

HOW CANCEL CULTURE TARNISHES MORALS CLAUSES AND WHAT TO DO ABOUT IT

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INTRODUCTION

Cancel culture is ubiquitous in modern news and social media.¹ Once confined to famous celebrities and business moguls, it has extended to the point that anyone can be cancelled for saying or doing anything of which some segment of the public disapproves.² While cancel culture is flashy and public—relying upon its profile to achieve its goals, morals clauses are

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¹ See Pippa Norris, *Closed Minds? Is a ‘Cancel Culture’ Stifling Academic Freedom and Intellectual Debate in Political Science?* 2 (Harv. Kennedy Sch., Working Paper No. RWP20-025), <https://research.hks.harvard.edu/publications/getFile.aspx?Id=4959> (discussing how social media can be utilized as a platform to penalize individuals); Nanci K. Carr, *How Can We End #CancelCulture—Tort Liability or Thumper’s Rule?*, 28 CATH. UNIV. J.L. & TECH. 133, 133 (2020) (describing the extent to which cancel culture reaches various types of individuals and personalities).

² Carr, *supra* note 1.

largely ignored by the media. Morals clauses are contract clauses that empower employers to terminate term employment contracts when employees do something to (among other things) bring public disrepute on themselves or on their employer.³ Morals clauses are often the legal tool that organizations use to bow to the wishes of cancellers and fire their unfortunate employees.⁴

What is wrong with that? Nothing at all—unless our society values freedom of speech and the ability to voice personal opinions on controversial issues without fear of reprisal or unless employees do not want to entrust their careers to unpredictable mobs on social media. To lessen the potential for those social-media mobs to intrude upon contractual relationships and destroy careers when they cancel a party subject to a morals clause, state legislatures should pass laws limiting the reach of morals clauses to situations in which a trademark claim for dilution by tarnishment would succeed.

Morals clauses appear in the contracts and employee handbooks of a growing number of American companies,⁵ and their interactions with cancel culture are complex and dangerous.⁶ As terminated employees seek justice in court, they and judges are left with no body of law to look to, other than basic contract principles.⁷ Yet, these principles are inadequate to deal with such a complex and troubling issue.⁸ Comprehensive state legislation based on a trademark tarnishment claim would provide a protective analysis that preserves freedom of speech and the free exchange of ideas.

While the legal issues surrounding morals clauses tend to revolve around negative publicity rather than morality per se,⁹ it is important to take a moral approach to understanding and responding to the potential injustices that morals clauses cause. The recommendations contained in this Comment are based on premises and biases that conform to the moral belief that the best outcome in a typical scenario involving a morals clause is one where the employer and the employee minimize the potential harm to brands, revenue, and relationships, protect their freedom of speech, and learn from the

³ Patricia Sánchez Abril & Nicholas Greene, *Contracting Correctness: A Rubric for Analyzing Morality Clauses*, 74 WASH. & LEE L. REV. 3, 5, 9–10 (2017).

⁴ See, e.g., *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 719–20 (M.D.N.C. 2012) (examining the morals clause of a professional athlete’s talent agreement).

⁵ Abril & Green, *supra* note 3, at 6–7; see also *Mendenhall*, 856 F. Supp. 2d at 719–20 (quoting a morals clause in a talent agreement).

⁶ See *infra* Part I.B.

⁷ See *infra* Parts II.A, II.B.

⁸ See *id.*

⁹ See *infra* Part II.

opinions of peaceful protesters.¹⁰ If this premise is morally or intellectually objectionable to the reader, then he or she may disagree with the recommendations in this Comment.

The Comment is composed of an introduction, three Parts, and a conclusion. The introduction briefly details the problems inherent in the confluence of cancel culture and morals clauses and the best solution to prevent injustice: legislative intervention to limit morals clauses from application in situations and to individuals who would not seriously tarnish their employers' reputation. Part I provides a broad history and overview of morals clauses, cancel culture, and trademark law. Part II analyzes several cases and statutes dealing with morals clauses to highlight the need for legislative reform. Part III argues that legislatures should use a trademark tarnishment claim as a blueprint to craft statutes limiting the potential harm of morals clauses. It also considers input from contract law, tort law, and Anti-SLAPP legislation. Finally, the conclusion summarizes and integrates the previous concepts, suggests further research into the topic, and calls upon state legislatures to proactively avert the injustices found in the intersection of morals clauses and cancel culture.

I. TARNISHMENT, CANCEL CULTURE, AND MORALS CLAUSES

The interrelated nature of cancel culture and morals clauses is readily apparent to the educated observer. However, the troubling consequences of their intersection are neither apparent nor frequently discussed. These consequences include the potential to ruin careers, or by the threat of so doing, to homogenize public discussion and punish people for holding unorthodox opinions.¹¹ Nevertheless, by legislatively laying a legal groundwork conceptually based on trademark dilution by tarnishment

¹⁰ This footnote contains several additional premises. Forgiveness also has intrinsic value and ought to be expressed in continuing business relationships. However, the value of forgiveness can be outweighed by the need to prevent *significant* harm to brands, businesses, and careers. The freedom to speak on subjects of morality is pivotal to ensuring a sustainable society. The vocal minority of our society that engages on social media to cancel a brand or individual follows patterns observable in protests or mobs. Either they peaceably protest, expressing an important viewpoint which deserves consideration, or they use #cancel_____ as a call-to-arms to form a mob, tear down, and destroy. Protests must be protected and cherished as a form of expression and method of inducing change. *Mob justice* cannot be tolerated.

¹¹ See *infra* Part I.B.

claims, this threat can be neutralized without destroying the utility of morals clauses or the discourse generated by cancel culture. This Part explains tarnishment claims, cancel culture, and morals clauses and examines their intersections.

A. Trademark Law and Dilution by Tarnishment

The common theme permeating this Comment is brand management, an area of business usually governed by trademark law.¹² Federal trademark law serves the policy of protecting the consuming public from confusion related to the origin and quality of goods and services.¹³ However, a requirement for trademark law and trademark claims is the existence of a mark used in commerce to designate a product's source and quality.¹⁴ Although trademark law was traditionally tied to words, names, symbols, or devices,¹⁵ the dimensions of a trademark are continuing to evolve at an astonishing rate.¹⁶ Nevertheless, legal persons are not trademarks.¹⁷ Thus, trademark law fails to address brand management issues solely surrounding the actions of company employees or brand ambassadors.

Trademark dilution by tarnishment is a claim famous trademark users can make to protect their mark from other persons who use similar marks in such a manner as to tarnish or disparage its reputation.¹⁸ One of the pillar cases dealing with dilution by tarnishment involved a suit by Hormel Foods, the creators of SPAM lunchmeat, against the Jim Henson company for a *Muppets Treasure Island* character named Spa'am.¹⁹ Hormel argued that this porcine character diluted their trademark in the lunchmeat by tarnishing it through association.²⁰ The court disagreed and thoroughly overruled what

¹² See 15 U.S.C. § 1127 (2018) (addressing the construction and intent of the trademark chapter and defining relevant terms).

¹³ *Id.*

¹⁴ 15 U.S.C. §§ 1127, 1051.

¹⁵ 15 U.S.C. § 1127.

¹⁶ See, e.g., *In re Clarke*, 17 U.S.P.Q.2d (LEXIS) 1238, 1239 (T.T.A.B. 1990) (determining that the applicant's scented thread and yarn was eligible for a trademark despite the absence of olfactory precedent).

¹⁷ 15 U.S.C. § 1127.

¹⁸ *Ringling Bros.-Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Dev.*, 170 F.3d 449, 452 (4th Cir. 1999).

¹⁹ *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 500 (2d Cir. 1996).

²⁰ *Id.*

a tarnishment claim entails.²¹ The court noted that the key component of a tarnishment claim is evidence of a negative association between the infringing mark and the famous mark in the minds of customers and that there was no such evidence of a negative association between Spa'am and Hormel's lunchmeat.²² A mark is tarnished when it connects consumers' perception of a mark to unsavory or low-quality goods or services.²³

Tarnishment claims usually only succeed if the offending marks are seamy, but they can also succeed if the context involves obscenity or illegal activity.²⁴ Additionally, the claimant's mark must be famous to mount a tarnishment claim.²⁵ This requirement ensures that an obscure trademark owner cannot sue for tarnishment because the other party has probably not sought to tarnish their mark.²⁶ Alleged infringers in a tarnishment case can defend themselves by (among other things) arguing that their mark is fair use in that it compares the famous mark's goods or services to its own or that it identifies, parodies, criticizes, or comments on the mark owner or their goods or services.²⁷

The relationship between tarnishment and morals clauses is purely a subject-matter correlation, with no legal implications. However, as discussed in Part III, tarnishment claims provide an excellent framework upon which state legislatures should construct legislation to narrow morals clauses and reduce the potential injustice in their intersection with cancel culture.

B. Cancel Culture

A phenomenon of the new social media age, cancel culture is often used as an umbrella term that encompasses *calling in*, *boycotting*, *cancelling*, and *calling out*.²⁸ Each aspect of cancel culture has utility and value in some

²¹ *Id.* at 507–08.

²² *Id.* at 507.

²³ *Id.*

²⁴ *Kraft Foods Holdings, Inc. v. Helm*, 205 F. Supp. 2d 942, 948 (N.D. Ill. 2002).

²⁵ 15 U.S.C. § 1125(c)(1) (2018).

²⁶ The non-famous trademark owner is still free to attempt a regular trademark infringement claim.

²⁷ 15 U.S.C. § 1125(c)(3)(A).

²⁸ Cancelling means “[a] collective attempt at ruining the reputation and livelihood of an individual or organization in response to a problematic or harmful action or opinion.” Erin Bunch, *The Cancel-Culture Glossary for Canceling, Boycotting, Calling Out, and Calling In*, WELL+GOOD (July 23, 2020), <https://www.wellandgood.com/cancel-culture-examples/> Boycotting means

circumstances. The #MeToo movement and related cancelling is the best fruit of cancel culture which has heightened responsibility, increased conversation, and exposed wrongdoing related to sexual assault, harassment, and violence in the entertainment industry and elsewhere.²⁹ *Calling in* plays a small part in cancel culture and benefits society by creating empathy.³⁰ *Boycotting* plays a larger part in cancel culture and *can* be beneficial as an organized expression of views that ethically uses resources to support persons with which consumers agree.³¹ Contrarily, *cancelling* or *calling out* are purely aggressive tactics aimed at shaming or harming persons or institutions with whom cancellers have no real human relationship yet whose business they seek to influence.³² This Comment will use the phrase cancel culture to refer only to cancelling and calling out.

Courts have rarely addressed cancel culture. One case acknowledged the existence of cancel culture when plaintiffs sought a declaratory injunction to excuse them from a sponsorship-disclosure statute by conjecturally and unsuccessfully arguing that a cancel culture backlash would cause them harm.³³ However, the court was unimpressed with the plaintiffs' failure to

“[w]ithholding financial support from a company in order to force change within that company’s policies or practices.” *Id.* Calling in means “[s]peaking to an individual privately about their perceived harmful or problematic actions or opinions.” *Id.* Calling out means “[c]riticizing an individual or organization publicly, usually on social media.” *Id.*

²⁹ See Allyn Davidson, *#MoralsToo: The Film Industry Must Implement an International Morals Clause*, 26 SW. J. INT’L L. 376, 377, 384, 395 (2020); see also Stuart N. Brotman, *Convicting Celebrities: How the Morals Clause Continues to Shape American Culture*, HARV. J. SPORTS & ENT. L.: HARV. L. DEV. (Feb. 26, 2019), <https://harvardjssel.com/2019/02/convicting-celebrities-how-the-morals-clause-continues-to-shape-american-culture>. The #MeToo movement has developed into its own distinct phenomenon with a narrower focus than general cancel culture. The arguments in this Comment regarding the potential harm of combining morals clauses and cancel culture should not be construed to extend to the #MeToo movement or the cancelling of sexual predators.

³⁰ Sian Ferguson, *Calling In: A Quick Guide on When and How*, EVERYDAY FEMINISM (Jan. 17, 2015), <https://everydayfeminism.com/2015/01/guide-to-calling-in/>.

³¹ Eric Facas, *We Can’t Let Boycotts Be Dismissed as Cancel Culture, They’re Democracy at Its Finest*, MEDIA CAUSE (July 24, 2020), <https://mediacause.com/cancel-culture-is-democracy-at-its-finest>.

³² Aja Romano, *Why We Can’t Stop Fighting About Cancel Culture*, VOX, <https://www.vox.com/culture/2019/12/30/20879720/what-is-cancel-culture-explained-history-debate> (last updated Aug. 25, 2020).

³³ Rio Grande Found. v. Oliver, No. Civ. 1:19-cv-01174-JCH-JFR, 2020 WL 6063442, at *1, *4 (D.N.M. 2020).

provide evidence of such a reaction from its previous twenty years of advocacy,³⁴ indicating that the novelty of cancel culture does not lessen the burden of production. Nevertheless, it is telling that the court entertained the notion that cancel culture might chill speech in such a way as to merit equitable relief.³⁵ Many commentators note the similarity between cancel culture and *mob justice* and infer an immense potential for harm from the movement.³⁶ It will be interesting to witness how courts engage with cancel culture as the data continues to amass.

Despite judicial silence regarding cancel culture, the media industry has generated volumes of articles on the topic.³⁷ Several cancellations stem less from harmful behavior and more from the mere fact that a person holds an unpopular opinion.³⁸ Usually, these opinions are reprehensible to a vocal minority of society who assemble on social media to intolerantly call for that individual's cancellation. Taylor Swift described this experience as being told "to kill yourself" or "to disappear" and said that most people cannot "understand what it's like to have millions of people hate you very loudly."³⁹

Several high-profile entertainers have felt the public's ire for some combination of political or social views and misbehavior. One highly controversial issue was the simultaneous and contradictory cancelling of Jonny Depp and Amber Heard due to cross-allegations of abuse in their marriage.⁴⁰ Ongoing legal battles to determine the truth have not dissuaded the masses from butting in to try to ruin one or the other of their careers. Millions signed a petition calling for Warner Brothers to fire Amber Heard from her role in *Aquaman 2*,⁴¹ and Warner Brothers asked Jonny Depp to resign from his role in the *Fantastic Beasts* series, a *Harry Potter* spin off.⁴²

³⁴ *Id.* at *10.

³⁵ *See id.* at *9.

³⁶ Carr, *supra* note 1, at 133.

³⁷ *See supra*, notes 39–51.

³⁸ Examples of these cancellations include J. K. Rowling, James Gunn, Gina Carano, and Mendenhall. *See infra* Parts I.B, II.B.

³⁹ Taylor Swift: 'Saying You're Cancelled is Like Saying Kill Yourself', BBC NEWS (Aug. 9, 2019), <https://www.bbc.com/news/newsbeat-49289430>.

⁴⁰ Zac Ntim, 'Fantastic Beasts' is Just the Start. Johnny Depp's Career is Over, *Experts Say*, INSIDER (Nov. 12, 2020), <https://www.insider.com/fantastic-beasts-johnny-depp-career-is-over>; Jacob Sarkisian, *The Petition to Remove Amber Heard from Aquaman 2 Now Has over 1.5 Million Signatures*, INSIDER (Nov. 28, 2020), <https://www.insider.com/petition-amber-heard-aquaman-2-reaches-million-202011>.

⁴¹ Sarkisian, *supra* note 40.

⁴² Ntim, *supra* note 40.

Speaking of the wizarding world, J.K. Rowling attracted public ire by speaking up against British legislation granting certain rights to transgendered individuals.⁴³ Rowling has been brutally criticized and labelled for her sincere social opinions despite these opinions being grounded in her own history as a victim of sexual abuse and well-communicated concern for young homosexual individuals.⁴⁴ James Gunn, screenwriter and director of the *Guardians of the Galaxy* franchise, was canceled and asked to leave the Marvel fold for several of his old tweets making light of rape and other shocking topics.⁴⁵ For Gunn, the experience was not entirely negative because it opened his schedule to direct *The Suicide Squad*, and Marvel welcomed him back after he publicly apologized for his tweets.⁴⁶

Two members of the *Mandalorian* production were cancelled: Gina Carano and Baby Yoda. Gina Carano was cancelled for controversial tweets about masks, voter fraud, gender pronouns, and the current political climate.⁴⁷ Carano's tweets expressed beliefs shared by many Americans and inspired both outrage and admiration in Star Wars fans.⁴⁸ She apologized for making fun of gender pronouns,⁴⁹ but Lucasfilm condemningly announced

⁴³ J.K. Rowling, *J.K. Rowling Writes About Her Reasons for Speaking Out on Sex and Gender Issues*, J.K. ROWLING (June 10, 2020), <https://www.jkrowling.com/opinions/j-k-rowling-writes-about-her-reasons-for-speaking-out-on-sex-and-gender-issues/>.

⁴⁴ *Id.*

⁴⁵ Mike Fleming Jr., *Disney Reinstates Director James Gunn for 'Guardians of the Galaxy 3'*, DEADLINE (Mar. 15, 2019), <https://deadline.com/2019/03/james-gunn-reinstated-guardians-of-the-galaxy-3-disney-suicide-squad-2-indefensible-social-media-messages-1202576444/>.

⁴⁶ *James Gunn: Disney Rehires Sacked Guardians of the Galaxy Director*, BBC NEWS (Mar. 15, 2019), <https://www.bbc.com/news/entertainment-arts-47577507>.

⁴⁷ Ryan Lattanzio, *'Star Wars' Fans Urge 'Mandalorian' to #FireGinaCarano After Controversial Tweets*, INDIEWIRE (Nov. 22, 2020), <https://www.indiewire.com/2020/11/gina-carano-mandalorian-petition-fire-star-wars-actress-1234600149>; Daniel Holloway, *Lucasfilm, UTA Drop 'Mandalorian' Star Gina Carano Following Offensive Social Media Posts*, VARIETY (Feb. 10, 2021), <https://variety.com/2021/tv/news/mandalorian-gina-carano-1234905589>.

⁴⁸ Phil Owen, *Conservatives Start #CancelDisneyPlus Campaign After Gina Carano Fired Off 'The Mandalorian'*, WRAP (Feb. 10, 2021), <https://www.thewrap.com/conservatives-start-canceldisneyplus-campaign-after-gina-carano-fired-off-the-mandalorian>.

⁴⁹ Anthony D'Alessandro, *Lucasfilm Calls Gina Carano Social Media Posts "Abhorrent"; Actress No Longer Employed by 'Mandalorian' Studio*, DEADLINE (Feb. 10, 2021), <https://deadline.com/2021/02/mandalorian-gina-carano-lucas-film-responds-to-controversial-statement-1234691898>.

her termination in early 2021.⁵⁰ Finally, Grogu (“Baby Yoda” himself) was cancelled for attempted xenocide.⁵¹ Grogu’s attempt to eat an entire species was reprehensible, but he learned his lesson soon afterward and some have forgiven him.⁵²

The venerated moralist Jesus, the Christ, was confronted with a situation in which a mob of men wanted to stone a woman for her private immorality.⁵³ Jesus responded that someone who had not sinned should be the first to cast a stone at the woman.⁵⁴ Faced with its own hypocrisy, the mob trickled away.⁵⁵ Jesus then told the woman that He would not condemn her and encouraged her to “go, and sin no more.”⁵⁶ Effectively, Jesus *called in* to the woman while resisting the destructive impulse of the mob. Today, people are quick to cast stones at others for their perceived failings. In some cases, the targets are powerful and destructive, and cancellation may be the best way to remove them from positions where they can harm others. In most cases, they are just people that diverge slightly from normative morality, and we would all do well to pick up some perspective before picking up some stones.

History illustrates that today’s deviant morality becomes tomorrow’s norm and vice versa. Those who condemn someone for having the gall (or should we say courage?) to voice an unpopular opinion may be remembered as one of our generation’s bigots. We could all learn from the Christ’s example. But until then, the least we could do is prevent social media mobs from pressuring companies to legally punish people for their unpopular conduct or opinions. Cancel culture coupled with morals clauses can ruin the careers of ignorant or isolated individuals who are not culturally astute enough to hide their true selves from the public eye. That people have unconventional opinions, to which others may vehemently object, should not jeopardize their livelihood unless they act on those opinions in an illegal, obscene, or sexually inappropriate manner.

⁵⁰ Holloway, *supra* note 47.

⁵¹ Anthony Breznican, *Baby Yoda Canceled Amid Accusations of Genocide*, VANITY FAIR (Nov. 12, 2020), <https://www.vanityfair.com/hollywood/2020/11/baby-yoda-eggs>.

⁵² *Id.* Grogu got to watch one of those yummy eggs hatch into a cute tadpole after going through a traumatic experience where he himself was nearly eaten by a much larger alien creature. *The Mandalorian: Chapter 11: The Heiress* (Lucasfilm Ltd. Nov. 13, 2020). Sometimes life experiences are the best tutor, and people—or aliens—just need to gain some perspective.

⁵³ *John* 8:3-5 (King James).

⁵⁴ *Id.* at 8:7.

⁵⁵ *Id.* at 8:9.

⁵⁶ *Id.* at 8:10-11.

Cancel culture connects to trademark law through the branding framework. In effect, cancel culture takes one action or opinion, inflates it out of proportion and context, attaches it to an entire brand without the owner's consent, and leaves them to deal with the fallout. In some ways, cancel culture is like an infringing trademark that dilutes a brand and tarnishes a reputation. Unfortunately, tarnishment claims provide no legal recourse because a person is not a trademark. Instead, hiring parties face the choice between standing in solidarity with their employees or cutting ties—often by using morals clauses.⁵⁷

C. Morals Clauses

Today, morals clauses can and often do appear in all industries and at all levels of employment.⁵⁸ But morals clauses originated in the film industry in the 1920s as a means to control headliners who might misbehave, ruin the reputation of a production, and scare off viewers.⁵⁹ Early accusations of rape and murder leveled against Hollywood star Roscoe “Fatty” Arbuckle drew public scandal and caused him to lose a three-year, \$3,000,000 contract with Paramount.⁶⁰ Fatty was unable to find employment in the industry after his acquittal,⁶¹ and the industry adopted the morals clause to give studios a quick

⁵⁷ See *infra* Part II.C.

⁵⁸ Joe Bogdan & Jennifer Rodriguez, *Morals Clauses: The Corporate Ejection Seat*, INT'L BAR ASS'N: INTELL. PROP./ & ENT. L. COMM'N (May 8, 2018), reprinted in Joe Bogdan & Jennifer Rodriguez, *Morals Clauses: The Corporate Ejection Seat*, CULHANE MEADOWS PLLC (May 24, 2018), <https://www.culhanemeadows.com/wp-content/uploads/2018/05/2018-05-08-Intl-Bar-Assn-Morals-Clauses-Bogdan-and-Rodriguez.pdf>; Fernando M. Pinguelo & Timothy D. Cedrone, *Morals? Who Cares About Morals? An Examination of Morals Clauses in Talent Contracts and What Talent Needs to Know*, 19 SETON HALL J. SPORTS & ENT. L. 347, 364–65 (2009). Despite the media attention morals clauses have garnered recently, they involve an aspect of deal making and decision-making that necessarily occurs “in the room where it happens.” The non-practicing public, legislators, and scholars are left wanting for information about the actual effects of these clauses. Thus, several suppositions will be made throughout this Comment which represent respectable inferences from the data and stories available to us but may not accurately reflect reality behind closed doors.

⁵⁹ Pinguelo & Cedrone, *supra* note 58, at 354.

⁶⁰ Brotman, *supra* note 29.

⁶¹ *Id.*

fix in case other stars attracted such negative attention.⁶² The only governing law that was or has ever been applied in court to the relatively recent invention of morals clauses is contract common law.⁶³

Unfortunately, the formative cases forging morals clause jurisprudence took place in the 1950s—the age of McCarthyism.⁶⁴ As Congress came calling to Hollywood, something far more insidious than communists riddled the industry: morals clauses. A congressional hearing summoned several members of the industry to public harassment, and ten of them made a principled stand by refusing to answer the representatives' questions.⁶⁵ These individuals (“the Hollywood 10”) believed that Congress’s actions infringed on their constitutional rights to believe and express, or refuse to express, unpopular political opinions.⁶⁶ Unfortunately, their civil disobedience was contempt of Congress—a misdemeanor.⁶⁷ The public backlash for their actions motivated the studio heads to terminate their contracts based on their morals clauses.⁶⁸

When the Hollywood 10 sought judicial redress for what seemed like a breach of contract by their studios, they met with initial success at trial and with resounding failure on appeal.⁶⁹ The appeals courts took morals clauses at face value; the Hollywood 10 had conducted themselves “in a manner that shall offend against decency, morality or shall cause [them] to be held in public ridicule, scorn or contempt, or that shall cause public scandal”; thus, they could be terminated.⁷⁰ It could be argued that they were really being punished for committing a misdemeanor at the congressional hearing, but the courts were clear that the crime did not trigger the morals clause; what triggered the clause was the violation of public morals and the public’s response to these men’s inferred communism.⁷¹ These decisions were based

⁶² *Id.*

⁶³ *Abril & Greene, supra* note 3, at 8–9.

⁶⁴ *See generally* *Loew’s, Inc. v. Cole*, 185 F.2d 641, 644-45 (9th Cir. 1950); *RKO Radio Pictures, Inc. v. Jarrico*, 274 P.2d 928, 929 (Cal. Dist. Ct. App. 1954); *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 848 (9th Cir. 1954); *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 87 (9th Cir.1957) (providing a detailed recounting of McCarthyism in Hollywood and how it informed the development of morals clauses).

⁶⁵ *See, e.g., Loew’s, Inc.*, 185 F.2d at 645, 653 n.13.

⁶⁶ *See, e.g., id.* at 653.

⁶⁷ *See, e.g., id.* at 648.

⁶⁸ *See, e.g., id.* at 645.

⁶⁹ *See id.* at 662; *Lardner*, 216 F.2d at 847, 854.

⁷⁰ *Lardner*, 216 F.2d at 848.

⁷¹ *Id.* at 850; *Loew’s, Inc.*, 185 F.2d at 649.

on principles of contract law, and they invented morals clause precedent that has been relied upon since.⁷² However, the decisions failed to recognize the gravity of allowing a boilerplate contract clause to punish people for their political beliefs—a fault that continues to haunt contracts to this day.

Since McCarthyism, morals clauses have not been given much attention. Modern scholarship on the subject is sparse, but it continues to accrue.⁷³ Legislatures have largely ignored the existence of morals clauses in contracts; although, some legislatures have included similar provisions in codes governing the conduct of government employees.⁷⁴

⁷² The *Lardner* case has been quoted extensively for classifying moral turpitude, a clause often used in morals clauses, into three categories:

1. Those crimes necessarily involving moral turpitude, for example, frauds;
2. Those crimes which are so obviously petty that a record of conviction does not admit of a suggestion of moral turpitude, for example, overtime parking;
3. Those crimes which may be saturated with moral turpitude, but nevertheless do not contain moral turpitude as a necessary element for conviction, for example, willful failure to pay federal income tax, and refusal to answer proper questions of a congressional committee.

Lardner, 216 F.2d at 851–52. While this system of classification is useful for understanding whether an action arises to the level of moral turpitude, drafters do not rely on the phrase, and even in *Lardner*, other aspects of the morals clause were decisive in the court’s ultimate decision to permit the defense to succeed. Morals clause jurisprudence is far more concerned with public reaction than the relative level of turpitude involved in an often-nonexistent crime.

⁷³ Recent articles on morals clauses include Rick G. Morris, *Media Moguls Risking It All: Contract Clauses in the Entertainment Business in the Age of #MeToo*, 9 ARIZ. STATE UNIV. SPORTS & ENT. L. J. 1 (2019); Davidson, *supra* note 29, at 376; Jonathan G. Finck, *Can NFL Players Be Punished for Kneeling? An Analysis of the Banter Surrounding the Star-Spangled Banner*, 21 U. DENV. SPORTS & ENT. L. J. 125 (2018); Matthew Junker, *Ending LGBTQ Employment Discrimination by Catholic Institutions*, 40 BERKELEY J. EMP. & LAB. L. 403 (2019); Pinguelo & Cedrone, *supra* note 58; Abril & Greene, *supra* note 3, at 9, 50. Abril and Greene’s *Contracting Correctness*, argues for a new multi-factor judicial analysis of morals clauses, including a secondary meaning factor—borrowed from trademark law. This article was referenced in *Williams v. MLB Network, Inc.*, No. A-5586-16T2, 2019 WL 1222954, at *14 n.11 (N.J. Super. Ct. App. Div. 2019) where the court noted the possible need for a new policy based judicial analysis of morals clauses that are activated solely by adverse publicity.

⁷⁴ See *infra* Part II.C.

While legislative silence is troubling, it also provides the states an opportunity to remedy the problem by filling that silence. As addressed in Part III, legislators should limit morals clauses to a narrow set of situations comparable to trademark tarnishment claims. Such a law would provide judges with clear guidance on how to treat morals clause defenses without disregarding the underlying policy issues and without legislating from the bench. Cases involving morals clauses that have gone to litigation have almost unanimously applied basic contract principles or early precedent to uphold the clauses.⁷⁵ While this represents another victory for freedom of contract, it also fosters a power that becomes dangerous when combined with cancel culture—the power to unilaterally terminate a contract based on the whims of the public.⁷⁶

II. THE PROBLEM OF JUDICIAL DEFERENCE

The sparse caselaw directly addressing morals clauses demonstrates the difficulty of applying deferential principles of contract law to a branding problem. An analysis of these cases, colored by an understanding of cancel culture, shows the potential for legal injustice and the need for a legislative solution. This Part looks at several such cases where employees were terminated under the morals clauses in their employment contracts. Part III follows this discussion by proposing a simple legislative solution.

A. Injustice

The first group of cases illustrates the injustice inherent in morals clause jurisprudence. In the Hollywood 10 cases, the plaintiffs' principled civil disobedience led to public contempt and termination, and the Ninth Circuit provided no redress.⁷⁷

The first case, *Loew's, Inc. v. Cole*, provides an extensive treatment of facts and statements made by all parties during the controversy and shows thinly veiled bias about the incident in both the district court and the circuit court.⁷⁸ Loew's arguments focused on perceived issues with the jury

⁷⁵ See *infra* Parts II.A, II.B.

⁷⁶ Pinguelo & Cedrone, *supra* note 58, at 354.

⁷⁷ See *Loew's, Inc. v. Cole*, 185 F.2d 641, 662 (9th Cir. 1950); *Lardner*, 216 F.2d at 854; *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 91–92 (9th Cir. 1957).

⁷⁸ See, e.g., *Loew's, Inc.*, 185 F.2d at 646–48.

instructions and evidence admitted at the trial where Cole was initially victorious.⁷⁹ Cole argued that he should have won his breach-of-contract claim as a matter of law because the morals clause in his contract was void under a California labor law which “forbids the employer to use his power as such to coerce or influence the political action or activity of his employees.”⁸⁰ The court dismissed this argument by noting that Cole’s act was a misdemeanor and implying that the trial judge was mistaken for not instructing the jury that the morals clause covered misdemeanors of the kind—a theory not advocated at trial.⁸¹ The circuit court took issue with other instructions and evidentiary decisions of the trial court and remanded the case.⁸²

The Ninth Circuit’s lack of sympathy bled into the second Hollywood 10 case, *Twentieth Century-Fox Film Corp. v. Lardner*, which based its analysis on both the facts and the outcome of *Cole*.⁸³ *Lardner* also reversed the trial court verdict for the plaintiff for evidentiary and jury instruction issues; but more importantly, *Lardner* laid down a groundwork of deference to contractual drafters that continues to plague morals clause jurisprudence to this day.⁸⁴ Unfortunately, *Lardner* did not challenge the clause on a policy basis or under the California labor law.⁸⁵

The third case to reach the Ninth Circuit, *Scott v. RKO Radio Pictures*, established the practice of deference to *Lardner*.⁸⁶ Its analysis amounts to quoting *Lardner*, dismissing the plaintiff’s admittedly persuasive arguments, pointing out the flaws in *Cole* and *Lardner*, and stating that a decision for the plaintiff would discredit the law.⁸⁷ This conclusive refusal to examine flaws

⁷⁹ *Id.* at 646.

⁸⁰ *Id.* at 647. This law is still in force today and should serve as inspiration to legislatures as they craft statutes narrowing morals clauses.

⁸¹ *Id.* at 648.

⁸² *Id.* at 662. The Ninth Circuit’s discussion of this case lingers on the facts to such great length that it seems the court thought they spoke for themselves. Additionally, the evidentiary issues and jury instruction errors for which the court reversed the case were somewhat arbitrary—nowhere near the level of plain error or abuse of discretion standards that an appellate court would need to reach to reverse a case today.

⁸³ *Twentieth Century-Fox Film Corp. v. Lardner*, 216 F.2d 844, 847–50 (9th Cir. 1954).

⁸⁴ *Id.* at 848, 851.

⁸⁵ *See id.* at 848 (arguing instead that the morals clause was not breached, and, in the alternative, that Fox waived the breach by continuing *Lardner*’s employment).

⁸⁶ *Scott v. RKO Radio Pictures, Inc.*, 240 F.2d 87, 91 (9th Cir. 1957).

⁸⁷ *Id.*

in the court's precedent does more to discredit the law of the Hollywood 10 cases than a corrective about-face could possibly have done.

In these cases, the Ninth Circuit did not consider deep policy reasons to protect the Hollywood 10 for expressing their political views. It simply resolved the cases before it and applied common law to interpret a contract. Despite some flaws in its reasoning, the court filled its role as a court should. It is the role of a legislature to layer policy consideration into statutes and instruct the courts how to handle these situations justly.⁸⁸

Another case that illustrates this point is *Vaughn v. American Basketball Ass'n*, which dealt with a basketball player who committed several highly publicized misdemeanors.⁸⁹ The basketball association terminated him pursuant to a morals clause which the court inferred should be judged by the "mores and customs" of the state where it was created.⁹⁰ The court made a point that Vaughn did not cite Virginia law to interpret the morals clause, yet there was no Virginia statute or case on point.⁹¹ As with most plaintiffs in morals-clause cases, Vaughn only had *Lardner's* unfriendly precedent to rely on, and the court would not even accept that.⁹² Despite refusing to credit Vaughn's reliance on *Lardner*, the court followed in its footsteps by deferring to the contract.⁹³

Finally, a recent North Carolina case dealt with a racecar driver who threw his helmet at another driver's window and crassly insulted him on television.⁹⁴ The parties and the court did not explore the morals clause issue despite the relatively low severity of Gordon's actions; they simply recognized that the contract contained a morals clause.⁹⁵ This further illustrates the degree to which modern courts defer to a morals clause.

⁸⁸ See *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997).

⁸⁹ *Vaughn v. Am. Basketball Ass'n*, 419 F. Supp. 1274, 1275 (S.D.N.Y. 1976).

⁹⁰ *Id.* at 1278. His morals clause was a bit different from those in the Hollywood 10 cases, but more customary for the sporting industry. It included requirements that Vaughn be fully attired in public, exhibit the highest standards of morality, honesty, fair play, and sportsmanship, not do anything detrimental or prejudicial to the club, and not bring the club to ridicule or contempt. *Id.* at 1276.

⁹¹ *Id.* at 1276.

⁹² *Id.* at 1276, n.8.

⁹³ *Id.* at 1276.

⁹⁴ *Team Gordon, Inc. v. Fruit of the Loom, Inc.*, No. 06-cv-201-RJC, 2009 WL 426555, at *3-4 (W.D.N.C. Feb. 19, 2009).

⁹⁵ *Id.* at *4-5.

B. Justice, but Just Barely

The next group of cases present situations where the court was able to reach just results, but the underlying morals clause law is legally troubling and could have led to unjust results under different facts. In *Nader v. ABC Television, Inc.*, ABC terminated a contract with Nader, a lead actor in a soap opera, who was arrested for cocaine trafficking.⁹⁶ Nader sued ABC for breach of contract, and the court flatly refused the idea, giving substantial deference to the contract language.⁹⁷ The court addressed ABC's standard morals clause to say that it was not "vague, ambiguous, or overbroad."⁹⁸ Here, Nader's failure was reasonable and just because the underlying act was criminal and would have clearly tarnished ABC. However, the court analyzed the morals clause under the contract standard of "public disrepute, contempt, scandal, or ridicule"—a standard that could have been easily proven by media attention arising out of innocent behavior.⁹⁹

Such media attention triggered termination in an important North Carolina case, *Mendenhall v. Hanesbrands*, where Mendenhall was terminated simply for expressing controversial views on Twitter.¹⁰⁰ Hanesbrands terminated Mendenhall's talent agreement after he tweeted to encourage people to think twice before celebrating death, even if it was that of Osama Bin Laden.¹⁰¹ Mendenhall did not challenge the validity of morals clauses; instead, he challenged the reasonableness of Hanesbrands's exercise of its contractual discretion under a duty of good faith and fair dealing analysis.¹⁰² Under New York law, all Hanesbrands had to show was a rational, reasonable, and non-arbitrary use of its discretionary contractual rights,¹⁰³ yet Hanesbrands had contradicted itself by crediting Mendenhall's termination to public disrepute in its letter to ESPN while admitting to having simply disagreed with him in its termination letter.¹⁰⁴

The court considered a narrow set of facts related to the public backlash and sided with Mendenhall because he had alleged support on Twitter for his

⁹⁶ *Nader v. ABC Television, Inc.*, 330 F. Supp. 2d 345, 346–47 (S.D.N.Y. 2004).

⁹⁷ *Id.* at 347.

⁹⁸ *Id.* at 348.

⁹⁹ *Id.* at 346–48.

¹⁰⁰ *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 720 (M.D.N.C. 2012).

¹⁰¹ *Id.* at 720–21.

¹⁰² *Id.* at 725.

¹⁰³ *Id.* at 725–26.

¹⁰⁴ *Id.* at 726.

non-nationalistic, forgiving, and tolerant viewpoint.¹⁰⁵ It is unclear how this close case would have gone if the court had permitted and considered evidence Hanesbrands proffered of news reporting negative public reaction to Mendenhall's tweets.¹⁰⁶ Good lawyering on one side and inconsistency on the other barely saved a man from being punished for making a mature comment under a repressive morals clause.

In *Bernsen v. Innovative Legal Marketing, LLC*, an actor with a regular contract for an advertisement campaign engaged in several private indiscretions and public appearances which cumulatively convinced the advertisement company to terminate his contract.¹⁰⁷ The court deferred to the contract and required ambiguity in contract language to defeat the morals clause.¹⁰⁸ Fortunately, this contract was drafted poorly and placed the morals clause in the indemnification section of the contract, making it non-self-executing.¹⁰⁹ Thus, the court required the breach to be material to justify termination, effectively transferring the decision-making power from contract party to the fact-finder.¹¹⁰ Because Bernsen's unwise, yet harmless, behavior did not rise to the level of other cases (including *Nader*), the court declined to grant summary judgment on the morals clause.¹¹¹ Again, this case would have turned out poorly if the contract was well drafted; and the court was only free to balance the policies of enforcement via a technicality. This court's analysis compares favorably to the tarnishment framework detailed in Part III.

Finally, in *Williams v. MLB Network, Inc.*, MLB fired a sports commentator for allegedly using profane language at his son's baseball game which was then reported in online articles.¹¹² Williams sued for breach of contract and won at trial.¹¹³ The court denied MLB's appeal by applying basic contract principles which worked in this case but allowed the clause to

¹⁰⁵ *Id.* at 727.

¹⁰⁶ *Id.* at 726–27.

¹⁰⁷ See *Bernsen v. Innovative Legal Mktg., LLC*, No. 2:11CV546, 2012 WL 3525612 *5–8 (E.D. Va. 2012), *overruled in part by* *Bernsen v. Innovative Legal Mktg., LLC*, 885 F. Supp. 2d 830, 834 (E.D. Va. 2012) (holding that the agreement does include a morality clause, and that ILM did not waive their rights due to a material fact still in dispute).

¹⁰⁸ *Id.* at *1, 5.

¹⁰⁹ *Id.* at *1, 6.

¹¹⁰ *Id.* at *7.

¹¹¹ *Id.* at *10.

¹¹² *Williams v. MLB Network, Inc.*, No. A-5586-16T2, 2019 WL 1222954, at *1 (N.J. Super. Ct. App. Div. 2019).

¹¹³ *Id.* at *1.

pass detailed scrutiny.¹¹⁴ The morals clause used the term *non-trivial* which the court deemed inapplicable to this situation where the evidence of profanity was weak, and the news coverage was minimal.¹¹⁵ There had been no previous cases of morals clauses in the jurisdiction,¹¹⁶ and the court made a point to cite *Contracting Correctness*,¹¹⁷ a recent law review article that argues for a more rigorous judicial analysis of morals clauses.¹¹⁸ This citation is the first gap in the armor of morals clause deference and shows that some judges may recognize the need for further discussion of and resolution to the morals clause issue.

C. Legislative Morals Clauses

Some states have passed laws to govern the conduct of government employees that closely resemble or relate to morals clauses.¹¹⁹ However, these laws, unlike contractual morals clauses, run the risk of directly infringing on freedom of speech through state action.¹²⁰ They also demonstrate the pervasiveness of morals clauses and that legislatures have already implemented laws dealing with the topic—albeit, ones enhancing the problem.

Borges v. McGuire dealt with a state code permitting termination of “member[s] of the force” for bringing disrepute on the police department and reads almost the same as a contractual case.¹²¹ The court reinstated a female officer who had been fired for modeling in a pornographic magazine.¹²² The

¹¹⁴ *Id.* at *14 n.11.

¹¹⁵ *Id.* at *3.

¹¹⁶ *Id.* at *13.

¹¹⁷ *Id.* at *14 n.11.

¹¹⁸ *See supra* note 3.

¹¹⁹ *See Brehe v. Mo. Dep’t of Elem. & Secondary Educ.*, 213 S.W.3d 720, 722 (Mo. Ct. App. 2007) (authorizing “discipline where a certificate holder has pleaded to or been found guilty of a felony or a ‘crime involving moral turpitude’”); *see also Borges v. McGuire*, 107 A.D.2d 492, 496 (N.Y. App. Div. 1985) (authorizing the police commissioner to dismiss an officer for “immoral conduct”).

¹²⁰ *See generally* *Marilyn Manson, Inc. v. N.J. Sports & Exposition Auth.*, 971 F. Supp. 875, 884 (D.N.J. 1997) (discussing the limitations placed on government organizations which attempt to use statutory authority to discriminate against a person based on its morals).

¹²¹ *Borges*, 107 A.D.2d at 498.

¹²² *Id.* at 494–95, 501.

court relied on the fact that Borges had been a member of the civil service at the time of the photo shoot and thus was not a member of the force.¹²³

In a case that addressed the state action problem, the New Jersey Sports Exhibition Authority, as a government entity, was prevented from discriminating against Marilyn Manson for its “character offensive to public morals,” because the location of Manson’s scheduled performance was a public forum.¹²⁴ This constitutional argument illustrates the government’s role in preserving freedom of expression. While statutory morals clauses empower government organizations to terminate employees for public disrepute, they do not authorize termination for political speech or non-criminal immorality.¹²⁵

III. WHAT TO DO ABOUT IT

Now that cancel culture pervades modern society and influences decision-making in most high-profile and some low-profile employment situations, morals clauses that allow a hiring party to terminate a contract based on public scorn, scandal, or disrepute take on new importance. However, morals clause jurisprudence remains caught in its ignoble past. Judicial solutions—short of a complete analytical overhaul—are likely to be labeled *legislating from the bench* or *judicial activism* and are both unlikely and unlikely to succeed. Still, something must be done to avoid unjustly punishing individuals for expressing their political and social opinions.

This Part argues for state legislation, built on a blueprint of trademark dilution by tarnishment. This legislation would require the party asserting a morals clause defense (“employer”) to prove that the party suing for breach of contract (“employee”) is famous, that the employee did something illegal, obscene, or sexually inappropriate, and that there is negative association in the public mind between the famous employee and their employer. Such a statute would prevent employers from unjustly applying morals clauses to punish employees simply for holding unpopular opinions, and tarnishment claims provide the best blueprint upon which to design such a statute to achieve this goal. This Part discusses the best elements of a tarnishment claim to form such a blueprint and then discusses additional optional elements or

¹²³ *Id.* at 498. One judge dissented out of principle because the photos were rather obscene, and he believed the department should have been empowered to discharge its employees for such actions. *Id.* at 501–02 (Kupferman, J., dissenting).

¹²⁴ *See Manson*, 971 F. Supp. at 886.

¹²⁵ *Id.* at 887.

procedures presented by contract law, defamation claims, and Anti-SLAPP legislation.

A. The Trademark Dilution by Tarnishment Blueprint

The dilution by tarnishment claim discussed in Part I provides the best blueprint for a legislative response to modern morals clause issues to prevent mob-driven selection and private enforcement of normative morals. Trademark law is a natural point of reference for solutions to problems surrounding morals clauses because trademark law is intricately entwined with brand management. The only aspect of a morals clause dispute that initially removes it from the realm of trademark law is that it has nothing to do with trademarks. The trademark claim to which legislatures should look to inform their morals clause statute is dilution by tarnishment. To contextualize morals clause issues in terms of a tarnishment claim, the employee is analogous to a party accused of tarnishing a famous party's trademark, and the employer is analogous to the famous party whose mark has been tarnished. The employer then uses the morals clause to attempt to prevent tarnishment through private enforcement of its brand management rights.

The tarnishment blueprint is not exact and requires some small tweaking to fit morals clause cases; as such, legislation based on this blueprint could take several forms based on the policy preferences of a specific state. However, each statute should include several key passages. One passage should explain the policies the state found compelling in crafting its legislation. Another should define morals clauses and morals clause defenses to a breach-of-contract suit. Such a defense, if successful, would disprove the existence of a contract, thus undercutting the employee's breach-of-contract claim. A passage should then list the elements that must be proved to succeed in a morals clause defense.

These elements would include proving that the offending party signed a contract with a morals clause, that the employee did something to cause public scandal, that the employee's conduct was sexually inappropriate, illegal, or obscene, that the conduct is not solely based on verbal or material expressions of controversial opinions, that the employee's conduct will cause a negative association between the employee and the employer, and that the offending party is famous.

Before the explanation of these elements, it should be noted that one suggested solution to the lack of clear judicial analysis for morals clauses included a showing of trademark law's secondary meaning.¹²⁶ This requirement would prevent employers from making out a morals clause defense unless they prove that the former employee was intricately related with the employer in the public mind. A secondary meaning requirement has merit because it correctly identifies the underlying economic rationale of the employer. Employers believe that when their employees have brought scandal upon themselves they have by association brought that scandal upon the employer.

Where this rationale breaks down is if the public does not equate the employer with its employee, so a required showing of secondary meaning makes sense to avoid unnecessary uses of morals clauses. Such a requirement might have little real effect because an employer—whose employees are not interconnected in the public mind with the brand of the employer—would have no reason to terminate an employee. However, requiring a showing of secondary meaning could serve to prevent some brash terminations motivated by a high sensitivity to public opinion or by pretense. The reason secondary meaning is not suggested as an element of this Comment's proposed legislation is that the tarnishment blueprint, upon which this legislation is built, already includes a fame requirement which essentially serves the same purpose.

As discussed in Part I, a mark is tarnished when it connects the public perception of a mark to unsavory or low-quality goods or services.¹²⁷ This requirement matches the associational requirement included in the language of most morals clauses, and it should be a required element in a morals clause defense.

Although not explicitly required, tarnishment cases usually only succeed if the negative association involves sexual, obscene, or illegal contexts.¹²⁸ This standard makes for an excellent element in morals clause defenses because it excludes instances of public outrage based on political, religious, economic, or social opinions, yet it still encompasses what is most likely to align with most of society's deepest moral convictions and what is most likely to tarnish an employer through association. The element would still allow morals clauses to justify termination for allegations of sexual assault, drug dealing, or abuse, but it would stop short of termination for political and social opinions held by people like the Hollywood 10, Gina Carano, J. K.

¹²⁶ Abril & Greene, *supra* note 3, at 8–9.

¹²⁷ *Hormel Foods Corp. v. Jim Henson Prods.*, 73 F.3d 497, 507 (2d Cir. 1996).

¹²⁸ *Id.*

Rowling, or Mendenhall.¹²⁹ Employers must establish that their employees' conduct was sexually inappropriate, obscene, or illegal.

The negative association element touches on a key difference between a trademark infringement case and those cases involving the immorality of an employee. While tarnishment can directly alter the goodwill of the public toward a product by causing confusion as to the source of the salacious mark, employees can only negatively affect their employer's reputation indirectly if the public makes an inferential connection between them and the employer. This makes employees' actions potentially less influential than trademark infringers' actions. Proof of a negative association should also be an element in the morals clause legislation.

Another important limitation in the tarnishment blueprint is that the mark which has been tarnished must have been famous.¹³⁰ This statutory requirement, developed by caselaw,¹³¹ involves an analysis of several factors unique to trademark law which would not transfer easily to a morals clause defense.¹³² However, they could inform legislators in setting a standard for use in determining if a particular employee is famous. As applied to morals clauses, the element ought to be inverted to require the employer to prove fame on the part of the employee rather than the fame of the employer.

This element would protect Average Joe from getting fired for a small slipup while headliners—whose prominence intensifies the negative association between them and the employer—would still be on the hook. Depending on the factors included in the statute, this requirement could effectively limit the application of morals clauses to the entertainment and sports industries and the top tiers of the business world. This further protects

¹²⁹ See *supra* Part I.

¹³⁰ 15 U.S.C. § 1125(c)(1) (2018).

¹³¹ 15 U.S.C. § 1125(c)(2)(A),(C) (“[D]ilution by tarnishment’ is association . . . between a mark . . . and a famous mark that harms the reputation of the famous mark.”); *VIP Prods., LLC v. Jack Daniel’s Prods.*, 291 F. Supp. 3d 891, 900 (D. Ariz. 2018).

¹³² See 15 U.S.C. § 1125(c)(2)(B)(i)–(vi). These factors are the following:

- (i) The degree of similarity between the mark or trade name and the famous mark.
- (ii) The degree of inherent or acquired distinctiveness of the famous mark.
- (iii) The extent to which the owner of the famous mark is engaging in substantially exclusive use of the mark.
- (iv) The degree of recognition of the famous mark.
- (v) Whether the user of the mark or trade name intended to create an association with the famous mark.
- (vi) Any actual association between the mark or trade name and the famous mark.

Id.

people who do not manage their brands as intentionally as famous individuals from being punished for their expressed beliefs. Furthermore, within the entertainment industry itself, it would protect non-headliners. What about exceptional situations where a minor employee does something so heinous as to bring contempt upon an employer? Those situations are serious enough that they can and should be covered by for cause termination clauses that do not specifically terminate the employee for the scandal but rather for the conduct. If certain conduct is inherently deserving of termination, public outrage should not be an element in that decision.

An aspect of tarnishment jurisprudence that should not be included in the morals clause legislation is the categories of trademark uses which are excluded from dilution claims and operate as defenses to a tarnishment claim.¹³³ These exclusions include uses of famous trademarks to identify, parody, criticize, or comment upon the famous mark owner or the goods or services of the famous mark owner.¹³⁴ These defenses have little application to morals clauses unless the employee criticized or parodied his or her employer (as alleged in the *Bernsen* case).¹³⁵ These defenses should not carry over into morals clause legislation.

Employees who sign a contract with an employer (and are famous enough to create negative associations with that employer in the public mind) are, in effect, given a license to represent the employer, so an intentional parody or criticism of the employer would be akin to betraying the trust of the employer and dragging its name through the mud. There may be good reason to criticize or parody that employer, but as a contractual ambassador for the brand, the employee must take more care. For these reasons, and due to the added protection already extended to employees by the recommended statute, injustice is unlikely to occur by omitting this aspect of the tarnishment blueprint from the morals clause legislation.

There are several concerns with and counterarguments to a statute limiting morals clauses in the manner described in this Comment. One concern is that such a statute would prevent morals clauses from providing an easy method of punishing people for their public misconduct or outrageous views. Morals clauses benefit employers, empowering them to

¹³³ 15 U.S.C. § 1125(c)(3).

¹³⁴ 15 U.S.C. § 1125(c)(3)(A)(ii).

¹³⁵ See *Bernsen v. Innovative Legal Mktg., LLC*, No. 2:11CV546, 2012 WL 3525612 *5, *8 (E.D. Va. 2012), *overruled in part by* *Bernsen v. Innovative Legal Mktg., LLC*, 885 F. Supp. 2d 830, 834 (E.D. Va. 2012) (holding that the agreement does include a morality clause, and that ILM has not waived their rights due to a material fact still in dispute).

quickly manage their brand, and they enable the previously voiceless public to influence society and enforce the values they cherish. However, morals clauses are an example of the proverbial battle axe where a scalpel would be more appropriate. It is better to love, correct, and educate someone than to stone them. If the vocal minority governs public morals, one of two things will happen: society will homogenize its moral views by punishing and weeding out anyone with unpopular opinions, or it will silence those people through the threat of unemployment without actually changing their minds. In either scenario, the detriment to society outweighs the benefits to the employer.

Employers might raise the concern that the recommended statute would stop them from removing themselves from some dialogues involving the worst exhibitions of racism, sexism, nationalism, anarchism, etc. Again, while this concern is valid, allowing those dialogues to exist is worth the discomfort or lost profits to these companies. For hundreds of years, western society punished atheists, egalitarians, and non-heteronormative individuals for their non-conformist values. Today, modern society is no better for upholding those ideas as accepted norms while putting down ideas at the fringe of modern thought—ideas which may one day become valued additions to our world view.

This argument in no way suggests that harmful actions based on fringe ideologies should be tolerated. Employees who believe or express racist, sexist, or other harmful ideas can be regulated with internal company discipline or education without immediately resorting to termination. Additionally, people who legitimately harm other people with their actions are probably committing crimes and could be terminated for that reason.

A counterargument to the recommended statute might be that the statute would hamstring morals clauses such that they would lose all value, and contract drafters would replace the clause with more specific for cause termination provisions. This argument is based on a false premise. Narrowed morals clauses would still perform the valuable function of allowing employers to cut ties with high-profile employees who act in a truly despicable manner such as physically or sexually harming another person. If an employer decides to draft a more specific for cause termination provision, it is free to do so, but the incidents of employers abusing a boilerplate morals clause would decrease dramatically.

B. Alternative Designs—Contract and Tort Law

Other legal theories have been explored to solve the morals clause issue, yet none offer a comprehensive solution that adequately protects an

employee's ability to engage in political and social debate nearly so well as the tarnishment blueprint. Employees appealed numerous times to contract law, and it has not offered them adequate recourse.¹³⁶ The only common law limits on morals clauses are the regular limitations on contracts contrary to public policy.¹³⁷ Unless otherwise established by legislation or precedent, the policy that people should be able to order their affairs in the way they see fit overcomes any objection that a specific contract is unfair or unjust.¹³⁸ There are good reasons to protect and support this policy generally.¹³⁹ However, morals clauses are one of the rare exceptions where it must be reined in.

Judicial resistance to the argument that morals clauses are illegal as against public policy can be seen in *RKO Radio Pictures, Inc. v. Jarrico* where the plaintiff argued that the morals clause was invalid because it violated his right to free speech.¹⁴⁰ The court would not even discuss the issue, calling it elementary, which it is.¹⁴¹ Absent state action, private individuals are not constitutionally prohibited from contractually limiting their rights to speak.¹⁴² However, when contract clauses infringe on important social interests, states have created policies to limit them.¹⁴³

Morals clauses are a strong contender for creating a new policy narrowing their scope to protect freedom of speech.¹⁴⁴ While there may be some hope for a more thorough analysis in modern courts establishing this very policy,¹⁴⁵ it would be better to address the problem legislatively than judicially. Other defenses to contract enforcement such as unconscionability, misrepresentation, illegality, duress, and undue influence provide no defense against morals clauses generally because they are fact-specific inquiries that prevent injustice from occurring within individual cases¹⁴⁶—rather than by correcting an entire system of injustice.

¹³⁶ See *supra* Part II.

¹³⁷ See MATTHEW BENDER & CO., 15 CORBIN ON CONTRACTS § 79.1 (2022).

¹³⁸ *Id.*

¹³⁹ *Id.* § 79.4.

¹⁴⁰ *RKO Radio Pictures, Inc. v. Jarrico*, 274 P.2d 2d 928, 929–30 (Cal. Dist. Ct. App. 1954).

¹⁴¹ *Id.* at 930.

¹⁴² See *id.*

¹⁴³ See *supra* note 137, at § 79.1.

¹⁴⁴ See *supra* Part I.

¹⁴⁵ *Williams v. MLB Network, Inc.*, No. A-5586-16T2, 2019 WL 1222954 *14 n.11 (N.J. Super. Ct. 2019).

¹⁴⁶ See, e.g., *Rosecky v. Schissel*, 833 N.W.2d 634, 651–52 (Wis. 2013).

The other potential source of law to redress injustice in morals clauses is tort law's defamation claim.¹⁴⁷ While defamation fails to protect a maligned party's interest in its employment contract, it often tempts plaintiffs into fruitless litigation targeting the mirage of tort damages. The plaintiff in *Elliott v. Donegan* recently attempted to use this claim to recover from someone who included his name in a list she published which built on the #MeToo movement and warned of unscrupulous men in the media industry.¹⁴⁸ Unfortunately, a defamation solution fails for several reasons: it is a difficult claim to succeed; it does not repair a reputation; and it requires proof that the statements made about the plaintiff were false. Where people are cancelled for their opinions or beliefs, the allegedly defamatory statements are probably true. For these reasons, defamation would be a fruitless claim for plaintiffs like Mendenhall.¹⁴⁹

Defamation does offer one concept which is worthy of consideration by legislators: its treatment of public figures.¹⁵⁰ Public figures or limited-purpose public figures are those who inject themselves into a public controversy.¹⁵¹ A public controversy is “any topic upon which sizeable segments of society have different, strongly held views’, even if the topic does ‘not involve political debate or criticism of public officials.’”¹⁵² The public figure bears similarities to and could stand in for secondary meaning or fame and negative association. In morals clause legislation, it could provide the standard to prove that an employee is famous for the purpose of morals clause defenses—that they are famous if they inject themselves into a public controversy. This application is not recommended because it could undermine the policies of the statute. However, it could also alleviate some concern among employers or legislators with protecting those who are not actually famous from morals clauses.

¹⁴⁷ See, e.g., *Elliott v. Donegan*, 469 F. Supp. 2d 40, 45, 47 (E.D.N.Y. 2020) (discussing an author's defamation claim after a list accusing him of sexual misconduct was distributed online).

¹⁴⁸ *Id.* at 47.

¹⁴⁹ See *Mendenhall v. Hanesbrands, Inc.*, 856 F. Supp. 2d 717, 720–22 (M.D.N.C. 2012) (quoting Mendenhall's tweets and Hanesbrands public response).

¹⁵⁰ *Elliott*, 469 F. Supp. 2d at 48.

¹⁵¹ *Id.* at 49.

¹⁵² *Id.* (quoting *Lerman v. Flynt Distrib. Co., Inc.*, 745 F.2d 123, 138 (2d Cir. 1984)).

C. Lessons from Anti-SLAPP Legislation

As discussed in Part I, morals clauses have already been the subject of or included in state legislation. Because some legislatures have shown a willingness to discuss and regulate these topics within the government employment context, they have participated in perpetuating a system with the potential to do great harm, and they must take responsibility for how the clauses are treated in court. Another area of legislation that could add to the tarnishment blueprint is legislation created to prevent strategic litigation against public participation (“Anti-SLAPP legislation”).¹⁵³

Anti-SLAPP legislation recognizes the value of public speech and participation in important social, political, or economic issues and provides defendants with a motion to strike claims that serve no purpose other than to harass and intimidate defendants for voicing opinions on a public issue.¹⁵⁴ This legislation specifically aims to prevent private parties from using the courts, as a sort of private state action, to violate a person’s first amendment’s guarantee of freedom of speech.¹⁵⁵ In general terms, it prevents abuses of law that could prevent persons from engaging in public discourse. Anti-SLAPP legislation sets a pro-speech pattern that legislators should continue to follow. Thus, the policies behind Anti-SLAPP legislation are analogous to the policies behind the proposed statute.

Anti-SLAPP legislation provides the final potential element to include in the morals clause statute. Where Anti-SLAPP legislation requires a plaintiff to prove that its claim serves some purpose other than to intimidate the defendant and discourage it from engaging in public discourse, the morals clause statute should include an element requiring the employer to show that use of the morals clause in this case would not unduly burden or punish the employee for engaging in public discourse (or in a public controversy). Some jurisdictions do not apply Anti-SLAPP statutes when a defendant’s underlying conduct is illegal since such conduct is not protected by the constitutional guarantees of free speech or petition.¹⁵⁶ This exception matches the tarnishment blueprint and should also be adopted into the morals clause statute.

¹⁵³ *Stuborn Ltd. P’ship v. Bernstein*, 245 F. Supp. 2d 312, 314 (D. Mass. 2003).

¹⁵⁴ Elizabeth Safran, *New York Passes Anti-SLAPP Legislation to Protect Speech Rights*, COWAN, DEBAETS, ABRAHAMS & SHEPPARD LLP (Dec. 7, 2020), <https://cdas.com/new-york-passes-anti-slapp-legislation-to-protect-speech-rights/>.

¹⁵⁵ *See, e.g.*, CAL. CIV. PROC. CODE § 425.16 (West 2022).

¹⁵⁶ *Flatley v. Mauro*, 139 P.3d 2, 5 (Cal. 2006).

The Anti-SLAPP motion to strike mechanism is also instructive for the procedure of a morals clause statute. The motion to strike requires a plaintiff's complaint and affidavits to show a probability that the plaintiff will succeed in its claim.¹⁵⁷ This standard could be applied to the morals clause statute: when an employer challenges the existence of an enforceable contract by alleging that it terminated the contract pursuant to a morals clause, the statute could be constructed to allow employees to move to strike that defense before trial unless the employer makes an initial probable showing that it can prove each of the morals clause elements. This attractive possibility may run into state constitutional challenges; two jurisdictions have ruled Anti-SLAPP legislation unconstitutional because it infringes on the plaintiff's right to a jury trial.¹⁵⁸ However, in other jurisdictions with Anti-SLAPP legislation, this motion to strike may do much to protect an employee's freedom to speak.

CONCLUSION

Morals clauses are a clever solution to a branding problem that empower employers to quickly manage their reputations, but in the age of cancel culture, they carry a massive potential for harm and injustice. The clause has a dramatic history and has been used to great effect in some cases. However, as times change and the clause evolves, gaining popularity in new situations, it deserves to be monitored and regulated to prevent injustice. Further scholarship is recommended to research and respond to the morals clause's expansion and application in new industries and roles.

Meanwhile, state legislatures should step in to solve the problem and provide clear guidelines for judicial analysis. This solution should attract the notice of states and legislators who value the free exchange of ideas over the suppression of racist, sexist, nationalist, or other fringe ideologies. While each jurisdiction should feel free to craft its own solutions to the problem of cancel culture and morals clauses, the tarnishment claim and Anti-SLAPP legislation provide a comprehensive blueprint to prevent the worst of the potential injustices and should protect the freedom of speech from private interference. State legislatures should stop the bus now before it is stopped by the sheer weight of the careers it runs over and ruins.

¹⁵⁷ *See, e.g.*, CAL. CIV. PROC. CODE § 425.16(b) (West 2022).

¹⁵⁸ *Davis v. Cox*, 351 P.3d 862, 874 (Wash. 2015); *Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 635–36 (Minn. 2017).