11-23-2012

Reputation Insurance: Why Negotiating for Moral Reciprocity Should Emerge as a Much Needed Source of Protection for the Employee

Mark Kesten
California Western School of Law

Follow this and additional works at: http://digitalcommons.ilr.cornell.edu/chrr
Part of the Human Resources Management Commons, and the Labor and Employment Law Commons
Thank you for downloading an article from DigitalCommons@ILR.
Support this valuable resource today!
Reputation Insurance: Why Negotiating for Moral Reciprocity Should Emerge as a Much Needed Source of Protection for the Employee

Abstract
[Excerpt] In March 2011 the Warner Brothers television studio made headlines when it terminated its employment contract with Charlie Sheen for the hit television show Two and A Half Men. Sheen was terminated after going on a public tirade that included several well-publicized drug binges as well as making allegedly anti-Semitic comments about the show’s executive producer Chuck Lorre. Sheen responded to the termination by suing both the studio and executive producer Chuck Lorre for $120 million claiming, among other things, that both parties had breached his employment contract. While the case settled out of court, one of the main defenses cited by Warner Brothers was the existence of a clause in Sheen's contract that would allow for termination if he committed any act "which constitutes a felony offense involving moral turpitude under federal, state, or local laws, or if indicted or convicted of any such offense." Warner Brothers claimed that Sheen had committed the equivalent of such a crime, pointing to Sheen’s open and public use of cocaine during this time period.

Keywords
HR Review, Human Resources, reputation insurance, moral reciprocity, Two and a Half Men, Charlie Sheen, Chuck Lorre

Disciplines
Human Resources Management | Labor and Employment Law

Comments
Suggested Citation:
I. INTRODUCTION

In March 2011 the Warner Brothers television studio made headlines when it terminated its employment contract with Charlie Sheen for the hit television show *Two and A Half Men*. Sheen was terminated after going on a public tirade that included several well-publicized drug binges as well as making allegedly anti-Semitic comments about the show’s executive producer Chuck Lorre. Sheen responded to the termination by suing both the studio and executive producer Chuck Lorre for $120 million claiming, among other things, that both parties had breached his employment contract. While the case settled out of court, one of the main defenses cited by Warner Brothers was the existence of a clause in Sheen’s contract that would allow for termination if he committed any act “which constitutes a felony offense involving moral turpitude under federal, state, or local laws, or if indicted or convicted of any such offense.” Warner Brothers claimed that Sheen had committed the equivalent of such a crime, pointing to Sheen’s open and public use of cocaine during this time period.

The provision relied upon by Warner Brothers’ defense team is commonly referred to as a “traditional morals clause.” Simply put the traditional morals clause operates as a termination mechanism in an employment contract that allows the employer to terminate the employment relationship on the basis of certain behavior of the employee and potentially expose the employee to civil liability for breach of contract. The traditional morals clause has become an enforceable, industry standard, term of employment and endorsement contracts in the sports and entertainment world that has been affirmed by both New York and California courts. Studios, sports teams and companies wishing to have celebrity endorsements have all argued that the morals clause is a necessary deal point to protect both their reputation and image from the often volatile and questionable behavior of the talent they employ. The use of traditional morals clause language has also become more and more common outside of the sports and entertainment sector in the employment contracts of “C-level” executives, and teachers. Similar to their contemporaries in sports and entertainment, employers of these individuals will often demand these clauses in an attempt to have a mechanism in place to quickly sever ties
with any “immoral” behavior on the part of these employees because they are viewed by
the public as representing the company and their personal behavior may tarnish the
overall goodwill of their business or institution.

The emergence of the traditional morals clause in the more conservative mainstream
 corporate context reaffirms that American society places huge value on one’s reputation.
 Indeed, American culture views employment in a unique fashion whereby one’s work is
 often viewed as a reflection of that which defines the individual as a person. However the
 recent public exposure of widespread, questionably immoral (and sometimes even
 criminal) behavior of companies such as Bernard L. Madoff Investments, LLC, and
 Enron begs the question of what protection employees are being afforded, if any, from
 the behavior of their employers.\textsuperscript{7} Take a look at the logic behind the morals clause from
 another perspective – the perspective of the employee. What if there were honest
 employees of Madoff’s company? These employees could be seen as permanently
damaged goods because of the acts of their employer and will likely find that they are
 unable to become gainfully employed again in the financial world. Alternatively, what if
 the recent allegations claiming that Apple has employed the use of child labor turn out to
 be true but had been in play long before new CEO Tim Cook had any say in the matter?
Again, he and many of Apple’s employees will likely sustain serious damage to their
reputations because of the behavior of their predecessors.

In both cases the employees are limited in their choices of action. If they knew about the
questionable behavior prior to public scandal they could either quit voluntarily, losing
eligibility for unemployment insurance, and at the same time potentially risk liability for
breach of contract if there is a term on their employment contract; alternatively they
could complain and risk being fired; or stay put and risk the public viewing their
nonfeasance as endorsing the actions of their employer. Either way, without further
contractual protection, these choices of action leave the employee in a very vulnerable
position and do little to compensate them for damages caused by the questionable
behavior of their employer.

The missing contractual protection needed by employees may be found in the concept of
moral reciprocity that underlies the reverse-morals clause. The reverse-morals clause is a
relatively new phenomenon that is being demanded by many top-level athletes and
celebrities in endorsement deals whereby they are able to sever ties with an endorsee
company if its business begins to negatively impact the reputation of the endorsing
party.\textsuperscript{8} In essence, these top-level celebrities and athletes are demanding reciprocal
covenants from employers to provide them with reputation insurance.
The current realities of the post-recession job market coupled with America’s unique view of employment make moral reciprocity provisions a concept that should be on the mind of every employee. Since employers use the traditional morals clause as reputation insurance, the employee would reap tremendous benefits from either demanding the same in return in the form of a reverse-morals clause or — in the event a traditional morals clause is not demanded — by requesting moral reciprocity provisions from the employer. The underlying concept of moral reciprocity is one that is quickly spreading from its birth in sports and entertainment to corporate America and the negotiation of moral reciprocity provisions as reputation insurance is beyond due to emerge as a topic front and center for employment contracts in general. By simply negotiating for moral reciprocity provisions in employment contracts, potential employees of every kind—from the rank and file executives to the everyday worker—will benefit, whether such negotiations are successful or not. If successful, not only will the employee receive sufficient and necessary protection to minimize, and perhaps compensate, for reputation damage as well as secure eligibility for unemployment insurance, but also society may benefit as a whole by making employers think twice about acting in moral grey areas. In the event that the employee is not successful in extracting such provisions, the negotiation process itself provides invaluable insight into the employer and allows the individual to make a more informed decision about who they are about to work for and what risks they are willing to take.

Part II of this paper will outline the mechanics, history and value of the traditional morals clause. Part III looks at the emergence of the reverse-morals clause as a form of moral reciprocity in the world of sports and entertainment endorsement deals. Part IV shows how the concept of moral reciprocity is fully applicable to the every day employment context outside of sports and entertainment. Part V sets out a framework for how moral reciprocity provisions can provide protection to the employees and explores tactics for negotiating with reluctant employers. Finally, Part VI brings the reader full circle by concluding that moral reciprocity provisions, including the reverse-morals clause, are a valid, enforceable, and tremendously valuable provision that may become a deal-breaker in the employment contracts of the future.

II. PROTECTING THE GIANTS: THE HISTORY OF THE TRADITIONAL MORALS CLAUSE

A. The Moral Majority

The birth of the traditional morals clause in American employment contracts can be traced to Hollywood circa 1921. It was around this time that the national media began to take an interest in exposing the scandals of celebrities and athletes. It was also around this time that Paramount had signed Roscoe “Fatty” Arbuckle, one of the America’s most
popular and beloved comedians, to a three-year employment contract worth $3 million.9 Later that year, Fatty hosted a Labor Day party in a San Francisco hotel room in which a young woman was found beaten, raped, and left close to death. Fatty was subsequently charged with rape and murder. These allegations resulted in a public backlash against not only the studio, but against the motion picture industry in general. In response to the widespread backlash, Universal Studios, one of Paramount’s competitors, was advised by its legal counsel to insert a clause in all its employment contracts with talent whereby the studio could take legal action against the talent in the event of so-called immoral behavior. This was the birth of the traditional morals clause. Universal claimed that the morals clause was necessary in order to “reassure the public [and] protect the company in an investment….”10 Following Universal’s lead, all of the other major Hollywood studios began to include versions of a morals clause in all talent employment contracts.11 This widespread adoption even spilled over into the sports world in 1922 when the New York Yankees inserted a morals clause into its contract with Babe Ruth in an attempt to reign in his off-the-field activities.12

These early versions of the traditional morals clause were drafted in a strategically broad fashion and included triggers for breach based on vague notions of “decency” and “morality.” The use of such indefinite and subjective triggers gave employers “exceedingly broad latitude to determine what talent’s conduct failed to meet the standard set by the contemporaneous society.”13 Breaching one of these clauses allowed the contracting party to access a multitude of potential remedies including suspension of compensation, termination of the contract, termination of employment for cause, and potential liability for damages at law for breach of contract. While studios used these clauses to fire talent for everything from criminal acts to interracial dating, their enforceability remained generally unchallenged in the courts.14

B. The Communist Threat

Shortly after the birth of the traditional morals clause, the focus of the American public shifted from the indiscretions of Hollywood to more serious matters as World War II unfolded. However, in the late 1940s a threat of a new kind emerged as the Cold War took center stage – the Communist threat. In 1947 the House Un-American Activities Committee (HUAC) took aim at Hollywood in a preemptive attempt to curb what they saw as a “tempting medium for Communists to spread ‘subversive messages.’”15 HUAC subpoenaed forty-one individuals with connections to Hollywood to testify. Ten of these individuals (The Hollywood Ten) refused, claiming first amendment protection, and were subsequently convicted of contempt of Congress. Again, reacting to the general backlash as well as government pressure, the motion picture industry issued the Waldorf-
Astoria Policy Statement “condemn[ing] The Hollywood Ten and declaring Communists unwelcome….”\(^{16}\)

The studios reacted immediately by not only terminating all contracts with The Hollywood Ten, but by also creating the “Hollywood Blacklist” – a list of talent that were deemed to be subversive and thus barred from being hired. Of The Hollywood Ten two screenwriters, Lester Cole and Ring Lardner, Jr., as well as director Adrian Scott sued their respective studios for breach of contract.\(^{17}\) All three sued claiming that their refusal to testify did not trigger the standard morals clause language contained in each of their contracts.\(^{18}\) However, the Ninth Circuit affirmed three terminations based on their holding in *Loew’s, Inc. v. Cole*, finding that a jury would be well within reason to imply involvement with the Communist movement from their actions and that because the general public viewed Communism as evil they could all be seen to have breached the morals clause in each of their contracts.\(^{19}\)

If the idea that refusing to speak based on first amendment rights could lead to a reasonable inference of such magnitude is not disturbing enough, the rule from *Cole* has yet to be overturned. In fact, the reasoning and the general enforceability of these vaguely worded clauses would stand the test of time. Fifty-four years after *Cole*, the Second Circuit upheld a similarly worded clause in *Nader v. ABC Television*.\(^{20}\) The precedent set is that an express morals clause is fully enforceable even when its triggers have nothing to do with illegal actions, but can be based on evolving subjective notions of what the general public views as being against the morals of the day.

While this may seem to be a very harsh and unpredictable standard which could provide employers a significant termination right, it may also work to provide two major benefits to the employee. First, the employee would be granted equally broad protection if an employer was bound to reciprocal covenants of moral behavior. Second, the flexibility provided by the loose standard allows for a great deal of room to negotiate a broad or narrow definition of immoral conduct. As discussed in Section V, this room for negotiation will be of particular value to an employee who does not have the bargaining power of a C-level executive.

C. *Sex, Drugs and Racist Rants*

As the Cold War rambled on through the decades, Hollywood became lackadaisical in its xenophobia and shifted its focus back to good old-fashioned capitalism. Over the next several decades, and into the present era, Hollywood would use the traditional morals clause as a way to keep a leash on its talent under the auspice that if their behavior got too out of hand – or at least if the public became aware of it\(^{21}\) – this behavior could mean
lost earnings. Perceived as an effective risk management mechanism the traditional morals clause began to appear outside of Hollywood in the executive employment contracts of many top executives in the corporate world. A recent study of 1,500 of America’s largest public corporations found that 72.27% of the chief executive officers’ employment contracts contained a traditional morals clause.\textsuperscript{22}

Another use of the traditional morals clause emerged as Hollywood and corporate America began to cross-pollinate and the business of the celebrity endorsement contract was born. The celebrity endorsement contract puts a public face to a company and again, to protect the reputation of its products, or services, these companies used the traditional morals clause as a mechanism to quickly separate themselves from any questionable conduct of the talent they chose as endorsee. As such it should come as no shock in 2009 when Gillette, Gatorade, and other sponsors terminated endorsement contracts worth over $20 million with Tiger Woods following the news of his marital infidelities.\textsuperscript{23} The same can be said in 2011 when fashion designer John Galliano was terminated from his position as creative director and designer for Dior following a video surfacing in the press where he was recorded shouting “I love Hitler…” to Jewish patrons in a Paris eatery.\textsuperscript{24}

The adoption of the traditional morals clause into endorsement deals basically exemplifies what can be inferred from their use in employment contracts – by agreeing to employment, an employee is endorsing the employer and their business practices. In a more subtle fashion the employee becomes somewhat of a public face of the company. Admittedly the everyday employee’s affiliation with an employer may not be a matter of public interest to the same extent of a CEO or celebrity endorsee, it cannot be denied that an employee’s choice of employer is a relevant and known fact to their peers and potential future employers within the same industry. Therefore, while there is a valid connection between a company’s reputation and the off the clock behavior celebrity endorsee, there is an equally powerful connection between the reputations of the employees amongst contemporaries and its business practices.

**III. Demanding Moral Reciprocity: The Birth of the Reverse-Morals Clause**

Despite being a fairly new concept, the reverse-morals clause is quickly becoming one of the most contentious points of negotiation in sports and entertainment endorsement contracts.\textsuperscript{25} In this area the reverse-morals clause has been defined “as a reciprocal contractual warranty to a traditional morals clause intended to protect the reputation of talent from negative, unethical, immoral, and/or criminal behavior of the endorsement company or purchaser of talent’s endorsement.”\textsuperscript{26} The reverse-morals clause ensures moral reciprocity between the talent and the company being endorsed by “giv[ing] talent
the reciprocal right to terminate an endorsement contract based on such defined negative conduct.”27

The rise in popularity of the reverse-morals clause has been attributed to a deal gone massively wrong between Enron and the Houston Astros.28 In 1999 the Astros signed a 100 million dollar contract that granted Enron the naming rights to their new ballpark. Within two years of signing the deal that renamed the ballpark “Enron Field,” Enron was the subject of one of the largest bankruptcy filings in American history. One commentator noted that the bankruptcy and subsequent publicity has caused “the word ‘Enron’ [to be] embedded in the national psyche and lexicon as being the icon of corporate avarice and the perpetuation of a Ponzi-Scheme on the public.”29 The Astros would spend the next several years, and several millions of dollars, attempting to untangle and disassociate themselves from a company that caused the unemployment of thousands of the team’s fans. Events of the following decade prove that it is not only sports teams who have to worry about the amoral actions of their endorsees. The recent recession of 2008-2009 that thrust numerous corporate scandals and crimes center-stage into the minds of Americans has added fuel to the demand for moral reciprocity from talent.30

While the reverse-morals clause has provided a new and interesting mechanism allowing talent to terminate contracts, it is really the underlying concept of moral reciprocity that is of importance to the broader context of employment in general. What the emergence of the reverse-morals clause shows is that both parties to a contract, especially one that reflects upon the parties personally, should be equally concerned with each other’s conduct. The employment relationship in the United States is perhaps the consummate contract of this sort. However, unlike the superstar celebrity or athlete the majority of employees are in an inherently vulnerable position with little bargaining power. As evidenced by the traditional and reverse-morals clause, both sides of an employment contract have a valid concern with how the behavior of one can affect the livelihood of the other. Therefore, it is a natural step to infer that the concept of moral reciprocity should be one that will start to emerge as a concern in the minds of many employees in a economic climate where finding employment is, at best, challenging.

**IV. APPLYING MORAL RECIPROCITY TO THE EMPLOYMENT CONTEXT**

To date, the published research has only provided evidence that reverse-morals clauses are being negotiated in the world of entertainment and sports contracts.31 Nevertheless the reverse-morals clause and its underlying function of demanding moral reciprocity are fully applicable to employment contracts in general—whether it be for a rock star, CEO, or factory worker— and are ripe for adoption by employees in light of the current
economic and employment realities of post-recession America. As one commentator states, “it is reasonable to surmise that morals clauses will continue to be used in a variety of circumstances by an ever-increasingly diverse group of entities - not just talent and their employers.” In fact, demands for moral reciprocity may serve an even greater function when applied to the “every day employee” in protecting or at least compensating for loss of reputation value that would be hard for such an employee to otherwise achieve.

In order to understand why employees of all types should be bargaining for moral reciprocity it is helpful to take a step back to look at the underlying psychology of both the endorsement deal and the American view of the employment relationship.

A. Meaning Transference

The current trend of demanding moral reciprocity by way of a reverse-morals clause in an endorsement deal is based on the social theory of “meaning transference.” Meaning transference is the social theory that posits “that there is no inherent meaning in a good until an individual ascribes meaning to it.” Companies attempting to make a product stand out see celebrities as an “easy and familiar way to manipulate consumer perception of a product...hop[ing] that the celebrity’s familiarity and credibility are transferred to the product, making that product familiar and credible to the consumer.” Thus, by associating its products with a familiar and credible celebrity the company is able to ascribe an inherent meaning to said product. The theory of meaning transference has also been accepted as being successfully applied to the endorsement of services as celebrities have been used with increasing frequency to endorse the services of financial advisory and wealth management companies. The problem that these companies encounter is that this transference works with equal efficiency to transfer negative implications to a product based on questionable personal conduct of the endorsing celebrity. This double-edged sword has become a material concern for high-profile celebrities in light of the recent rise in public interest with regards to, as one commentator put it, “corporations behaving badly.”

B. You Are Your Work: The Role of Employment in American Culture

When looked at on a macro-level, the theory of meaning transference shares many analogous traits to the American view of the employment relationship. A theme running through almost all aspects of employment law is the extent to which American society views a person’s employment as a defining trait. Both academics and the courts have
acknowledged the idea that one’s employment is much more than simply a contract for services. The employment relationship goes beyond compensation and becomes a defining trait in the way employees view themselves, and —perhaps more importantly in this context—the way employees are viewed by society. In fact the authors of a prominent case book on employment law begin the entire volume by stating “in early twenty-first century America, to a great extent, we are what we do.” Justice Marcus Kaufman, while serving on the Supreme Court of California, echoed this sentiment by emphatically stating: “One’s work obviously involves more than just earning a living. It defines for many people their identity, their sense of self-worth, their sense of belonging.” Therefore, like meaning transference, an individual’s choice of employer transfers a kind of inherent meaning to them as an individual, and as in the endorsement context this works to transfer both positive and negative implications. In other words, by choosing to work for a certain employer, a person is making an implied endorsement of that employer’s business practices; an endorsement that is known by the employee’s friends, family as well as, and perhaps most importantly, his or her colleagues, clients, and potential future employers.

As previously noted, there is a valid argument that the “every day employee” is in a much different position than a celebrity or even a C-level executive. After all, celebrities (and to some extent CEO’s of multi-national companies) are under constant scrutiny from a media over-consuming public that pays attention to their every move. Their fame is exactly what amplifies the effect of the meaning transference they give to the products or services they endorse and is also exactly what gives them the leverage to negotiate for moral reciprocity. However, this disparity —when viewed in the context of future employment opportunities and reputational damage—also works to further the argument that not only does the “every day employee” need to demand moral reciprocity, but they are also an equally deserving candidate for such a form of reputation insurance.

For the celebrity the major concern is protecting the value of their reputation for future deals from devaluation as a result of negative transference from their current endorsers conduct. Likewise, the “every day employee” has a valid interest in protecting their reputation to the extent that it could be negatively affected by an employer’s questionable conduct. The interests of the celebrity and the employee align in one very important aspect; both have a valid interest in protecting their reputation to the extent that it affects their livelihood. For the celebrity the future value of endorsement deals will be negatively affected if they lose credibility; while for the employee his or her ability to attain subsequent employment will unquestionably be negatively affected by a scandal involving their employer. However, unlike the celebrity, the employee does not have readily available access to the media or the attention of the public to attempt to engage in reputation rehabilitation or clever public relations tactics aimed to reverse the damage of
negative transferences stemming from an endorser’s conduct. The employee, in this case, is left to their own devices to attempt to restore credibility amongst their peers and colleagues within his or her given industry. The impact that this negative transference has on the ability to attain future employment is only amplified amongst professionals in industries where their employment involves matters of discretion, ethics, or trust such as attorneys, teachers, doctors, or journalists. Professionals in these industries already have a lot to worry about given the current economic climate in the post-recession United States and its impact on employment opportunities.

V. PROTECTING THE EMPLOYEE IN CONTRACT

Recent statistics released from the Federal Labor Department show that as of February 2012 there were 12.8 million unemployed persons in America. This puts the unemployment rate at 8.3%, which is just below the rate reported in August 2011. While employment rates for professionals and business services have seen a recent rise, it is still recovering from the all time low reported in September of 2009. This information can be interpreted as showing that while the unemployment situation may be starting to heal from the recent recession, it is a long way from being fully repaired. In other words, jobs are scarce and those who are faced with unemployment are having a tough time finding new ones. All of this information boils down to the fact that employees in today’s job market should be especially concerned with protecting their value in the event that they must look for new employment. One way for an employee to gain protection is by negotiating for moral reciprocity provisions in the employment contract. While moral reciprocity provisions may not protect an employee from the ever-present threat of losing their job, an employment contract that contains a moral reciprocity provision is a good starting point for protecting one of the employee’s most valuable, yet intangible assets for future employment—their reputation.

It should also be noted from the outset that, like the negotiation of a reverse-morals clause in an endorsement deal, not all employees are going to have the bargaining power to extract moral reciprocity from an employer. An employer will likely be reluctant to allow any employee to impose potentially subjective restrictions on its business affairs. Nevertheless, the following sections outline ways in which an employee may overcome such resistance. Additionally, it discusses how the mere process of negotiation may provide insights into what kind of employer one is about to work for—thus allowing a person to become knowledgeable about whether they are assuming any risk of future reputation damage.

From the employee’s standpoint, the concerns and protections provided by moral reciprocity provisions can be divided into two main categories of employment contracts:
“at–will” employment contracts where an employee can be fired or quit for any reason at any time\textsuperscript{46}, and employment where the rights to terminate have been narrowed by contract, most notably contacts for a specified term.\textsuperscript{47}

A. At–Will Employment

It is well settled that, outside of Montana,\textsuperscript{48} the default regime for employment in the United States is that of “employment at–will.” In other words, unless there is some kind of contractual limitation that creates an exception, an employee can quit or be fired at any time and for any reason, or no reason at all.\textsuperscript{49} In this context an employee that is faced with an employer engaging in immoral conduct has three choices: quit voluntarily, complain and risk being fired, or do nothing and remain employed. The problem is that without further contractual protections each of these options comes with harmful consequences.

Voluntarily quitting will likely result in the employee becoming ineligible for unemployment insurance.\textsuperscript{50} In the current job market where the prospects of finding a new job may take some time the thought of being both unemployed and ineligible for any kind of interim income is certainly not a desirable one. Furthermore, this may not even be an option if the employee is supporting dependents such as a spouse or children. Therefore, it is likely that an employee facing this dilemma may be forced to put their morality aside and remain at the job.

The next option is for the employee to complain and request that the behavior in question be discontinued. However, this option runs a serious risk that the employer will fire the employee, and in an employment at–will context the employer can do so without any concern for liability so long as the termination cannot be seen as being the result of any type of discrimination. If the employee is in fact fired he or she is once again faced with unemployment in a hostile market and while they will likely now be eligible for unemployment insurance their prospects of gaining new employment will likely be negatively affected by such termination. Again, if the employee is not fired and the employer does not change in response to the complaint, the employee is faced with the decision to remain and deal with the immoral conduct. Alternatively, even if the request it granted and the questionable behavior stops, the employee will likely be faced with a work environment that is tenuous at best.

The third option, to remain and do nothing, is perhaps the most damaging. On the one hand the immoral behavior may become the subject of an industry wide or public scandal. If this occurs, the employee who remained is at risk of having serious reputational damage as a result of negative transference. At best a scandal will cause
those aware to imply an endorsement of said behavior to the employee. At worst a scandal may cause the employee to be directly attributed with the immoral behavior. Even if the immoral behavior does not become public knowledge or the source of a scandal, an employee that decides, or is cornered into, doing nothing and remaining at the job is not doing society as a whole any favors. For example if the immoral behavior is criminal, or viewed as morally reprehensible by members of the general public, society does not benefit from a situation where those who are in a position to create change by exposing and protesting are handcuffed by economic realities to remain silent.

Taking the employee’s options into account, moral reciprocity provisions in an at-will employment context should aim to protect the employee in two ways. First, an employee’s decision to quit if faced with immoral conduct by the employer should not be encumbered by questions of eligibility for unemployment insurance. State laws govern unemployment insurance systems and generally require an employee to file a claim for coverage that can then be challenged by the former employer. One of the main challenges brought by employers is to attack the requirement that the employee had an eligible reason for leaving the job. In the case of an employee who quits voluntarily, that employee must show “good cause,” a standard that varies drastically from state to state. To that end, the most cost-effective and reassuring way to provide an employee with protection would be to negotiate for a contractual release stating that the employer will not challenge a claim for unemployment insurance if the employee quits as a result of an employer’s immoral behavior.

Second, the moral reciprocity provisions should provide for the ability to access damages at law for breach of contract or a liquidated damage provision should the employer engage in immoral conduct. These damages would act as a kind of severance package for employees who become unemployed or find that their reputation has been damaged because of the immoral behavior of their employers.

From a contract negotiation standpoint an immediate criticism that comes to mind when this is presented is that it is simply unrealistic for any employee below perhaps a C-level executive to be able to extract such a release from an employer. However, this is where the flexibility of the traditional morals-clause discussed in Section II comes into play. The definition of immoral behavior that would trigger this release could be tailored as broadly or as narrowly as the employer will allow. Thus while a C-level employee may be able to negotiate for a broad definition or immoral behavior to allow him or her to quit if the company’s board decides to pursue practices that they find morally reprehensible, the every day employee may be able to negotiate for a release that is only triggered if the company engages in, or is actually convicted of, a criminal act of moral turpitude. Even if the employer does not agree to such a provision, simply asking for such a narrowly
tailored clause in negotiations may provide insight and be used as a litmus test for an employer’s propensity to engage in criminal acts. This alone will allow an individual to make an educated decision as to whether or not they are willing to assume such a risk and begin the employment relationship.

B. **Contracts for a Specified Term**

The employment at-will regime is subject to many exceptions that narrow the instances when an employee may quit or be terminated.\(^53\) One of the most notable is an employment contract that states a term of length for the employment.\(^54\) When such a term exists, the employer is only able to terminate an employee for “just cause;” a term that the courts have generally interpreted as requiring some kind justification relating to an employee’s job performance for termination.\(^55\) Likewise the employee is not able to quit at will during the term without breaching the contract. Therefore an employee in a contract for a specified term should not only be concerned with all of the potential for negative transference and limited options as that of an employee in an at-will contract, but they must also be concerned about the added potential exposure to liability for breach of contract should the employee choose to quit because of immoral conduct prior to the expiration of the term.

Protection from breach of contract liability could be achieved by negotiating for the employer to release the employee from liability if the behavior of the employer triggers the clause. At the same time if the employer already requires a traditional morals clause, such as is the case in most entertainment and sports contracts discussed in Section II, the addition of a reverse-morals clause simply asks for reciprocity of covenants. In the case of an employer who does not have traditional morals clause language in the employment contract, an employee may be able to negotiate this kind of release by offering the idea of moral reciprocity provisions to the employer. A moral reciprocity provision would protect the employee from liability for breach of contract. In return the employer would be afforded the same protection if that employee engages in immoral conduct that may not rise to the level of “just cause”—perhaps because it involved off work activity or activity not related to job performance—yet would still be damaging to the employer by way of negative transference. Again, as is the case with at-will contracts, the employee’s bargaining power will dictate whether or not these contractual provisions can even be negotiated. However in the case of a contract for a term, the employee has an extra bargaining chip in that the employer has an equal interest in having a mechanism in place to quickly sever ties should immoral conduct threaten the reputation of the company.
VI. Conclusion

In a society where one’s employment is often viewed as defining the person, it is a reasonable inference that entering into an employment relationship carries an implicit reciprocal endorsement of the parties involved. Given this reflection and the current challenging employment climate in the United States, every employee should be thinking about ways to protect themselves from situations that could seriously impede their prospects of future employment. A look at the evolution morals clause phenomenon and its emergence from sports and entertainment into mainstream corporate America evidences the great value that our society attaches to reputation. The reverse-morals clause is underpinned by the concept of moral reciprocity, recognizing that negative implications of one’s behavior can flow in both directions to damage either party’s reputation, and in turn deplete their future value. This concept of moral reciprocity is not only fully applicable to employment relationships in all contexts because of the reciprocal endorsements that are inferred this unique contractual situation, but it is also ripe for adoption because of the challenges presented by the current employment climate in the United States. Thus the traditional morals clause and the birth of the reverse-morals clause provide a template for a mechanism by which employees of all kinds can seek to attain reputation insurance. Filling this contractual gap is absolutely necessary to protect the employee because of the simple fact that reputations can take a lifetime to build and seconds to lose. N

Mark D. Kesten is a December 2012 J.D. candidate at the California Western School of Law. He received his B.A. in History from the University of British Columbia and is the senior editor for the California Western International Law Journal.

2 Sheen’s complaint was filed by famed entertainment litigator Marty Singer. Singer argues that even if Sheen’s behavior was found to be the equivalent of a felony, Warner Brothers had waived any right they had to enforce the morals clause because in the past it had not only supported his decision to plead guilty to pending felony charges, but actually took that opportunity to re-negotiate his contract. See Complaint at 4, Sheene v. Lorre, Los Angeles Super. Ct., No. SC111794 (filed Mar. 10, 2011), available at http://www.tmz.com/2011/03/10/charlie-sheen-files-lawsuit-warner-bros-two-and-a-half-men-sues-chuck-lorre-crew-salary-8-episodes/#.T4NO145QSGM.
3 Carter, supra note 1.
4 The examples in this article display just a small fraction of the number of employment and endorsement contracts in the sports and entertainment world that have been terminated on the grounds of so-called immoral behavior. This kind of termination has become commonplace in the world of sports and entertainment and as this article will show is rarely litigated. While Sheen did file suit disputing the validity of his termination; his case is the exception to the rule.
6 The employment contracts of teachers in public institutions have statutory morals clause language, regulation of which is beyond the scope of this paper. For an overview of the interplay between statutes

7 Corporate Crimes and Scandals, supra note 5 at 67-68.
8 Id.
10 Corporate Crimes and Scandals, supra note 5 at 76-77.
11 See Morals?, supra note 8, at 355.
12 “Ruth’s reputation on the field, however, may only have been matched by his reputation off the field...Ruth has been described as a glutton, womanizer, spendthrift, heavy drinker, and smoker.” Corporate Crimes and Scandals, supra note 7 at 76.
14 Id.
15 Id.
16 Id.
17 See Loew’s, Inc. v. Cole, 185, F.2d 641 (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).
18 Cole, Lardner and Scott’s contracts each contained traditional morals clause language. While there were linguistic differences they were substantively the same citing triggers for offending “public morals or decency”. Katz, supra note 12, at 204.
19 See id. at 205.
20 Nader v. ABC Television, Inc., 150 Fed. App’x 54 (2d Cir. 2005). Not only is Nader a cautionary tale of how selling cocaine to an undercover cop can get a soap opera star in hot water with the studio; more importantly the reasoning of the court is fascinating as it seems to “contravene the general principle of contract law that ambiguous language is interpreted against the drafting party.” Katz, supra note 12, at 215.
21 In the past both Sheen and Nader’s employers had elected to not exercise the morals clause in earlier incidents that would have constituted “prohibited behavior” but did not receive the same level of media attention.
25 Corporate Crimes and Scandals, supra note 7 at 72.
26 Id. at 68.
27 Id.
28 The official birth of a reverse-morals clause has been attributed to the singer/actor Pat Boone’s 1968 record deal, where the newly born-again Boone was able to successfully negotiate an informal oral agreement whereby his contract would terminate if the label “did something unseemly.” Id. at 80.
29 Id. at 68.
30 Id. at 80.
31 Id. at 72.
32 See Morals?, supra note 8, at 365.
33 Id. at 366.
34 The “every day employee” refers to those who are not public figures and do not have ready access to the media.
36 Id.
37 Ironically two of the best-known examples of celebrities endorsing services are pro golfers Tiger Woods
with Accenture LTB — a global management consulting firm, and Vijay Singh with Stanford Financial
Group—a wealth management firm. Tiger Woods would go on to lose his endorsement deal with
Accenture following his much publicized sexual escapades, while Vijay Singh may have wanted to
negotiate a reverse-morals clause after hearing that CEO Sir Allen Stanford has been formally charged
with running a “massive Ponzi-scheme” and labeled a “serious flight risk.” See Corporate Crimes and
Scandals, supra note 7 at 85-88.
38 See Katz, supra note 12, at 191.
39 Id. at 80.
40 Mark A. Rothstein & Lance Liebman, Work and Law, in EMPLOYMENT LAW: CASES AND MATERIALS 2
(7th ed. 2011).
42 See Corporate Crimes and Scandals, supra note 7 at 100 (arguing that pre-scaral Tiger Woods, a
celebrity with enormous selling power, was the quintessential type of party who could extract moral
reciprocity from endorsers).
43 U.S. DEP’T OF LABOR, The Employment Situation -- February 2012, BUREAU OF LABOR STATISTICS
44 In an employment contract that already contains a traditional morals clause, negotiating for a reverse-
morals clause would create the reciprocity.
45 See Corporate Crimes and Scandals, supra note 7 at 99.
46 See Mark Rothstein & Lance Liebman, Terminating The Relationship, in EMPLOYMENT LAW: CASES AND
MATERIALS 954 (7th ed. 2011).
47 For the purposes of this paper this type of employment is inclusive of contracts with express or implied
in fact contracts that only allow termination by employer for “just cause”.
48 Montana is the only state that has repealed the employment at-will rule and enacted the Wrongful
Termination Act that prohibits an employer from terminating an employee without “good cause”. The
statute provides a remedy of up to four years of lost wages and makes punitive damages available. See
49 The employment at-will rule is subject to many exceptions that limit the rights of the employer and
employee, including but not limited to: contracts that provide for an express term, implied in fact contracts,
and contracts that define “just cause” for termination. See generally Rothstein Liebman supra note 44,
838-965.
50 See Lori G. Kletzer & Howard Rosen, Reforming Unemployment Insurance for the Twenty-First Century
Workforce, in EMPLOYMENT LAW: CASES AND MATERIALS 1064 (7th ed. 2011).
51 Id.
52 Id.
53 Rothstein Liebman supra note 44, at 861.
54 Id.
55 See Scribner v. Worldcom, 249 F.3d 902, 908 (9th Cir. 2001) (“the term “cause” is ordinarily a
performance-related concept”).