity on its board as well as the fact that its original founders were socially conscious individuals who worked to ingrain conceptions of social justice within the organizational fabric of their business.²⁵⁶ The company's ten-person board contains four women—including one black and one Indian female—and one black male.²⁵⁷ Although the board also includes five white males, it has a meaningful population of minorities, which substantially reduces the tokenism effect.²⁵⁸

Contrast the racially diverse board that Ben & Jerry's has with AIG's board in 2003 prior to the financial crisis.²⁵⁹ In 2003, AIG's board of 15 members lacked any meaningful diversity. Based on AIG's Board of Director's picture from 2003, its board consisted of 14 white people—12 white males and two white females—and one male of Asian descent.²⁶⁰ Needless to say, this lack of diversity may have been one of the primary reasons for AIG's failure. One of the practices that allowed AIG to profit in the manner that it did during the market boom was its focus on discriminatory

255. Although many corporations provide information about maintaining a diverse workforce, few corporations are willing to take positions similar to that of Ben & Jerry's regarding the "Black Lives Matter" movement. These same corporations, however, will take strong positions on environmental issues because there is greater economic benefit in supporting environmental concerns rather than social justice in race relations. See Steffen Böhm & Annika Skoglund, *Why companies are embracing environmental activism*, CNN, <http://www.cnn.com/2015/10/23/world/business-green-activism/index.html> (last updated Apr. 14, 2017, 7:41 AM) ("Companies are becoming environmental activists because it makes good business sense.") [<https://perma.cc/BSV2-C9M8>].

256. *Board of Directors*, BEN & JERRY'S, <http://www.benjerry.com/whats-new/2014/bod> (last visited Oct. 22, 2017) [<https://perma.cc/H9W7-H62W>].

257. *Id.*

258. The notion of the "Tokenism Effect" focuses on the idea that minorities who are not represented in any meaningful capacity have low levels of efficacy in the decision making process. Mariateresa Torchia, Andrea Calabrò & Morten Huse, *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. OF BUS. ETHICS 299, 299–301 (2011).

259. CLARK & CUMMINGS, *supra* note 229, at 248.

260. AIG, ANNUAL REPORT 2003, at 96–97 illus. 1 (2003). The author and Professor Cummings in their book entitled *Corporate Justice* highlight the lack of diversity among many of the corporations that caused the financial crisis and placed our country on the brink of financial ruin. See CLARK & CUMMINGS, *supra* note 229.

lending practices wherein AIG would charge black borrowers greater broker fees than white borrowers.²⁶¹ As a result, the United States Department of Justice and the United States Attorney General's Office sued AIG and successfully negotiated a consent decree within which the company agreed to

1. Refrain from engaging in any act or practice in wholesale home mortgage lending that discriminates on the basis of race or color;
2. Maintain during the period of the order annual fair lending training;
3. Develop and implement specific, nonracial standards for the assessment of direct broker fees on residential real estate-related loans;
4. Post and prominently display in each location where loan applications are received by the lender a notice of nondiscrimination;
5. Require brokers to make certain disclosures to applicants;
6. Participate in a monitoring program to ensure compliance with the provisions of the consent decree;
7. Provide a minimum of \$1 million to certain organizations to provide credit counseling, financial literacy, and other related educational programs to African-American borrowers;
8. Provide employees with equal credit opportunity training; and
9. Pay \$6.1 million in damages to those affected by AIG's discriminatory lending practices.²⁶²

In comparing the diversity on Ben & Jerry's board to that of AIG's during the financial crisis, one could extrapolate that greater levels of diversity lead to more racially, and possibly socially, conscious decisions. Based on this idea, one reasonably could assume that a more meaningful representation of black board members on AIG's board possibly could have curbed its discriminatory lending practices towards black borrowers. In fact, some scholars opine that the entire financial crisis could have been prevented if more women were represented on the boards of the companies that contributed to the crisis, based on the idea that women tend to be more risk averse than men.²⁶³

261. See Richard Vanderford, *AIG To Pay \$6.1M Over Anti-Black Lending Bias Claims*, LAW360, <https://www.law360.com/articles/153653/aig-to-pay-6-1m-over-anti-black-lending-bias-claims> (last visited Oct. 4, 2017) [<https://perma.cc/9WQ3-48G2>].

262. Consent Order at 10, *United States v. AIG Fed. Sav. Bank*, No. 10cv178-JJF (D. Del. Mar. 19, 2010).

263. See, e.g., Irene van Staveren, *The Lehman Sisters hypothesis*, 38 CAMBRIDGE J. ECON. 1014, 1022–23 (2014).

Again, if the population consists predominately of white people, the purchasing power of white people far exceeds the purchasing power of black people. If the corporate management structure consists overwhelmingly of white people, then it will be extremely difficult for black people's conceptions of morality to prevail when they conflict with that of the dominant group. If white people and black people view the world from different vantage points and have different perspectives about morality regarding these types of issues, then it likely would have been difficult for Mendenhall and other athletes from diverse backgrounds to validate a different perspective of morality. In addition to the lack of diversity in the areas highlighted above, there is also a lack of diversity within the judiciary.

C. Lack of Judicial Diversity

According to statistics from the Federal Judicial Center, white people overwhelmingly make up the federal judiciary.²⁶⁴

Federal "Sitting Judges" as of April 21, 2017		
	Total # of Judges	Total % of Judges
Total # of "Sitting Judges"	1318	100%
Female	351	27%
Male	967	73%
Total # of White "Sitting Judges"	1047	79%
Female	258	20%
Male	789	60%
Total # of Black "Sitting Judges"	148	11%
Female	53	4%
Male	95	7%

The representation of black judges at the state level is just as abysmal, especially among judges at the highest state court level.²⁶⁵

State Judges by Race (Numbers)							
Court	White	African American	Hispanic	Asian American	Native American	Other	Total
Supreme Court	307	20	8	5	0	0	340
Intermediate App. Courts	856	60	25	13	2	2	958
Trial Courts	9037	585	287	104	11	22	10046
Total	10200	665	320	122	13	24	11344

264. FED. JUDICIAL CTR., <https://www.fjc.gov/history/judges/search/advanced-search> (last visited Aug. 18, 2017) [<https://perma.cc/7GNL-CWU9>].

265. See *Diversity of the Bench*, NAT'L CTR. FOR STATE COURTS, http://www.judicialselection.us/judicial_selection/bench_diversity/index.cfm?state (last visited Sept. 22, 2017) [<https://perma.cc/ZQA4-VAYF>].

All Judges by Race			
	State Judges	Federal Judges	Total
White	10200	652	10852
African American	665	89	754
Hispanic	320	58	378
Asian American	122	6	128
Native American	13	0	13
Other	24	0	24
Total	11344	805	12149

These statistics highlight that meaningful diversity is absent at each level of the judiciary. This lack of diversity is critically important because judges influence the scope and course of the litigation process. Implicit in this lack of diversity is an inherent bias that can cause a judge's race to influence judicial outcomes. In fact, there is substantial research to suggest that judicial bias profoundly impacts litigation outcomes.²⁶⁶ For example, research indicates that race influences the likelihood that a judge's decision will be overturned,²⁶⁷ the likelihood that a judge will side with a litigant,²⁶⁸ and whether a claimant in a discrimination case will prevail.²⁶⁹ Given the results of these studies, it is clear that the racial composition of the judiciary legitimately can influence the outcome of litigation. Similar to the lack of diversity among corporate decision makers, this problem skews the way that judges evaluate morality. More specifically, in recognizing that black people and white people share different perspectives regarding morality, it is not beyond the realm of possibility that moral differences will influence the way that certain behavior is perceived. To offset this reality, it is imperative that

266. Rose Hackman, 'Black judge effect': study of overturning rates questions if justice is really blind, *GUARDIAN* (Mar. 17, 2016), <https://www.theguardian.com/law/2016/mar/17/black-judge-effect-race-bias-overturning-court-cases> [<https://perma.cc/5TEW-L88A>].

267. Maya Sen, *Is Justice Really Blind? Race and Reversal in US Courts*, 44 *J. OF LEGAL STUDIES* S187 (2015) ("[C]ases decided by African-American lower court judges are up to 10 percentage points more likely to be overturned than are cases written by similar white judges.").

268. Paul Bedard, *8-year study: Black federal judges 'conditioned' to go easy on fellow blacks*, *WASH. EXAMINER* (Dec. 12, 2013), <http://www.washingtonexaminer.com/8-year-study-black-federal-judges-conditioned-to-go-easy-on-fellow-blacks/article/2540607> [<https://perma.cc/34XU-7FW2>]. According to a study from the California State University, Northridge, black judges sided with black claimants 32.9% of the time, whereas white judges sided with black claimants only 20.6% of the time. *Id.*

269. See Pat K. Chew & Robert E. Kelley, *Myth of the Color-Blind Judge: an Empirical Analysis of Racial Harassment Cases*, 86 *WASH. U. L. REV.* 1117 *passim* (2009).

the way in which morals clauses are interpreted, in relation to certain expressions, must be modified to minimize this bias.

VI. THE SOLUTION

Because of the concerns highlighted above, courts need to rethink the way in which they evaluate the enforceability of morals clauses. As the law presently operates, a plaintiff claiming that a corporation abused its discretion in terminating an endorsement contract pursuant to a morals clause would carry the burden of establishing that either the termination was not made in good faith²⁷⁰ or that the termination violated an established public policy.²⁷¹ Instead of using this framework, a fairer and more balanced approach would place the initial burden on the plaintiff-endorser to establish that his speech is protected speech. To establish that his speech is protected, the plaintiff would need to establish that it falls into a category of speech that otherwise would be protected if it was spoken by a governmental employee. This initial burden strikes a fairer balance because it recognizes the value in prohibiting non-diverse, profit-driven entities from unreasonably trammeling free speech rights, especially when it relates to marginalized populations that otherwise do not have a meaningful voice in effectuating change. Moreover, the relationship between athletes and corporations is analogous to the relationship between the government and its employees because the government clearly has an interest in limiting certain employee speech rights in order to maintain an effective and efficient perception of its structure and viability, similar to the way that a corporation has a vested interest in protecting its brand and goodwill. The free speech rights of government employees more closely approximates the appropriate speech right protections of athletes in determining the enforceability of morals clauses because these rights recognize that government employees, like athletes, should not always have an unfettered right to speak, considering that there are important interests to be protected by both the government and private corporations.

Next, if the plaintiff-endorser establishes that his speech is protected, the burden will shift to the corporation to rebut this presumption by proving that the plaintiff-endorser's speech is in direct contravention to the purpose of the endorsement contract, that the plaintiff-endorser's expression has a direct and negative effect on the corporation's goodwill or brand image,

270. See discussion *supra* Part II.

271. See *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 719 (M.D.N.C. 2012).

or that the contract includes a clause narrowly tailored to prohibit the very speech expressed by the plaintiff-endorser.

In thinking about the first type of affirmative defense, in which the speech is in direct contravention to the purpose of the endorsement contract, consider a corporation that specializes in selling luxury handbags and other leather accessories. If that company contracts with an athlete to endorse its products, it would be inconsistent with the nature of the agreement to allow an athlete to condemn the slaughter of animals for their pelts or to support the People for the Ethical Treatment of Animals (“PETA”).

In regards to the second category, the morally reprehensible conduct of Lance Armstrong, a seven-time winner of the Tour de France, and Ray Rice, a former NFL running back with the Baltimore Ravens, provides two excellent examples of the type of conduct that could have a direct and negative effect on the corporation’s goodwill. In Armstrong’s case, Nike, Trek, and Oakley terminated their endorsement deals with him, pursuant to contract-based morals clauses, after the United States Anti-Doping Agency stripped him of all of his Tour de France titles and issued a life-time cycling ban after it determined that Armstrong, along with his fellow team members, used performance enhancing drugs (“PEDs”).²⁷² Rice also lost several endorsement deals, including one with Nike, pursuant to a contract-based morals clause after a video was released showing him brutally beating his wife in a hotel elevator.²⁷³

Finally, the third way that a corporation could establish an affirmative defense is by proving that the morals clause was tailored narrowly to prohibit the specific speech expressed by the plaintiff. For example, ABC has adopted Twitter guidelines prohibiting specific “tweet” practices.²⁷⁴ Although there is no evidence that any of these guidelines are incorporated into any of the ABC employee contracts, the guidelines themselves provide an example of contractual language that could be used by a corporation to allow it specifically to terminate a contract for narrowly defined conduct. Although this example

272. See William Fothering, *Timeline: Lance Armstrong’s journey from deity to disgrace*, GUARDIAN (Mar. 8, 2015, 8:50 PM), <https://www.theguardian.com/sport/2015/mar/09/lance-armstrong-cycling-doping-scandal> [<https://perma.cc/G9FM-QDA7>].

273. Ryan Wilson, *Report: Nike terminates endorsement deal with Ray Rice*, CBS SPORTS (Sept. 9, 2014), <http://www.cbssports.com/nfl/news/report-nike-terminates-endorsement-deal-with-ray-rice/> [<https://perma.cc/2B8K-UE4N>].

274. Andrew Wallenstein & Matthew Belloni, *Hey, Showbiz Folks: Check Your Contract Before Your Next Tweet*, HOLLYWOOD REP. (Oct. 15, 2009), <http://reporter.blogs.com/thresq/2009/10/check-your-contract-before-your-next-tweet.html> [<https://perma.cc/FM8P-7Q3Q>].

falls outside the scope of the athlete endorsement context, it nonetheless provides useful illustration of the facts necessary to prove this defense.

Significantly, the test advanced by this Article has some support in existing case law. The court in *Davies v. Grossmont Union High School District* applied a similar burden-shifting framework in determining that a party could not waive a constitutional right contractually if the waiver significantly impacted the public at large, even if the party waiving the right received valid consideration and made the decision knowingly.²⁷⁵ In *Davies*, two employees, Dr. Thomas Davies and Ms. Davies, sued their employer, Grossmont High School District (“the District”), for violations under federal and state law after Ms. Davies was transferred to less desirable employment.²⁷⁶ After the suit was filed, the Davies reached a settlement agreement with the District to settle the case in exchange for cash consideration.²⁷⁷ The agreement also provided that “neither one nor both of [the Davieses] will ever seek, apply for, or accept future employment, position, or office with Defendant District in any capacity.”²⁷⁸ A year later, however, Dr. Davies campaigned and was elected to the Governing Board of the District.²⁷⁹ Thereafter, the District brought a motion to enforce the settlement agreement.²⁸⁰ The district court ruled in the District’s favor and ordered Dr. Davies to resign from his position.²⁸¹ On appeal, Dr. Davies argued that the settlement agreement should not bar his election for the following reasons: (1) the terms of the settlement agreement did not apply to the elective office;²⁸² (2) “he did not knowingly intend to waive his constitutional right to run for office”;²⁸³ and (3) the District waived its right

275. *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1397–98 (9th Cir. 1991).

276. *Id.* at 1392. Dr. Davies was suing for loss of consortium as a result of the transfer. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 1392–93.

281. *Id.* at 1393.

282. The court dismissed this argument because it reasoned that the language of the settlement agreement that provided that Dr. Davies shall “never seek or accept any office or position with the District in any capacity” was clear. According to the court, the use of the word “any” was “all-encompassing” and precluded Dr. Davies from running for office. *Id.* at 1394.

283. The court dismissed this argument because it reasoned that there was clear and convincing evidence to suggest that the waiver was voluntary, knowing, and intelligent because counsel represented Dr. Davies at the time he signed the waiver, he was highly educated, and the agreement he signed clearly indicated

to enforce the settlement agreement because it was aware that he was running for the position but waited until he was elected to assert breach of the settlement agreement.²⁸⁴ The court dismissed the first two arguments and did not decide the third because of insufficient factual inquiry.²⁸⁵ Dr. Davies, however, made one additional argument, and the court of appeals found it persuasive. Dr. Davies argued that the agreement violated public policy because it violated his constitutional right to run for elective office and the constitutional right of the voters to elect him.²⁸⁶ In deciding this issue in Dr. Davies's favor, the court applied the *Rumery* balancing test.²⁸⁷ Pursuant to this test, the inquiry focuses on whether the public interest in enforcement of the agreement or provision is outweighed by the policy furthered by non-enforcement of the agreement.²⁸⁸ In applying this test, "when there is a substantial public interest that would be harmed by enforcement," the party seeking enforcement of the agreement must prove some important interest beyond its own interest in enforcement of the agreement.²⁸⁹ The court concluded that the District did not meet this burden because the public policy in favor of non-enforcement of the agreement was more compelling than the arguments offered by the District in favor of its enforcement.²⁹⁰

The trial court rejected both of the District's arguments in support of the agreement's enforcement.²⁹¹ First, the District argued that there is a strong policy in favor of enforcing private settlement agreements.²⁹² Although the court recognized this argument, it did not find it compelling because this policy was outweighed by the constitutional right that the agreement

that he had been advised of the consequences of the terms of the agreement and *knowingly* entered into it. *Id.*

284. The court did not address the waiver or estoppel issue because it reasoned that it needed additional fact-intensive inquiry to make this determination and, because of the urgency of the motion, the court of appeals did not have adequate time to remand the issue for additional fact inquiry. *Id.* at 1395–96.

285. *Id.* at 1394–95.

286. *Id.* at 1396.

287. *Id.* ("In *Rumery*, an individual charged with criminal tampering with a witness to a sexual assault prosecution entered into an agreement with the prosecutor, whereby the criminal charges against him were dropped in return for his waiver of all rights to bring a civil action against the prosecutor. The Supreme Court held that such agreements are not per se unenforceable and that the particular agreement at issue in that case had been knowingly and voluntarily entered into.").

288. *Id.* at 1398.

289. *Id.*

290. *Id.* at 1399–1400.

291. *Id.* at 1398.

292. *Id.*

infringed.²⁹³ Second, the District argued that the voters were in a better situation if Dr. Davies were not included in the election because he is a “troublesome person.”²⁹⁴ The court rejected this argument, reasoning that “the people are the best judges of their own interests, and that in the long run it is better to permit them to make their own mistakes than to permit their ‘rulers’ to make all their decisions for them.”²⁹⁵ Additionally, the court noted that the right of the people to elect representatives of their own choosing “is inextricably intertwined with the public’s fundamental right to vote, and may be limited only where necessary to achieve a compelling state purpose.”²⁹⁶

This case illustrates the central argument advanced by this Article—the burden of determining the enforceability of a morals clause, attempting to stifle certain speech, should rest with the corporation.

Moreover, the public concerns highlighted in *Davies* are more compelling in cases involving the enforcement of morals clauses, particularly when they relate to racially diverse athletes speaking on issues related to or important to members of marginalized populations. Racially diverse athletes have increased levels of importance to the communities they represent because these communities often lack the financial and political resources to have a legitimate voice.²⁹⁷

What corporations likely want is for black athletes to mimic Michael Jordan’s approach to issues of social justice because Jordan’s approach maintained the status quo.²⁹⁸ Jordan’s off-the-court personality was focused

293. *Id.*

294. *Id.* at 1398. The court found the District’s logic to be “pernicious” because “the real parties in interest urging enforcement of the settlement agreement are the current members of the Board, with whose policies Dr. Davies vigorously disagrees.” *Id.*

295. *Id.*

296. *Id.*

297. See generally Othello Harris, *The Role of Sport in the Black Community*, 30 SOCIOLOGICAL FOCUS 311 (1997) (examining the role that sports have on the black community).

298. See Rafael Canton, *'NBA Freedom Fighter' Craig Hodges on Playing with Michael Jordan and Speaking Truth to Power*, VICE SPORTS (Jan. 30, 2017, 8:45 AM), https://sports.vice.com/en_au/article/jp7jag/nba-freedom-fighter-craig-hodges-on-playing-with-michael-jordan-and-speaking-truth-to-power, for the interview with Craig Hodges wherein he discusses how Michael Jordan refused to engage in political issues in order to maintain the brands of the corporations he endorsed [<https://perma.cc/MW6Q-M2Z6>].

I think the pressures that he was feeling from corporate entities provided a lot of his impoliticness. So it was sculpted more to capitalize on the brand, capitalize on those brands he represented, more so than to capitalize on

primarily on his brand image to the exclusion of addressing issues pertinent to the black community.²⁹⁹ Although Jordan represented the apex of sports success, he

has never shown much interest in shaping the world that lies at his feet. He carefully dodged any political issue that might have jeopardized his family-friendly image. When asked in 1992 about the Rodney King riots in Los Angeles, for instance, Jordan lamely replied: “I need to know more about it.” He refused to take a side in the tight 1990 North Carolina Senate race in which Jesse Helms, despised by many blacks, was challenged by a black man, Harvey Gantt. Approached by Gantt’s campaign, Jordan declined to get involved, reportedly offering this explanation: “Republicans buy sneakers, too.”³⁰⁰

Corporations desire that black athletes toe the company line and refrain from speaking on issues that make white Americans uncomfortable.³⁰¹ This concern does not impact white athletes in the same manner because, as noted above, black people and white people view issues of morality and social acceptability differently.³⁰² Additionally, because white people disproportionately

what he could do as far as job creation and taking away some of the violence and the violent mindset. We could’ve played a larger role in the images that were given about Chicago during that period of time and years that followed.

Id.

299. Jordan “has never used his platform to pursue social or political change; indeed, he’s gone out of his way to play it safe. This is, of course, precisely how the corporations he endorses want it. Politics and successful marketing don’t mix.” Michael Crowley, *Muhammad Ali Was a Rebel. Michael Jordan Is a Brand Name*, NIEMAN REPS. (Fall 1999), <http://niemanreports.org/articles/muhammad-ali-was-a-rebel-michael-jordan-is-a-brand-name/> [<https://perma.cc/S5RL-LY3H>].

300. *Id.*

301. See Michael McCarthy, *‘I Can’t Breathe’: Will sports TV viewers and sponsors be turned off by activist athletes?*, SPORTING NEWS (Dec. 12, 2014), <http://www.sportingnews.com/nba/news/eli-manning-lebron-james-eric-garner-michael-brown-nfl-nba-activist-athletes-new-york-giants-cleveland-cavaliers-georgetown-hoyas/liu8uywczsuei1l8vyyjgoi3u5> (“Sponsors get ‘nervous’ when athletes mix politics and sports, warned Brandon Steiner, CEO of Steiner Sports.”) [<https://perma.cc/99CX-QLVX>].

302. The NBA’s most recent memorandum reminding its players that they must stand during the National Anthem highlights this issue, especially considering that black athletes and white athletes have drastically different views on this issue. Denis Slattery, *NBA memo warns teams to stand during national anthem ‘OR ELSE’*, N.Y. DAILY NEWS (Sept. 30, 2017), <http://www.nydailynews.com/sports/basketball/nba-memo-reminds-teams-stand-national-anthem->

occupy the corporate management structure, the judiciary, the political power structure, and contain the majority of the wealth in the United States, their views are well represented. For example, after several black athletes, including LeBron James and Derrick Rose, began wearing “I can’t breathe” t-shirts³⁰³ to protest police brutality against black people after Eric Garner was choked to death by a New York police officer, there was substantial discussion about whether any professional sports league or corporation would take an adverse action against the protestors.³⁰⁴ First, for the reasons highlighted in Part V, it is extremely troubling that a professional sports league or a corporation could execute a tangible action against an athlete to attempt to stifle such critical expression. Second, the primary opposition against the black athletes who supported the protest came from white players, owners, and fans. For example, Eli Manning, a white quarterback for the New York Giants, openly questioned whether athletes should use the game experience to protest violence against black people.³⁰⁵ Specifically, he remarked that “[o]bviously, when we’re on the field, we’re wearing our uniforms. You know there’s a time and place to make your statements. I don’t know if it’s always during a game.”³⁰⁶ Manning’s position reflects his status as a white male and the privilege that he experiences through the color of his skin. For him, there exists a time and place to express racial injustice; however, for the black players that experience racial injustice more directly, the time, need, and importance of addressing it are more critical. Because white people do not experience the evils of over-policing to the same extent as black people, it is obvious why Manning would make such a comment—he is not affected by it, nor are his family members likely to become victims of it.³⁰⁷ According to a research study conducted by Cody T. Ross at the

article-1.3532858 [https://perma.cc/BN2M-SL22]. According to a CNN poll, 59% of white people said that kneeling during the National Anthem is wrong, whereas 82% of black people said that it’s the right thing to do. *See* Agiesta, *supra* note 7.

303. The shirts represent the words spoken by Mr. Garner as he was choked to death. *See* Scott Cacciola, *LeBron James, Jay-Z and More Made ‘I Can’t Breathe’ T-Shirts Happen in the N.B.A.*, N.Y. TIMES (Dec. 9, 2014), https://www.nytimes.com/2014/12/10/sports/basketball/i-cant-breathe-tshirts-in-the-nba-how-jayz-lebron-james-and-others-made-them-happen.html [https://perma.cc/632Z-RMM3].

304. *See* McCarthy, *supra* note 301; *see also* Shaun Powell, *Reinvigorated spirit of protest ignites throughout the NBA*, NBA (Dec. 11, 2014, 10:01 AM), http://www.nba.com/2014/news/features/shaun_powell/12/11/nba-shirt-protests-i-cant-breathe/ (discussing whether the NBA’s commissioner might discipline players for wearing the “I Can’t Breathe” t-shirts) [https://perma.cc/UZ6T-9PN3].

305. McCarthy, *supra* note 301.

306. *Id.*

307. Kia Makarechi, *What the Data Really Says About Police and Racial Bias*, VANITY FAIR (July 14, 2016, 3:09 PM), http://www.vanityfair.com/news/2016

University of California, Davis, there is a “significant bias in the killing of unarmed black Americans relative to unarmed white Americans, in that the probability of being black, unarmed, and shot by police is about 3.49 times the probability of being white, unarmed, and shot by police on average.”³⁰⁸

Jim Brown, NFL legend and social activist, is encouraged by the willingness of modern athletes like Dwyane Wade, LeBron James, and Carmelo Anthony to speak out against issues of injustice affecting the black community. Brown remarked,

I love it. We’ve been asking athletes for a long time, especially this generation, to stand for something. A lot of them, to me, have been cowards. And unwilling to do it. Now they are. And I think that’s great. Even if you disagree with it, let them talk, let them express themselves. They’re not robots.³⁰⁹

When black athletes pull a “Jordan,” their lack of engagement reinforces the status quo that confirms the majority perspective. The modern-day morals clause enables corporations to “Jordanize” black athletes by preventing them from expressing views that are inconsistent with the views of white Americans. More importantly, these clauses can be used to encourage athletes, particularly black athletes, to disconnect themselves from their communities in favor of profit.

The test advanced by this Article does not undermine the scope and validity of the morals clause. More accurately, it limits the application of these provisions when they attempt to restrict “protected” speech unreasonably. This Article’s approach will continue to give corporations the power to terminate endorsement deals for a wide array of inappropriate conduct,

/07/data-police-racial-bias (referencing 18 separate research studies that provide evidence that a person’s race influences the nature of his or her police encounter) [<https://perma.cc/N3AE-5QVN>].

308. Cody T. Ross, *A Multi-Level Bayesian Analysis of Racial Bias in Police Shootings at the County-Level in the United States, 2011-2014*, PLOS ONE (Nov. 5, 2015), <http://journals.plos.org/plosone/article?id=10.1371%2Fjournal.pone.0141854> [<https://perma.cc/HG6M-285P>].

309. McCarthy, *supra* note 301.

including, but not limited to, hate speech,³¹⁰ tortious and/or criminal misconduct,³¹¹ infidelity,³¹² or product criticism.

A critical component of this test requires a determination of the type of speech that should and should not be protected. Initially, this may seem like a difficult task; there is a plethora of case law in the First Amendment context, however, that provides a useful basis for making this determination. Because of this existing case law, the approach for interpreting morals clauses articulated in this Article can be applied easily without developing a new legal analysis or framework.

VII. THE FIRST AMENDMENT AND FREEDOM OF SPEECH

Despite First Amendment protections being inapplicable to an athlete's right to express himself freely, First Amendment jurisprudence can be a viable tool to assist courts in determining what types of expression a corporation may prohibit lawfully without violating public policy or running afoul of the implied obligation of good faith.³¹³ The position

310. For example, under the approach advanced by this Article, Nike was well within its contractual rights to cancel Manny Pacquiao's endorsement deal after he made the following comments to a Filipino television station: "Have you seen any animal having male-to-male or female-to-female relations? If you have male-to-male or female-to-female [relationships], then people are worse than animals." Cindy Boren, *Manny Pacquiao apologizes for saying gay people are 'worse than animals'*, WASH. POST (Feb. 16, 2016), https://www.washingtonpost.com/news/early-lead/wp/2016/02/16/manny-pacquiao-apologizes-for-saying-gay-people-are-worse-than-animals/?utm_term=.12e213d06eb6 [<https://perma.cc/9JF3-E5SX>].

311. Although he had yet to be convicted, the test advanced by this article would validate Cytosport's termination of Aaron Hernandez's endorsement deal after an investigation was launched into his role in Odin Lloyd's murder. See Josh Katzowitz, *Report: Aaron Hernandez loses endorsement deal*, CBS SPORTS (June 21, 2013), <https://www.cbssports.com/nfl/news/report-aaron-hernandez-loses-endorsement-deal/> [<https://perma.cc/C2C6-2NGP>].

312. Tiger Woods's infidelity would provide a valid basis to terminate an endorsement deal. After admitting that he had engaged in infidelity, Woods lost endorsement deals with AT&T, Accenture, and Gatorade. Interestingly, it is not entirely clear that these companies terminated him for violating a morals clause or whether his endorsement contracts were not renewed when the original contract expired. *Gatorade cuts ties with Tiger Woods; third major sponsor to drop him*, N.Y. POST (Feb. 26, 2010), <http://nypost.com/2010/02/26/gatorade-cuts-ties-with-tiger-woods-third-major-sponsor-to-drop-him/> [<https://perma.cc/X2EE-L7ZZ>].

313. Because private corporations are not state actors, First Amendment free speech rights do not attach. See Jeannette Cox, *A Chill Around the Water Cooler: First Amendment in the Workplace*, 15 INSIGHTS ON L. & SOC'Y 12 (2015), https://www.americanbar.org/publications/insights_on_law_and_society/15/winter

advanced by this Article is that the implied obligation of good faith and/or the public policy exception should operate to prohibit a corporation from terminating an athlete's contract when the athlete engages in content or viewpoint-based speech that otherwise would be protected by the First Amendment. The basis for this position is that athletes play a critical role in bringing issues of injustice to the forefront of the social conscience. Although a particular athlete's position may not coalesce with the management of the corporation, an athlete's position nonetheless may provide useful insight to the public. This notion is particularly true regarding marginalized populations, such as the black community, in which athletes have an increased level of importance in light of the lack of traditional opportunities in these communities. There may be circumstances in which an athlete's speech may be deemed morally reprehensible to corporate decision makers and the public, yet the same speech is viewed positively among members of the marginalized group. As a result, this Article advances a novel idea that provides for the protection of specific content and viewpoint-based speech in the scenario in which it would be protected if spoken by a governmental employee. To understand adequately what type of speech should limit a corporation's right to terminate an athlete's contract, it is necessary to provide a brief discussion regarding the contours of First Amendment speech. The purpose of this Article, however, is not to provide a robust commentary regarding the First Amendment and free speech rights; instead, this Article's objective is merely to highlight how a court may use the existing First Amendment jurisprudence to determine what type of speech should be protected.

In analyzing whether speech is protected under the First Amendment, there are three general classes of speech: (1) speech for which there is no protection; (2) speech for which there is limited protection; and (3) protected speech.³¹⁴ The first class, unprotected speech, includes "obscenity, child pornography," or speech that constitutes "advocacy of the use of force or of law violation" in which "such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."³¹⁵ Each category of speech listed in the first class are types of speech for which there is no inherent social value. As the Court noted in *Roth v. United States*, "All ideas having even the slightest redeeming

-2015/chill-around-the-water-cooler.html (briefly explaining that employees have very limited rights to express themselves freely in the private workplace) [https://perma.cc/7F8D-GLMM].

314. KATHLEEN ANNE RUANE, CONG. RESEARCH SERV., 95-815, FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST AMENDMENT 1 (Sept. 8, 2014), <http://www.fas.org/sgp/crs/misc/95-815.pdf> [https://perma.cc/5FFE-AFGF].

315. *Id.* at 5.

social importance[—]unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion[—]have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests.”³¹⁶ Additionally, several of the types of speech listed in this category have another compelling motivation for their lack of First Amendment protection. In regard to child pornography³¹⁷ and fighting words,³¹⁸ each of these categories of speech causes harm to another person other than the speaker.

Speech for which there is only limited protection includes “commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television (as opposed to speech transmitted via cable or the Internet), and public employees’ speech.”³¹⁹

The final category of speech, more generally, includes speech that does not fall into the two prior categories. This type of speech receives the greatest level of First Amendment protection. Nonetheless, this type of speech can be limited in regards to its content when the government can

316. *Roth v. United States*, 354 U.S. 476, 484 (1957).

317. *New York v. Ferber*, 458 U.S. 747, 756–64 (1982) (holding that First Amendment does not protect child pornography for five reasons:

(1) It is evident beyond the need for elaboration that a State’s interest in “safeguarding the physical and psychological wellbeing of a minor” is “compelling.”

(2) The distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children . . .

(3) Advertising and selling child pornography provides an economic motive for engaging in an illegal activity.

(4) The literary and/or artistic value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is de minimis since these things could be accomplished using persons over the statutory age.

(5) Finally, the evils of child pornography outweigh its expressive interests.)

318. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Chaplinsky was convicted of a New Hampshire statute prohibiting the use of offensive or annoying words when addressing another person in public after he called a city marshal a “God Damned racketeer” and “a damned fascist.” *Id.* at 569. Chaplinsky appealed the conviction claiming that the statute placed an unreasonable restraint on free speech. *Id.* The United States Supreme Court held that the statute did not place an unreasonable restraint on trade because Chaplinsky’s comments were likely to provoke the average person to retaliate resulting in a breach of peace. *Id.* at 574.

319. RUANE, *supra* note 314, at 1.

establish that its regulation is designed to serve a compelling state interest and that it is drawn narrowly to serve that purpose.³²⁰ The government also can regulate content-neutral speech in regards to its time, place, and manner if the regulation is tailored narrowly to serve a significant government interest and leaves open ample alternative channels of communication.³²¹

In thinking about how First Amendment jurisprudence can assist in helping to understand what speech a corporation lawfully can regulate, pursuant to the test advanced herein, consider the Supreme Court's decisions in *Pickering v. Board of Education*³²² and *Garcetti v. Ceballos*.³²³ Both of these cases involved circumstances in which a government employer took adverse action against a government employee after the employee engaged in speech criticizing the employer.³²⁴ These cases provide an excellent parallel for explaining how First Amendment cases can help in determining the enforceability of speech prohibited by a morals clause. Free Speech Rights largely are determined by the status of the speaker and the subject matter of the speaker's expression. Private citizens, speaking on matters of public concern, receive the greatest level of First Amendment protection.³²⁵ Government employees, speaking on matters of public concern, also receive a fairly high level of protection.³²⁶ In contrast, government employees

320. See *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

321. *Id.*

322. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

323. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

324. See *Pickering*, 391 U.S. at 564; *Ceballos*, 547 U.S. at 413–15.

325. Private employers, however, generally are granted more leeway to take adverse actions against private employees for expressions inconsistent with the employer's objectives. According to "Lafe E. Solomon, acting general counsel for the National Labor Relations Board, however, the National Labor Relations Act protects some employee social-media activity and as a result, private employees now have more freedom of speech than their government counterparts." Douglass E. Lee, *NLRB bolsters private-employee speech*, FIRST AMENDMENT CNTR. (Sept. 14, 2011), <http://www.firstamendmentcenter.org/nlr-bolsters-private-employee-speech> [<https://perma.cc/LQR9-WQ5B>]. The NLRB protects most private sector employees and allows them to "form or join unions; engage in protected, concerted activities to address or improve working conditions; or refrain from engaging in these activities." *What are my rights under the National Labor Relations Act?, Frequently Asked Questions – NLRB*, NLRB, <https://www.nlr.gov/resources/faq/nlr#t38n3180> (last visited Sept. 12, 2017) [<https://perma.cc/78DH-GPWL>]; see also *Labor Management Relations Act of 1947*, Pub. L. 80-101, 61 Stat. 136 (1947). Thus, employees who engage in these activities via social media are protected by the NLRB and cannot be adversely disciplined.

326. See *Pickering*, 391 U.S. at 570–71.

speaking on employment related matters have the least First Amendment protection, especially when the employee's speech interferes with his ability to perform the job.³²⁷ These employees have the least First Amendment protection because the government, in this context, has a strong interest in regulating this type of speech because it has the capacity to interrupt the government's ability to service its customers—the public.³²⁸ Given that corporations also have a significant interest in servicing their customers, by analogy, this category of speech provides the most reasonable basis for determining when an endorser's speech should be protected and therefore not subject to termination via a broadly drafted morals clause.

In *Pickering*, school teacher Marvin Pickering was terminated after he wrote a letter to the local newspaper criticizing his employer, the Will County School Board in Illinois (“Board”) and the superintendent.³²⁹ Pickering's letter criticized: (1) the manner in which the Board handled two bond issues to raise money for the school district; (2) the way the school stated that funds from the bond issue would be used for academic/educational purposes, yet were used disproportionately for athletic endeavors; and (3) the superintendent and Board for attempting to prevent teachers from the district from criticizing the Board.³³⁰ The United States Supreme Court held that Pickering's termination violated his First Amendment rights.³³¹ The Court reasoned that the statements were general statements not directed toward anyone with whom Pickering would interact and therefore there was no real evidence that his statements would interrupt his daily position.³³² As such, because neither the Board nor the Superintendent served as Pickering's immediate supervisor, the Court opined that their workplace relationship was too attenuated to hold that “personal loyalty and confidence” were necessary for an efficient workplace interaction.³³³ In essence, the Court opined that the employee's speech was not within the scope of his employment and, as a result, his speech was more like that of a private citizen.³³⁴ Although the Court concluded that Pickering's letter contained false accusations about the Board's allocation of funds, the Court held that such misstatements were

327. *Id.* at 572.

328. *Id.*

329. *Id.* at 564.

330. *Id.* at 566.

331. *Id.* at 575–76.

332. *Id.* at 569–70.

333. *Id.* at 570.

334. *See id.* at 574–75.

not sufficient to justify his termination.³³⁵ Specifically, there was no proof that Pickering made the statements knowingly or recklessly, and, therefore, his First Amendment right to freedom of speech trumped the Board's desire to terminate.³³⁶ Moreover, there was no real evidence that Pickering's statements harmed the school district because his statements were made after the bonds were awarded already and the board's true allocation of funds was a matter of public record that clarified that the funds were not spent improperly as Pickering claimed.³³⁷

In *Garcetti*, Ceballos, a deputy district attorney for the Los Angeles District Attorney's Office, sent an inter-office memorandum complaining about an affidavit that was used to obtain a search warrant.³³⁸ Specifically, a local defense attorney contacted Ceballos and informed him about several inaccuracies contained in the affidavit.³³⁹ Ceballos investigated the assertions made in the affidavit and determined that it did in fact contain serious misrepresentations.³⁴⁰ Ceballos then called the warrant affiant, a deputy sheriff in the local sheriff's department, to discuss the misrepresentations, but Ceballos was not happy with the deputy's response.³⁴¹ Thereafter, Ceballos communicated his findings to his supervisors and subsequently drafted a memorandum reiterating his concerns and recommending dismissal of the case.³⁴² His supervisors disagreed and thereafter Ceballos alleged that he was subjected to a series of retaliatory employment actions that included "reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion."³⁴³ Ceballos argued that these actions directly resulted from the memorandum he drafted and thus

335. *Id.* at 572–73.

336. *Id.*

337. *Id.* at 572.

338. *Garcetti v. Ceballos*, 547 U.S. 410, 410 (2006).

339. *Id.* at 413.

340. *Id.* at 414. More specifically,

After examining the affidavit and visiting the location it described, Ceballos determined the affidavit contained serious misrepresentations. The affidavit called a long driveway what Ceballos thought should have been referred to as a separate roadway. Ceballos also questioned the affidavit's statement that tire tracks led from a stripped-down truck to the premises covered by the warrant. His doubts arose from his conclusion that the roadway's composition in some places made it difficult or impossible to leave visible tire tracks.

Id.

341. *Id.*

342. *Id.*

343. *Id.* at 415.

amounted to a violation of his First Amendment rights.³⁴⁴ His employer disagreed and asserted that these actions were based on legitimate, employment-related concerns.³⁴⁵ In deciding this case, the United States Supreme Court applied the *Pickering* Test to determine when a public employee's speech is protected.³⁴⁶ Pursuant to this test, a court must make two inquiries:

The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The [Second] question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.³⁴⁷

In applying this standard to the case, the Court held that his speech was not protected by the First Amendment.³⁴⁸ First, the court reasoned that it was not dispositive that Ceballos made his statements inside his office rather than publicly because employees nonetheless may receive First Amendment protection for workplace expressions.³⁴⁹ In reaching this particular conclusion, the Court wanted to make clear that expressions made in the office context do not result automatically in a right to restrict.³⁵⁰ Second, the Court reasoned that it was not dispositive that the memorandum concerned the subject matter of Ceballos's employment.³⁵¹ The Court was careful to highlight this point because it realized the employees in a particular workplace setting may be in the best position to speak about a particular issue because of their knowledge about the workplace and its operation.³⁵² In reaching its conclusion that Ceballos's

344. *Id.*

345. *Id.*

346. *Id.* at 417–19.

347. *Id.* at 418.

348. *See id.* at 426.

349. *Id.* at 421.

350. *Id.*

351. *Id.*

352. *See id.*

speech was not protected, the Court relied heavily on the fact that his comments were made in the scope of his workplace duties; in fact, Ceballos admitted that he prepared the memorandum pursuant to his job as a prosecutor.³⁵³ As such, the Court determined that Ceballos was speaking as a government employee and not as a general citizen.³⁵⁴ An employee may speak generally about issues concerning his employment, but when that speech begins to connect with the employee's official workplace responsibilities and capacity, the government will have a greater right to restrict the employee's speech.³⁵⁵ As the court noted,

Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. Ceballos' memo is illustrative. It demanded the attention of his supervisors and led to a heated meeting with employees from the sheriff's department. If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.³⁵⁶

These cases thoroughly illustrate that the government must respect the free speech rights of government employees when the employee's speech relates to matters of concern for the general citizenry and is not specifically within the scope of the employment relationship.

CONCLUSION

The purpose of the test advanced by this Article is not designed to undermine the contractual relationship between corporations and athlete-endorsers. Morals clauses will and should continue to empower corporations to protect their brand images. Corporations, however, should not possess the power to use morals clauses to restrict speech unreasonably that otherwise should be protected. When morals clauses operate to restrict this type of speech, they harm the athlete-endorser as well as the public. The voice of the modern athlete is a critical voice in inspiring positive change. As

353. *Id.*

354. *Id.* ("We hold that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").

355. *Id.*

356. *Id.* at 422–23.

evidenced by the historical accounts of Muhammad Ali, Tommie Smith, and John Carlos, athletes have the power to bring issues of injustice to the consciousness of the world. Athletes, via their respective athletic platforms and social acclaim, have the capacity to express their ideas in a way that resonate with people who might not otherwise be receptive to certain ideas.